TRANSCRIPT OF PROCEEDINGS
*Fair Work Act 2009* 1057301

**VICE PRESIDENT HATCHER**
**DEPUTY PRESIDENT DEAN**
**COMMISSIONER SAUNDERS**

**C2013/6333**

**s.302 - Application for an equal remuneration order**

**Independent Education Union of Australia**
**and**
**Commonwealth of Australia as represented by the Department of Education, Employment and Workplace Relations; Australian Chamber of Commerce and Industry; Australian Childcare Centres Association; Australian Community Children's Services; Australian Community Services Employers Association, Union of Employers; Australian Federation of Employers and Industries; Association of Independent Schools of South Australia; The Association of Independent Schools of Tasmania Incorporated; Association of Independent Schools of Western Australia (Inc); Association of Quality Child Care Centres of NSW Inc; Australian Childcare Alliance Victoria; Childcare Queensland Inc; Childcare South Australia; Child Care Association of Western Australia; Community Connections Solutions Australia; Australian Municipal, Administrative, Clerical and Services Union-New South Wales and ACT (Services) Branch; NSW Business Chamber Limited; The Association of Independent Schools of New South Wales Limited T/A AISNSW; Catholic Commission for Employment Relations**
**(C2013/6333)**
**Educational Services (Teachers) Award 2010**

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

**Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch**
**and**
**No Respondent for AM2018/9**
**(AM2018/9)**

**Educational Services (Teachers) Award 2010**

**Sydney**

**9.03 AM, THURSDAY, 5 SEPTEMBER 2019**

**Continued from 4/09/2019**

PN324

VICE PRESIDENT HATCHER:  Mr Taylor?

PN325

MR TAYLOR:  Could I just provide some information in response to some questions that were raised while I was on my feet yesterday.  The first one was your Honour the Vice President asked about whether we could just do some calculations.  Can I hand you a document.  We've just picked up a typo, so I'll have to identify what that is, but it might also be helpful if I just explain to the parties.

PN326

What we've done - so your Honour asked us to take the C1 rates in the Manufacturing Award as made and apply the annual wage review increases since that time to identify what the C1 rates would be if the Manufacturing Award still had C1 rates.  That's what we've done in the first of those two tables.  You'll see there there's a typo.  The C10 rate when the award was on 19 December 2008 was 637.50 not 657.50.  637.60, two typos, my apologies, 637.60.

PN327

The next figure that you see for C10 at 1 July 2019 of 862.50 is what you see in the award now.  That of course is still there, and there's an annualised figure.  The two figures, the C1A and C1B are our calculation applying those annual rate wage review figures as to what those amounts would have increased to if they were still in the award to answer your Honour's question.

PN328

We did produce underneath that a second table which identifies what the rates would be if one calculated them against the relativities which remain in the award of 180 per cent for C1A and 210 per cent for C1B, and you see there that's what they would be if there had not been the compression which, as we all know, arose due to flat dollar increases.

PN329

VICE PRESIDENT HATCHER:  Thank you.

PN330

MR TAYLOR:  Then the second thing I wanted to deal with was to assist in identifying where in the evidence one finds information about the Commonwealth funding scheme.  That was another issue that was raised with us.  Can I identify three documents without asking the Commission to open them, but just so the material can be found.  Firstly, in Ms Carol Matthews' statement marked exhibit 2, from paragraphs 20 through to 31 there's a summary of that Commonwealth scheme.  Yesterday - - -

PN331

VICE PRESIDENT HATCHER:  Sorry, 20 to 31?

PN332

MR TAYLOR:  Twenty to 31.  The second is a fact sheet.  On the new Commonwealth system that's document number 155 in the IEU bundle.  The IEU bundle is exhibit 75, so in exhibit 76 document number 155, and then the third document that we think is of assistance is document number 159 in that same bundle which provides an analysis of impact on families and that is a Commonwealth Government publication.

PN333

So we think those three documents will assist.  One thing I said yesterday needs to be corrected.  I indicated in answer in particular to a question from Dean DP that the maximum Commonwealth funding is 80 per cent.  I understand that that is wrong.  It's actually 85 per cent, and those documents set out the circumstances in which that funding arises at that percentage.

PN334

The third thing I wanted to deal with is in answer to questions about teachers and statistics.  Data from the ABS recording the number and breakdown of teachers in schools is found in the IEU bundle, exhibit 76, in two documents, documents numbers 241 and 242.  241 gives you data as at 2017 breaking down on a gender basis the number of teachers in schools, both government and non-government and non-government is further broken down into Catholic and independent, and then there is a break down by state and territory as well.

PN335

Document number 242 is an Australian Bureau of Statistics document which, amongst other things, it's headed Schools, and it identifies the number of schools falling into Government, Catholic and independent and then it contains within it in-school staff, Government, Catholic and independent staff.

PN336

And then third on this subject, in answer specifically to questions about the percentage or numbers of early childhood teachers we made some inquiries about this.  The ABS doesn't publish a single PDF document that provides teacher numbers by sector.  There is a publication which is called a pivot table, EQ08 employed persons by occupation unit group of main job ANZSCO, sex, state and territory, August 1986 onwards, and from that data can be printed out which records specific numbers.  It was that data then I used in opening to identify that early childhood teachers make up approximately 10 per cent of all teachers and that there are approximately in broad numbers 400,000 teachers of which approximately 10 per cent are early childhood teachers.

PN337

I have a document from the Australian Bureau of Statistics which is the EQ08 document which contains admittedly in fairly small text as printed this breakdown of employed persons by occupation group, one of the occupation groups being teachers.  It isn't currently part of the evidence but I would seek leave to provide this publication to the Bench and have it entered into the evidence in the proceedings.

PN338

VICE PRESIDENT HATCHER:  Is there any opposition to that?

PN339

MS EASTMAN: I haven't seen it. Perhaps once I have a chance to look at it I could give an indication one way or another. I don't expect there'll be a difficulty.

PN340

VICE PRESIDENT HATCHER: We might just receive it on a provisional basis and we will mark it when we get a final view as to whether there's any objection.

PN341

MR TAYLOR: As I said, the printer seemed to be on a fairly small font this morning, but for me if I hold it far enough away on the second page you see school teachers in the second heading and there are then a number of entries. The first is school teachers NFD. I'm told that's ABS language for 'not further defined', and then you find early childhood teachers at 44,000 and then primary school, middle school, secondary school and special education teachers are separately identified by numbers which translate to thousands of employees.

PN342

If it please, they are the three matters that I wanted to just complete in answer to the questions raised yesterday.

PN343

VICE PRESIDENT HATCHER: Thank you. Ms Eastman?

PN344

MS EASTMAN: Your Honour, just before Mr Fagir rises, on this question of the Commonwealth roles on subsidies, in light of the questions that were asked yesterday Mr Taylor's drawn your attention to two Commonwealth documents at the bundle of 155 and 159. What we sought to do overnight, and we got instructions this morning, is to provide the Commission with an aide memoire that just brings together the relevant legislative scheme for the childcare subsidy and just explain its operation in a fairly simple way which can be read with those other two documents. We've got copies for the parties. I accept they haven't had a chance to read it yet. We've described it as an aide memoire so the Commonwealth is not seeking to add to the evidence in any way, but just to explain the operation of the scheme. So could I provide that to the Commission, please?

PN345

VICE PRESIDENT HATCHER: Yes. Thank you. That's very useful.

PN346

MS EASTMAN: And we'll provide a copy to the parties.

PN347

VICE PRESIDENT HATCHER: Mr - - -

PN348

MR TAYLOR: Your Honour, one thing I omitted to say, to the extent to which the Bench would like assistance understanding not the Commonwealth subsidy scheme but State subsidy schemes we started to look at that overnight. There is a

variety of material scattered through the evidence which describes the subsidies available or the State Government funding in the various states. If that is something that the Bench would like us to provide a note about, just identifying where one finds that material, we can readily do that but we haven't got that to hand at the moment.

PN349

VICE PRESIDENT HATCHER: Thank you. Mr Fagir?

PN350

MR FAGIR: Thanks, your Honour. On the basis of your Honour's solemn promise yesterday afternoon to read the submissions with an intense focus I didn't propose to deal with all that is dealt with in the written submissions. What I intended to deal with was to follow the structure of the submissions making a series of observations and, in some cases, responses to things that were said yesterday and other cases things not dealt with in the submissions, and I have two or three points amplifying things that were said.

PN351

Before coming to the detail of any of these matters could I explain how we see these applications. They are square pegs being hammered into round holes, or putting it perhaps a little technically they're in truth the complaint which underpins more the application is not, we would suggest, a complaint about gender pay equity or about a failure to properly take into account work value in any conventional sense. The complaint really is simply that it's unfair that some early childhood teachers are paid a relatively high bargained rate and other early childhood teachers doing similar work are paid a lower award rate.

PN352

There's nothing unusual about that phenomenon and there are many parts of the workforce or the economy where the same phenomenon be might observed. It has been the case for at least as long as this Commission has adopted the concept of minimum rates awards. Viewed in that way the case is really, we would say, a critique of the concept of minimum rates awards from a comparative wage justice perspective. We would rather suggest that that real complaint or that real issue has been forced uncomfortably into a parameters of a gender pay equity case and/or a work value case. And the fact that the case has been advanced in this uncomfortable and artificial way manifests itself in a series of contradictions, some of which I'll touch on today. I should also say there was one point yesterday in oral submissions where the true nature of the case was articulated momentarily, and I'll say something about that in a moment as well.

PN353

I don't need to add anything to what we've said about the form of the applications in written submission, but I could just deal with two things that were said yesterday. The first is that it was pointed out that these claims are resisted by what was said to be a minority of the sector. Perhaps it might be regarded as unsurprising in the circumstances where it seems to be a common ground that direct impact on the claim will be on the minority of the sector.

PN354

The fact that the claim does impact on the minority of the sector I might say in passing is relevant to the question of undervaluation and again I'll come back to that in due course.

PN355

VICE PRESIDENT HATCHER: So, when you say 'in the sector' are you talking about teaching as a whole or the early childhood sector?

PN356

MR FAGIR: That's a good question. The description of my client or the sector that my client represents at times was said to be a minority of the education sector as a whole and other times a minority of early childhood teaching. As best as I could recall that it was said that my clients employ something in the order of five per cent of teachers and less than 50 per cent of early childhood teachers, and I must say and I'd suggest there's no evidence about this. The evidence in support of those two figures didn't leap to my mind, it may be out there, and it may be that we've got it now in the ABS statistics. It may not make a great deal of difference or it may, and if I can deal with that shortly.

PN357

Could I deal - perhaps not very much turns on this, but there was a reference yesterday to the submissions of the Catholic Council for Employment Relations, and according to my note the submission was that the CCER had submitted that there was a proper basis for the pay parity claim and the submission was that CCER acknowledge the legitimate aspirations of early learning teachers for increased rates of pay, which is not quite the re-endorsement that was suggested yesterday.

PN358

We have, in our submission at part B and following, set out some of the relevant principles largely extracted from the Full Bench decision in the Pharmacy Industry Award case. If I could I wish to deal with identifying a small number of additional principles and identify the way that they feed into the analysis. I'm handing up this extract only to save me from having to stand here and read references to the authorities and so on, but if I could just hand it up and put it to one side I'll identify the principles that may bear on this issue in shorthand.

PN359

Firstly, the well-established principle, in my respectful submission, that the application of skills already held does not involve an increase in work balance. Usually the principle is expressed by reference to new equipment but it is, we would say, broader than that and that is, in my respectful submission, a critical point bearing in mind, for example, and perhaps this was obvious in any case, but for example when I asked Ms James whether it was her view that any ECT Master's Degree or not, recently qualified or not, could do what the NQF required of ECTs. She said 'I would certainly hope so'. That, again, is perhaps a statement of the obvious. But the point is that if it is the case and, as I said we suggest otherwise, but if it were the case that the NQF and everything that comes with it involved an application of some higher level of skill, but it was a skill which was already held by ECTs by virtue of their training a work value increase would not be demonstrated.

PN360

Conventionally in work value cases in involving increased skill, not always but often, there's some new training requirement, historically a certificate of competency if it be put in different ways, but typically we would suggest it's necessary to identify some form of increased skill usually as a result of some different of increased training, not necessarily. Perhaps it might be obtained by experience but some new or different skill be applied as opposed to a skill which is obtained through a university degree or by some other means which perhaps was not fully exercised, and the case has used the phrase 'fully tested', but whilst nonetheless part and parcel of the training of a particular cohort of workers.

PN361

The second longstanding principle is the comparative wage justice is not relevant to work value. Third is that loss of relativities are not sufficient to justify a work value increase. Another is detailed information in work value changes relied on is required, and we would submit that detailed information takes the form of, to adopt the Vice President's phrase, neutral fact based descriptions of the work as opposed to higher level conclusory descriptions of the workers being or involved in increased professionalism being more demanding or whatever the phrase might be. We've said this time and again, perhaps more times than we need to, but it really is a very unusual aspect of this case that there is sometimes it seems a studied effort or a dedicated effort to avoiding describing the work that's actually being done now and the work that was done previously.

PN362

An obvious example is observations. There were many submissions made about the need for more complex, more difficult reporting now as opposed to in the past. One could search through the thousands of pages of IEU evidence and not find one example of an observation or the reports that would've been described. That's perhaps the most obvious. There are some in the evidence introduced by my client but not in the IEU evidence, and that's perhaps the most obvious or an obvious example of a phenomenon which is present throughout the IEU case.

PN363

The next principle we would identify is that benefits to an employee as a result of change need to be weighed against other consequences and we've identified a series of practice that we suggest that made the job easier, and maybe that's the wrong phrase. Maybe that's an oversimplification but which weigh against any finding of increased skill, responsibility or difficulty.

PN364

Finally, once appropriate rates have been assessed the Commission may create a new classification onto other things. Obviously we say the Commission would never get to that point but if it did there would be no difficulty, as a matter of proper approach in redesigning the classification structure, and I'm not suggesting that should be done. I'm dealing with a submission which, if I've understood it correctly, was to the effect that if the Commission concluded that there had been work value changes for the primary and secondary school teachers but not early childhood teachers, given that the entire cohort is currently covered by a simple classification structure the ECTs would simply be swept up in the change. At

least in circumstances where there is no application for some change in classification structure or award coverage.

PN365

My point simply is that if - this is certainly not my submission, but if the Commission concluded that there had been a work value change affecting primary and secondary school teachers as opposed to early childhood teachers there would be no difficulty at all in creating separate classifications or separate wage rates for the two groups of workers, and our client I said during the hearing and again in our written submissions that the evidence really did suggest that the distribution of duties and responsibilities in the workforce does not gel at all with the award classification structure when it comes to ECTs, but sits comfortably with the classification structure which appears in the Children's Services Award, room leader, assistant director, director and so on. The evidence, in my respectful submission, suggests that that was a conventional way of organisation of responsibilities in services, not invariably the case, as we've said, G8 and perhaps the larger and more corporatized services seem to employ that structure. The smaller services and perhaps the more, in one sense, the more progressive services might adopt a different structure, but the point simply is that the current form of the classification structure is not a matter of any real weight in terms of the Commission's conclusions as to how any work value increase which is found should be expressed in the award.

PN366

VICE PRESIDENT HATCHER: Just so I understand the framework of your submissions, are we to take it that your position vis-à-vis school teachers is neutral?

PN367

MR FAGIR: Yes. The way that we put it is to say that to the extent it's submitted that there have been changes of some significance in respect of primary had secondary school teachers the evidence is consistent with that view. Now, whether that amounts to a significant addition or otherwise would justify a work value increase is a matter about which we do not really express any view other than to say that perhaps the Commission would tread cautiously in circumstances where there has been no real contradictor and the matter really hasn't been explored fully, but ultimately if the Commission determined that it would proceed on the basis of what was before it in respect of primary and secondary school teachers it's really not a prominent concern for my client.

PN368

In terms of principles the other point that I wish to make in response to a submission made yesterday, that was the submission that the Commission's traditional approach or the traditional work value principles do not appear in the statute in the Fair Work Act. And of course that's true but the principles have never appeared in the statute. They've developed over a period of time through a series of decisions of the Commission. If anything, the principles have a firmer statutory foundation now than they did in the past insofar as the statute requires that awards provide a fair and relevant minimum safety net of terms and conditions, and that award wages are a safety net of fair minimum wages. The use of those terms and the statue in the context of a long history and well understood

meaning of those terms provides the statutory foundation for the continued application of course of those principles.

PN369

It's setting aside the fact that the considerations or the logic which led to the adoption of the principles in the first place holds firm. In any case to the extent that suggests that the principles do not appear in the statute or don't have a firm statutory foundation, we would say that they do, and that they're in a sense imported by the use of those well-understood phrases.

PN370

Could I now say something about the significance of the New South Wales Commission cases for present purposes. I won't repeat what we have said in our written submissions other than to say two things: firstly, reasons for judgment of a different tribunal is not evidence; and, secondly, this is really the critical point, it should be steadily borne in mind that the starting point in the New South Wales IRC cases was that the award wage rates for teachers were below those of other professionals and the award rates for early childhood teachers were below those of teachers, so everything that was said in the New South Wales IRC cases was leading to the point which has obtained in the Federal awards until at least 2004.

PN371

It is not, in my respectful submission, much use to say, for example, that Schmidt J made a series of findings about work value in circumstances where her Honour was considering the question of whether ECTs should be brought to the point of where they are now, and certainly not in the circumstances where her Honour didn't ultimately conclude that the work value of ECTs and primary school teachers was the same. No doubt she made a series of comments which pointed in that direction, but as I say, in the context where the debate was whether ECT award rates should be the same as teachers as opposed to whether ECT award rates should leap ahead of other professionals.

PN372

I said a little earlier that there was one point in the submissions where the true nature of the application momentarily emerged, and that was the point at which it was said that there was no difference in approach warranted by the difference in statutory language between the Fair Work Act formulation of the safety net or a need to establish a safety net of minimum wages as opposed to the New South Wales and Industrial Relations Act formulation of awards or a power to create awards establishing fair and reasonable conditions of employment, and that was a submission which we would respectfully suggest was put in a casual sort of way which belied its gravity.

PN373

There is - and I'm sorry if I'm stating the obvious, there are decades of decisions and determinations in this tribunal which have awards in this tribunal on a different course to the awards of the New South Wales IRC. The Commission now is applying a statute which, as I've said, has embraced that approach and those principles through the use of the language to which I have referred. If that course, if the course of award wage fixation in the Federal Commission is to be

reversed it would, to state the obvious, be a matter of very great significance, not only for the workers in this area but for the award system in general.

PN374

VICE PRESIDENT HATCHER: The Schmidt J's decisions involve the setting of wages in a minimum rates award; did they not?

PN375

MR FAGIR: Not on our reading of it.

PN376

VICE PRESIDENT HATCHER: So how would you characterise the awards that were the subject of consideration by her Honour? That is, how were they different in nature to a minimum rates award?

PN377

MR FAGIR: They were different in the sense that they were intended and did set rates that were actually paid. I'm not suggesting that they were paid rates awards in the strict sense but like many awards of the New South Wales tribunal they were something approaching paid rates awards. They were in the category of awards which in the Federal tribunal did not survive various processes of award simplification and everything that came before and afterwards and which did not survive award modernisation. I've referred previously to transport, that's the example I know, but it's also similar. New South Wales Transport awards were not paid rates awards in the strict sense, but they were not minimum rates awards and this tribunal rejected the contention that the New South Wales award rates should be absorbed, should be reproduced, I should say, in the modern award on the basis that they were not properly fixed minimum rates.

PN378

It does not follow from what I've said that a new approach could never be taken, more that a case advocating a new approach would never be taken. But if this issue is to be seriously approached we would respectfully suggest it should be done on the basis of the proper and fulsome analysis and consideration not as a brief almost throwaway line in oral submissions.

PN379

I said I had two things to say about the New South Wales cases. I think I've said four, and I still have two more, but they are less significant than what I've just said. Firstly, it was said that the pay increases resulting from the New South Wales decisions didn't lead to the financial disaster that was said to have been foreshadowed. Whether that's right or wrong is not a matter that has really been explored. What has been explored is the question of shortage and what the Commission does know is that any wage increases that were given in the New South Wales tribunal on the IEU's case did not resolve any question of shortage at all, and if one were to accept the view of the Productivity Commission referring to various statistical material which we've highlighted in fact the real shortage began in 2009. That is the point at which there had been a series of wage increases in the New South Wales tribunal.

PN380

That perhaps highlights the fact that the impact of those cases is a little uncertain in circumstances where the earlier decisions probably applied only to community kindergartens and the later decisions I'd have to say we don't clearly understand and the evidence doesn't really demonstrate who those awards actually covered. It might be that they applied only to a small fraction of the workforce.

PN381

Could I now deal with the datum point question. The premise of the IEU case, as we understand it, is that work value was properly assessed in 1995, not in 2004 or 2010. The submission is that there have been work value increases since 1995 which warrant increases on the rate which was set then and varied through a series of annual wage reviews, but if the submission about the 2004 and 2010 decisions is correct that throws up a real anterior question as to whether the pay parity as between ECTs and other teachers from 2004 and onwards was proper.

PN382

If it's said that 2004 was not a serious consideration of work value nor was 2010. There's a reference to earlier awards dealing with school teachers, and apart from '04 and '10 there's not been identified in this tribunal any occasions on which the work value of early childhood teachers was considered in the context of an adversarial proceeding. It follows that the IEU's submissions about the significance of 2004 and 2010 very much cuts both ways. 2004 so far as we can tell is the one occasion or the first occasion on which an assessment was made in this tribunal or a conclusion was reached that the work value of ECTs was equivalent to primary school teachers.

PN383

If that decision is to be treated as something other than a serious consideration of the issue it throws up the question of whether the rates in 2004 were properly fixed, and that is - it's not an arid question in circumstances where the union's case in these proceedings is that there have been significant changes leading to or introducing professionalization and higher standards and so on. If it is right that professionalism is a relatively recent feature of this industry or of this sector on what basis could the rates have been said at parity with professional teachers in 2004? And really if the argument about the force of 2004 and 2010 is accepted the starting point is not that the rates which appear are properly fixed and the question is where do we go from there? It's really carte blanche. It's starting from zero.

PN384

That's not the submission that we make. We've made a different submission, and we don't resile from it, that is that the work value was assessed in 2004 and 2010, and the fact that the parties had a common view about the issue does not mean that the Commission did not discharge its statutory obligation to properly fix minimum rates but if we're wrong about that there is a real knife in the napkin from the IEU's point of view.

PN385

This point rather highlights the issue with the rejection of the notion of a datum point because if there isn't one here how does one fix any rate. In the absence of a datum point the only real reference point or objective criterion by which a rate

could be fixed is awards in other professionals or equivalent classifications in other awards and if that were the appropriate course then of course that would have implications for the viability of this claim for a premium, whatever it is, somewhere between 15 and 45 per cent relative to other professionals.

PN386

Could I now add something briefly to what we've said about the threshold issue on the first limb of the ERO claim, that is the legitimacy of the comparator. We've made the point in written submissions and in earlier submissions and it's a short one, and the short point is that the two groups - the comparator group cannot be selected on some arbitrary basis on the basis of a gerrymander and apart from anything else, the consequences that flow from that are obvious. The Bench gave an example during the opening submissions in the ERO matter, many others could be given, again coming back to the transport example, perhaps I'm stating the obvious but I'll do it anyway, on the approach that's mooted by the applicant it would be sufficient to find, for example, a female garbage truck driver employed by Inner West Council on an enterprise agreement, compare that person to a male truck driver employed on the award rates by one of the many waste and recycling companies which employ workers on an award rate, and as a matter of jurisdiction setting aside any gender related aspect the simple fact that there are two employees of different genders being paid different amounts for identical work would be as a matter of jurisdiction sufficient for the purposes of part 2-7 and then it would simply be an argument about discretionary considerations. That is not - an interpretation which leads to those sorts of results is one which would not readily be accepted, in my respectful submission.

PN387

VICE PRESIDENT HATCHER: When you say an interpretation, so what's the language in the statute which tells us how comparator groups are to be selected?

PN388

MR FAGIR: The power pursuant to section 302 is a power to make an order that considers it appropriate to ensure that the employees to whom the order will apply there will be equal remuneration for work of equal and comparable value. That's the phrase which is defined in the next subsection to mean equal remuneration for men and women workers for work of equal and comparable value.

PN389

It follows, in my respectful submission, accepting what the Full Bench has said about the need for a comparator group, the comparator must be selected on the basis that they give rise to a comparison of male and female workers, not on the most superficial level of saying this person is a woman and this person is a man but in the way which in fact allows a comparison between remuneration for work done by women and remuneration for work done by men.

PN390

VICE PRESIDENT HATCHER: But why can't it be individually based? For example, if I'm in a single - two people working for a single employer of opposite gender apparently doing the same work and they're being paid different remuneration why couldn't that be the subject of an application? That might be the classic example of where there's some form of gender bias in the pay.

PN391

MR FAGIR: Yes. It could be done, but in that case the groups wouldn't be drawn arbitrarily or simply on the basis that one group or one individual was a man and the other was a woman. The logic or the non-arbitrary basis for the selection would be that one man and one woman in the same enterprise were doing the same work but being paid differently. If there was some self-evident reason why that was then there might be a problem with the comparator group but in the ordinary case they would be appropriate groups because the principal basis for their selection could be identified. It would not be an arbitrary selection of groups mapped out on no basis other than purely the fact that one is a subset of female workers within one industry and the other is male subset of workers in the next.

PN392

VICE PRESIDENT HATCHER: How do you make that a workable principle? It can be used to identify what are legitimate comparator groups. It's almost like it's whether it's a bona fide comparison as distinct from ones intended to achieve an outcome. Is that the distinction you're making?

PN393

MR FAGIR: Yes. Yes, if there was some, in this case, some identified basis for the selection of the groups other than to say that one is male and one's female. That would be one thing, but in the absence of some bona fide or principal jurisdiction for drawing the boundaries of the group they are not, in my respectful submission, a comparator for these purposes.

PN394

The example that your Honour gave identifies a bona fide basis for the selection of the group. If the comparison, as here in the second limb of the case, were between female early childhood workers as being a component of a feminised workforce by comparison with male engineers as being the predominate component of a masculine workforce that again is a principled or a drawing of boundaries that has some rational basis. That's the arbitrariness of the selection of the comparator group here which renders it offensive to the statutory scheme, in my respectful submission.

PN395

Could I now deal with the threshold issue in respect of the work value claim. This is a document we've provided previously.

PN396

VICE PRESIDENT HATCHER: So that last submission addressed the primary ERO comparison sought to be drawn by the IEU. What about the second one, the one with the engineers?

PN397

MR FAGIR: It's a very short point, which is that the evidence which has been led in this proceeding is entirely insufficient to allow any assessment of the work value of professional engineers as a group. As we've - - -

PN398

VICE PRESIDENT HATCHER: We started off at the beginning where you addressed the first ones. Are they legitimate comparators?

PN399

MR FAGIR: Yes. Yes, we've accepted that. And what we have said and gone into the warning previously given by the Full Bench that the comparison is going to be easier with smaller comparisons capable - with comparators that are small in terms of number of employees capable of precise definition and in which employees perform the same or similar work under the same or similar conditions. That's the easy version. At the other end of the spectrum is the comparator which is large, diverse, involves significantly different work under a range of different conditions, and if one were to look across the workforce for a group of workers that is large, diverse and carries out work under significantly different conditions, professional engineers we'd rather suggest would be the example par excellence. It's not to say they are not a legit comparator but if they were to be the comparator there would be a very, very large evidentiary burden to be met, and as we have said in this case we have statements from people, one is an engineer, the other one is actually not an engineer, is a computer programmer, but in any case even if everything they said was accepted holus bolus, and we say it should be, including the things they said in cross-examination, that is compatibly sufficient to allow any assessment of the work value of professional engineers as a group.

PN400

And as we've again pointed out in the written submission the evidence suggests there are about 140,000 professional engineers employed as such. They're spread across 16 different disciplines in various industries. In selecting them the IEU took on a very substantial evidentiary task and we say it didn't come close to doing what it needed to do to allow the comparison to be drawn.

PN401

Cam I assist any further on that question of considering the ERO claim?

PN402

VICE PRESIDENT HATCHER: No. Thank you.

PN403

MR FAGIR: The threshold issue we identified in respect of the work value claim is the external relativities question. We provided this document previously. I'll hand it up again for convenience and it can be discarded at the end.

PN404

Your Honours will recall that this is a document that we handed up on day 1 or day 2 and the short point is to highlight that the rates for early childhood teachers in long day-care centres is sort of paid the four per cent above the rates that the IEU has identified. As things stand at the graduate level well ahead of nurses, ahead of doctors, lawyers and engineers. If the claim were allowed it would be 30 per cent ahead of nurses, 24 per cent ahead of doctors and one goes on. At the graduate level and at around four years, which is the point where we would most easily draw the comparison, the gap between ECTs and nurses, for example, would be in the order of 46 per cent. That is - - -

PN405

VICE PRESIDENT HATCHER: But, I mean, the problem is in view of the present statement of 27 August this is a submission built on sand, isn't it? That is, there's been identified a possible problem with the external relativities in the first place such that the foundation for this comparison becomes something that's contingent.

PN406

MR FAGIR: We wouldn't accept that characterisation. As we would put it there are a range of modern awards. We're not drawing a comparison to just one. There's a series of awards which prima facie until the opposite is demonstrated include properly fixed minimum rates. The starting point could not be that the moment a question is raised about the propriety of those rates that any concept of external comment is out the window in my respectful submission. The fact that a question has been asked and no real answer identified, perhaps there are other people who can see all this more clearly than we do, but there's no real answer that's been identified yet, has no bearing at all, in my submission, and doesn't undermine its foundation one jot, we would say.

PN407

Anyway, I'll deal with the question of how that matter is to be dealt with in just a moment, but the starting point we would say is that an increase which would leave a 46 per cent gap between two sets of professionals is unsatisfactory, both as a matter of the integrity of the award system, and on the basis that it would inevitably invite catch-up or leap-frogging claims from other professionals.

PN408

And that is not a principle that we've invented for the purpose of these proceedings. That is a basic principle which has underpinned the approach in this Commission for 30 years. It's answered only to the extent that it's said, not by reference to evidence, but award rates are irrelevant to the professionals. As we've said, not only has that not been demonstrated but it's demonstrably wrong. The easy example, these nurses, and we identified a recent decision which I know about because I lost it, where an enterprise agreement in aged care covering nurses failed the BOOT. The proposition that you don't need to worry about any of this any more because the award rates are irrelevant except to ECTs is not one which would be accepted either at the level of principle nor as a matter of fact.

PN409

If that is accepted there are only two ways the application can succeed, one is that the long-standing principle is abandoned, and as I've said if it is to be abandoned it's not on this basis. Well, the only alternative is for the IEU to demonstrate that the work value of ECTs is significantly higher than other professionals and that it has not done and it has not attempted to do.

PN410

Could I do my best to deal with the submission that was made yesterday on the basis of a document which I don't think was marked, but it was a landscape format table dealing with manufacturing award classifications and so on. I hope I haven't misunderstood it, and I'm sorry if I'm not doing the argument justice, but doing my best I thought what was put was this, if one proceeded on account of factual

where the annual wage increases at the C10 level are the wage increases that were in fact given in flat dollar terms at C10, but if one then ignored the actual increases paid at the higher classifications and assumed in effect that they weren't flat dollar increases but that the percentage increase went all the way up the classification structure, that is if one assumes that the annual wage increases for workers above C10 were significantly more than they were, and one leaves out the four per cent paid to long day-care, if we then compare those results to a rate, a C1 and C2 rate, which either has never appeared in the awards or last appeared in awards in 1995, if you take those series of steps on that count are factual then the claim is within the proper range of relativities.

PN411

As I say, I hope I haven't misunderstood the argument, but if that is in fact what was put it is not one which would readily be accepted. It effectively asks the Commission to forget about everything that's happened over the last at least 10 years and instead proceed on the basis of an assumption that the carefully considered decision is to give a flat dollar increase on whatever basis that was made to be effectively reversed now, and it's on that basis that one compares relativities and by reference to a classification rate has never existed or has not existed for many years. It's not a real comparison, in my respectful submission. It's much more straight forward than that. It's this, there are award rates for other professionals, there are award rates for ECTs and what's being sought would put the award rates for ECTs at a serious disconformity with all other professional rates and apart from anything else that is reason to reject the claim, not on the basis that the rate must always be the same or similar but if the work value is the same or at least it has been demonstrated that the work value is significantly in excess of comparable positions, then a significant increase is not warranted. It's not permitted having regard to the principles which have long applied in this tribunal.

PN412

Is there anything further I can say about that beyond what I already have? Could I then say something about undervaluation. I don't need to add much to what appears in our written submission. The short point is that the evidence demonstrates with some clarity that the view of ECEC as being child-minding along those lines was rejected a long time ago. On the view of the national childcare accreditation council that view was gone by 1983. On Schmidt J's view the attitude towards ECEC is providing a child minding service while, at the time of her decision, not consistent with the regulations governing the sector. And, she said, had not had currency since 1970.

PN413

As we pointed out, insofar as this tribunal is concerned there has never been a time where early childhood teachers were treated as anything other than professionals with equivalent work value to other professionals. Whereas in the material and in the evidence a huge of amount of material from government and otherwise, which is consistent with that view that emphasises the importance of this work, which doesn't suggest for a moment that it's to be treated as something that anyone can do by walking in off the street, and I should add that whenever my client's witnesses were asked about this, Ms Toth, who had quite a few pity

phrases, accepted that it's not a matter of tipping a box of Lego on the floor and telling the children to go at it.

PN414

The idea that the work is - frankly the case remains elusive on exactly who has undervalued the work and how that undervaluation has manifest. But what it can say is that there's no indication in any of the material whether it's government employers or otherwise that any person takes the view of ECEC that it's child minding. In fact, again doing the best we can to understand it, the submission seems to be that the mere fact that some ECTs are paid less than school teachers is of itself evidence of undervaluation in the relevant sense. Again, I hope I haven't misunderstood what is being said, but that seems to be, you know, the submission, and that's not a view of undervaluation that we understand to have any currency and not one that would be accepted for the purposes of whether it's analysis under part 2-7 or a general work value analysis.

PN415

Perhaps not much turns on this, but one could identify a series of points in the submissions where the incoherence of the case on undervaluation is manifest, for example, in answer to a question from your Honour the Vice President yesterday it was said that employers had undervalued the work. Later in the same submission it was said that the employer witnesses who were asked about this work confirmed that it is not simple child minding. In the written submission it is said that government has undervalued the work and in the same written submission it's said that government recognises the value of the ECTs insofar as imposed requirements for a certain number of teachers in early childhood.

PN416

Ultimately it was said in the same submission that this type of work is undervalued. It's also said that this claim would affect the small percentage of the profession. Now, it's that idea that the work is undervalued even though it is said the bulk of the employees actually doing the work are paid a rate which is said to be satisfactory is again the two propositions that are difficult to reconcile. And all of this really exposes a problem in the starting point, and that all we would rather suggest is a function of what we've described as the artificiality of the way that the claim is advanced. It's really comparative wage justice but it's being forced into a form of a gender pay equity case. It sits very uncomfortably in that vessel and that is manifest as I say in the various contradictions that appear in the case put against us.

PN417

Could I now say some things about the evidence. I won't - we've said them enough times. We've said it - it's almost as though someone was challenged to run a work value case without talking about the work. At times it's almost seemed - we've said what we need to say about the evidence. The significance or the point that we would wish to make really is that the Full Bench considers the factual findings that it makes would rather suggest that the reliable part of the material is not the material which says in a conclusory way it's the increased professionalism, standards have been increased, the bar is higher and so on. But the evidence, almost all of it from ACA witnesses which actually deals with what has happened in the day-to-day work of early childhood teachers and other

educators, the ACA witnesses who are the - with the exception of Ms Connell, and I'll deal with her evidence in a moment, but with the exception of Ms Connell they are the witnesses who actually provide the evidence which is material to your Honour's determination.

PN418

Could I say something briefly, but before I come to some of the detail of the evidence, could I say something shortly about the comparison of ECTs to other educators. I hope we've made this clear in our written submission, but I'll say it again anyway. The case that was put against us included evidence from early childhood teachers to the effect that they, as ECTs, repeatedly, I mean as we've said, surprisingly similar language said that, 'I as an ECT have the following duties', and there are a whole series of effectively things put that suggested that the ECTs by virtue of that role had leadership obligations or were required both operationally and pedagogically to lead the service. It was in that context that my client's witnesses put on evidence saying the demarcation is not between ECTs and other educators, it's between - this is a gross oversimplification of the evidence in a way, but I hope it communicates the point. The line isn't drawn between early childhood teachers and other educators, the line is between educators simpliciter including early childhood teachers. Room leaders, if there are room leaders, have another level of responsibility, directors really bear the real burden, as do the approved providers in terms of compliance and in terms of operational leadership.

PN419

That's the point of the evidence. It's a matter of the duties, the work that's actually done. Is it, as the ECTs said that they're effectively running the show. Is it, as they suggest, ECTs on one level and everyone else on another? That's really what the evidence went to. It's not a matter of coming along and saying, 'ECTs don't know anything more than educators'. The witnesses when they were asked about it certainly in the pedagogical sphere ultimately, and perhaps unsurprisingly, accepted that a person who had a four year teaching degree, and all things being equal, would be expected to be more capable in that sphere than someone who hadn't.

PN420

VICE PRESIDENT HATCHER: Can I just put this proposition to you only for the purpose of getting your response, on one view there are differences in the way that employers in the sector use their ECTs. The starting point is that there's obviously been a government level policy decision that a requirement that early childhood centres employ qualified teachers will improve outcomes presumably on the basis that teachers will add value and add something that wasn't there before. There are some employers who are on board with that as a policy level decision and seek to maximise the value they get out of using a university qualified teacher. That's at one end of the spectrum, and at the other end of the spectrum there appears to be some employees who aren't really on board with the policy decision at all are stuck with a regulation that they need to employ some teachers and then work out where to put them within a framework of saying, 'I don't see there's any reason to change anything'. And as I say, that's a spectrum.

That's necessarily the opposite end of the range and there's people in between. What do you think about that?

PN421

MR FAGIR: We certainly wouldn't accept that without serious qualification. But given one example, Ms Toth said that she had one of her ECTs in the zero to two room, the babies room, and she didn't say she put the ECT in there because she thought it made no difference what room they were in or whatever else. She explained that when it comes to babies that it's an important period and, I'm sorry, I can't recall exactly what she said, but the gist of the evidence, as I understood it, was that it was worthwhile putting the ECT in the babies room, not because I've got to put her somewhere and I'm going to shunt her off into that corner, but on the basis of some perceived benefit that would be obtained by doing that. In terms of - perhaps one could accept as a pole as one end of the spectrum that some services might be feel burdened by the presence of an ECT and that if they had their way they wouldn't have one. I wouldn't necessarily resist the proposition that there are some services that are in that category, but insofar as it's suggested that that's some prevalent view we wouldn't accept that.

PN422

But in any case it's all by the by that the sole component of the regulatory framework which differentiates ECTs from other educators is the requirement imposed by the requirement for certain numbers of ECTs in services together with some funding requirements that are - they vary and we've given a short description of them in the written submission, but some fundamental requirements that are tied to delivery of a kindergarten program by an ECT.

PN423

Your Honour said that's presumably on the basis that there's some improved outcome that's perceived to be obtained by that arrangement. It really is a matter of presumption because so far as I can tell there's no witness nor any material which explains the rationale for that arrangement, but perhaps it's a presumption or an inference that's available, but it doesn't go anywhere in terms of the work value assessment, in my respectful submission. It's not demonstrative of a change, it's demonstrative of a change in regulation but it could not be inferred that's what happened is early childhood teachers have become more professional and more skilled and as a result governments have introduced those changes. There is no basis for that kind of inference we would suggest, so it's all by the by.

PN424

Perhaps this is a tangent but could I deal with Ms Viknarasah for a moment, self-described industry rogue that's referred to in the IEU submissions, and your Honour has heard part of a podcast on which she appeared. Firstly, she appeared on a podcast one would presume because she is a person who has some standing in the sector, and someone people want to hear from. Her evidence explains her qualifications and that given a short extract from a podcast which means the evidence is not particularly useful, but this is a tangent, but Ms Viknarasah explained both in her evidence and her cross-examination that from her point of view she did not want her services to adopt an approach of complying with the regulations for the sake of complying with them. And in her policy document

which is annexed to her supplementary statement dealing with observations that is exactly what she says:

PN425

*We do not take observations for the sake of being able to show an assessor that we've done two observations per month for the last three months. We do observations on the basis that something meaningful has happened that needs to be recorded.*

PN426

And as she explained her inspiration in that respect was Mr Siemen, who is a respected consultant and who set up the G8 internal professional development framework.

PN427

It seems to be suggested that Ms Viknarasah is an example of a rogue who doesn't value the work of ECTs and perhaps I'm reading too much into the submission, or perhaps it's said to be a foothold for a view about undervaluation amongst employers, but we would respectfully suggest that what that evidence highlights firstly is that there are legitimately a variety of ways in which the requirements of the NQF can be achieved and that different services have different philosophies and different ways of achieving those requirements, and again in the written submission we've pointed to the evidence of Ms Gleeson and some other evidence explaining that a Montessori oriented service might take a different approach to someone else. Ms Toth dealt with the same thing in respect of scaffolding learning and the way that those matters might specifically be approached.

PN428

The significance of all that in terms of the evidentiary analysis is that when one reads, for example, Ms James's evidence saying, 'Because of the NQF the following must be done', that as a general proposition, setting aside the specifics of what she says, is something that's not really consistent with the evidence because the evidence reveals this scheme by design allows for its requirements to be achieved in a variety of ways, and that being the case, it is not useful for a witness, and the evidence is not reliable insofar as a witness comes along and says, 'This is what the framework requires', particularly in circumstances where there are no explanations other than at the level of assertion as to what part of the framework requires particular things to be done. And, again, to come back to the theme of the observations Ms James says they now have to be more complicated, there are more of them, they are longer.

PN429

She does not identify the part of the framework which has that affect. It's a mere assertion, and as the evidence shows there are a variety of ways in which observations are done, and all perfectly legitimate. One of the witnesses explained that she had to do two a month. That's one end of the spectrum. Ms Viknarasah at the other centre said, 'We do not do a fixed number. We are not here to be able to say, 'Here are the eight observations we've done for young Mohammad' or 'Susan'. The scheme, as I say, by design is able to be applied in a variety of ways and that means dogmatic evidence about its requirements must be approached carefully.

PN430

Sorry, I'm jumping around quite a bit. Could I deal with the question of social utility and the short point is, as we've said, it doesn't feed into the work value analysis at all. If it's relevant as a discretionary consideration it tends to weigh against the grant of the claim because it is such a significant social issue. It is such a difficult issue and it's an area where the Commission would tread carefully, and I'll say something more about that in the context of affordability.

PN431

In terms of workforce shortages we've said what we need to say in the written submissions. The evidence we would suggest demonstrates fairly clearly that there is a shortage, that it is caused by a massive increase in demand for ECTs which has been matched but not completely by an increase in ECTs entering the profession. As the evidence shows one of the fastest growing professions, as the evidence shows, the workforce tenure for ECTs and directors is above average. So what the evidence indicates is that there's a shortage caused by a sharp increase in demand. The evidence does not identify, in my respectful submission, any turnover problem. In fact, what the - both the statistical evidence and the anecdotal evidence suggests is some difficulty in getting them in the first place. When you get them there is not, we would suggest, any real evidence of a problem with people leaving. If there's an issue with Diploma educators and qualifying and leaving, we accept there's some evidence of that, and there's evidence of difficulties perhaps at the point of graduation and the choices that are being made, but in terms of turnover the evidence does not, contrary to the submissions that are made, without reference to evidence the material does not identify a problem with turnover with attraction or retention. It's very difficult to suggest, in my respectful submission, that there's a problem with attraction in circumstances where there has been the huge growth in the numbers of ECTs in the workforce over recent years.

PN432

I said earlier - - -

PN433

VICE PRESIDENT HATCHER: Sorry, Mr Fagir, the issue of shortage is that called into play by any of the considerations under the modern awards objective or the minimum wages objective?

PN434

MR FAGIR: Yes. Yes, we would accept that it is. And that analysis arises only after the work value issue is dealt with. We accept that in terms of the modern awards objective analysis it is a factor that would be considered together with the variety of other factors that arise under (indistinct).

PN435

I said earlier that my client's evidence was to the effect that there was no demarcation in duties as between ECTs on the one hand and non-ECT educators on the other and in fact that the evidence suggests that the demarcation was drawn differently. That evidence so far as we can see is answered only to the extent that the union points to ECT position descriptions and says that, well, at least the two that were referred to yesterday demonstrate that ECTs have a leadership role.

That submission is made in circumstances where the witnesses were not challenged on this aspect of their evidence, and where the IEU chose to tender position description for ECTs but not the other position descriptions which were in play.

PN436

No doubt that was seen to be forensically clever but, in my respectful submission it was not. It undermines the force of the point. The Commission would not be persuaded that the position descriptions identify some difference or some leadership role on the part of ECTs not shared by educators in the circumstances where it hasn't been given the position descriptions for the non-ECT educators.

PN437

Could I say some things about the regulatory change, and it is said now that the union has never suggested that the NQF came out of thin air, but with the greatest of respect that was the evidence. At least the overwhelming weight of the evidence suggests that this was all new and shiny. The only exceptions that we could identify were those in Professor Press's report where she adverted to the existence of something called the quality improvement and accreditation system and the New South Wales curriculum in one or two paragraphs.

PN438

Associate Professor Irvine not only ignored the existence of that framework but went a step further. For example, the associate professor said the early years learning framework introduced outcomes based education in Australian ECEC. That is demonstrably untrue. As we know from Professor Press and from Ms Gleeson, for example, and to take one example only, in New South Wales there existed something referred to as the New South Wales curriculum which Professor Press accepted was a list of outcomes expressed more broadly than is usual for curriculums towards which professional educators should be working. And it's in that context that the associate professor comes along and says the EYLF introduced outcomes based education in Australian ECEC.

PN439

The problem is addressed to some extent by the end of the hearing, but the point is that as a matter of reliability these matters weigh heavily in the balance as against Professor Press and particularly Associate Professor Irvine. Certainly, in those circumstances where the Associate Professor put that sort of proposition without any acknowledgement of the existence of what came before it'd be different if the Associate Professor said there were some things in place and here are the reasons why this is qualitatively different. She didn't do that. She said EYLF introduced outcomes based education. In those circumstances, when your Honours read the reports and see time and again an assertion that, 'It is expected that', 'The bar has been raised', 'Professional expectations are now X', those are all matters that your Honours would treat with a grain of salt.

PN440

We have explained in our written submission that all of the key features of the NQF as highlighted in this case as being indicia of significant change appeared in the old system, and in the interests of efficiency I won't take your Honours to the evidence and ask you to read it, but could I just identify that that submission is

best made good by reference to the supplementary statements in Ms Prendergast and Ms Viknarasah and in particular by reference to the documents annexed to those statements including, for example, the second tab to Ms Prendergast's supplementary statement, exhibit 106, is the quality practices guide, and in the interests of time I won't go through and deal with it, but the draw point is that evidence that's said in submissions by Ms Connell to be novel individualised attention, child led learning, integration of families into services, all of those matters were well-entrenched in the QIAS for many years.

PN441

The guides make that clear as do particularly the statements of Ms Viknarasah attaches a series of publications by the NCAC that effectively expands on some of the concepts and there one sees discussions of reflective practice and the whole range of other issues that are said to be recent innovations.

PN442

We were criticised yesterday on the basis that that material came in late. It came in late because the evidence about actual work came in late and it was at that point that we came to grips with what was being put and responded to the evidence, particularly of Ms Connell, to the effect that before the NQF we had rigid thematic curricula and so on and so forth, and as we suggested and your Honours accepted during the hearing, everything that appeared in the supplementary statements was directly responsive.

PN443

Perhaps a more significant point is that it was said yesterday and perhaps in written submissions that your Honours would note that the QIAS applied only to the for profit sector. It wasn't clear exactly what was said to vote on that. Now, it was not put that your Honour would proceed on the basis that there was some different higher standard in the QIAS part of the sector as opposed to the community or not for profit sector. But if that were put there would be a real difficulty. As your Honours will recall the evidence tended to suggest that there was variation around the country but traditionally there were less teachers in the for profit sector, and teachers weren't concentrated, at that stage, in the community and not for profit sector.

PN444

To the extent that suggested that your Honours should proceed on the basis that the QIAS was a higher standard than what prevailed elsewhere that it is not a submission which would readily be embraced in circumstances where it's said ECTs are the key to quality. It would be a very awkward submission to suggest that quality was higher in the no ECT or less ECT quality improvement accreditation service universe than in the community and not for profit sector. That submission wasn't quite put and perhaps I'm jumping at shadows but if it were put or if it was a question that your Honours were asking yourselves that is, we would suggest, the answer.

PN445

The last point I wanted to make about the QIAS is just to identify in evidence annexure KV7 to Ms Viknarasah's statement is an extract from a QIAS handbook which sets out the system in a relatively brief but useful discussion. Also annexed

to her statement are some documents which identify the assessment results for services under the QIAS system.  And what that material demonstrates is that the majority of services under the QIAS were not operating at the minimum level but at either the good or highest quality level.  For example, to take one example, principle 4.1:

PN446

*Staff encourage children to make choices and participate in play.*

PN447

The material identifies that as of 2011 88 per cent of services were assessed as being high quality and another eight per cent were good quality.  To the extent that it said, 'In fact standards have changed because', you could only assume that services were meeting satisfactory as opposed to the higher levels under the QIAS system.  That is not what the material indicates.

PN448

Do your Honours intend to take a break now or at 11 or some other time?

PN449

VICE PRESIDENT HATCHER:  How long do you think we'll be this morning?

PN450

MR FAGIR:  I don't expect to be much longer than an hour after we resume.

PN451

VICE PRESIDENT HATCHER:  We'll take a break now.

**SHORT ADJOURNMENT** **[10.35 AM]**

**RESUMED** **[10.54 AM]**

PN452

VICE PRESIDENT HATCHER:  By the way, Mr Fagir, over the morning tea adjournment I was just looking for a copy of the agreed statement of facts but couldn't locate it.  Do you have a copy handy or has there been a conspiracy of silence about this?

PN453

MR FAGIR:  You've just heard Ms Saunders say that they've chased us down and didn't get back to us.  I think the best thing I can say is that we are the respondents in this case - - -

PN454

VICE PRESIDENT HATCHER:  Yes.

PN455

MR FAGIR:  - - -so it wasn't for us to go out and draft an agreed statement of facts.  We - - -

PN456

VICE PRESIDENT HATCHER:  I wasn't trying to attribute blame to anybody.  I was just wondering indirectly when it might turn up.  Is there some prospect we'll get it at some stage or are there no facts agreed?

PN457

MR FAGIR:  I suppose that depends on how sternly the Commission instructs the parties on this point.  But there is no agreed statement of facts.  Not giving anything away by pointing that out and that's because we didn't do it, despite the things that your Honour said at the end of the hearing.

PN458

VICE PRESIDENT HATCHER:  We'll come back to that.  Mr Fagir?

PN459

MR FAGIR:  Just continuing jumping around, could I just say one other thing about the question of the general problem, if I can put it that way - - -

PN460

VICE PRESIDENT HATCHER:  So what's the general problem?

PN461

MR FAGIR:  The professional employee relativities.

PN462

VICE PRESIDENT HATCHER:  Yes.

PN463

MR FAGIR:  What I should have said earlier is that the fact that that matter is now in the hands of a different Full Bench means that the matter should be left in the hands of that Full Bench.  If there is in this case some improper fixation on wages as one manifestation of that broader phenomenon then if that is to be remedied it should be remedied in those other proceedings, and that's simply on the basis that it would be undesirable for this Full Bench to reach a conclusion by reference to the particular circumstances of this sector and then leave the matter in a position where either a future Full Bench and parties are bound by the result of the determination they were not involved in or alternatively they're inconsistent determinations of two different Full Benches.  So if there is a real issue then it is not to be resolved here.  It should be left to be addressed as part of the broader proceeding.

PN464

I was saying some things about the regulatory framework and change, and I need to deal with the evidence of one witness in particular.  That's Ms Connell.  Your Honours might recall Ms Connell was the long-term director of a community kindergarten in Albury, and if one read the IEU's - there were 12 or 13 early childhood teachers who gave evidence.  If one read the IEU's submissions one might think there was only ECT who gave evidence, and that was Ms Connell, because it is her evidence which is time and again cited in support of various contentions, particularly in the parts of the evidence dealing with work value and changes, and we would rather suggest that that's not coincidence.  It is a function of the fact that Ms Connell said a whole series of things that were not repeated or

endorsed by any other witness including the other ECTs and the school teachers. And in some respects were actively contradicted by the other witnesses.

PN465

I just need to spend some time dealing with the reliability of that evidence because in many respects it is the only evidentiary foothold for contentions that are put against us. To be clear, in saying this, I'm not suggesting for a moment Ms Connell was dishonest or did anything other than her best, but her evidence was unreliable and we gave some examples of why we say that is in our written submission and I'll add a few now.

PN466

The context of the evidence of course is that, as I say, Ms Connell was the director of a community kindergarten in Albury, was the director for something in the order of 20 years. The backdrop to her evidence is that whatever she says about her service is really describing a situation that she's brought about as the leader of that service for two decades.

PN467

Here are some of the things that Ms Connell said that we would suggest demonstrate that her evidence is to be treated very carefully. For example, Ms Connell was the only witness, as far as we can tell, who suggested that intentional teaching was some novel innovation. Now, in fact ultimately in the course of cross-examination she came to a slightly different point. The starting point was I suggested to Ms Connell, 'You don't say intentional teaching is something new?' and she said, 'Yes, it is something new'.

PN468

There were a variety of other propositions to similar effect which, as we pointed out, have been contradicted in various parts of the evidence, but particularly in the supplementary evidence of Ms Viknarasah and Ms Prendergast, and in particular the table attached to their statements. In respect of almost every proposition persuasively answers it sometimes by description of those witness's experience commonly by reference to a regulation, a QIAS principle, or some other objective fact as opposed to mere assertions. There are cases where they say, 'In my service this is what happened' and it was different. But there were many, many examples where there is an objective external reference point which answers what Ms Connell has said.

PN469

Could I give some other examples of some things Ms Connell said. She said that one of the consequences of the introduction of the NQF is that her service was now required to be involved in university research and that in turn required her to install special speakers and issue press releases. This is one example of a case where Ms Connell refers to some development as being a function of the NQF. In reality it may well be the case that Ms Connell installed special speakers and issued press releases and participates in university research, but these propositions are put as universal truths or consequences of the NQF in circumstances where that is, in my respectful submission, clearly wrong.

PN470

In a slightly different category this is what Ms Connell said about the professional standards for teachers.  Ms Connell said she thinks the higher, not just the proficiency standard, but the highly accomplished and lead standards are relevant to ECTs because she thinks services will encourage or require teachers to meet those higher standards.  Now, that was evidence that she gave in circumstances where the evidence of other IEU witnesses, or at least one of them, is that the take up of those higher levels of qualifications were miniscule even among school teachers let alone ECTs.  It's in that context that Ms Connell says that, 'The higher standards are relevant because I think services are going to be pushing people to achieve them'.

PN471

Another example that we gave in the written submissions was that Ms Connell said:

PN472

*Because the NQF requires that non-teacher educators be qualified I am now required to tutor those other educators to help them get up to speed.*

PN473

Now, again, kudos to Ms Connell for doing that.  I'm not suggesting she's not doing it, but, again, the problem that I'm trying to highlight is the reliability of these views about the implications of the NQF which are obviously heavily influenced by her own idiosyncratic experience at her service, but which are put on a broader basis than that as being some sort of indication of the general implications of the introduction of the NQF.

PN474

Another example, she said there's now an expectation that families are involved in the preschool.  Now, if families were not involved in Ms Connell's preschool before the NQF it is absolutely an outlier, and in my respectful submission the evidence is perfectly clear from the QIAS material and otherwise that families have always been involved in early childhood education.

PN475

Ms Connell said that the EYLF introduced the play based curriculum.  Again, we would respectfully suggest that if that was true at her service then it was an outlier and the same goes for the things that she says about intentional teaching, scaffolding, child led programs and so on, if those things are true of her service then it's Robinson Crusoe in that respect.

PN476

She said in her statement that there are increased curriculum resources now and suggested that that was a problem.  She accepted in cross-examination, what may have been obvious, that is that the availability of pedagogical resources, the increased availability is unequivocally a benefit.  That was the proposition that she accepted.  She said or at least implied that at her service daily observations were taken.  Again, if that's true that is just her and her service.  She said that she was expected to write daily reflexions.  Now, given that she was the boss, it's a bit hard to understand who expected her to do that, but, again, she was required to.  If

she did write daily reflexion that was not anything that was the product of or an obligation of ECTs arising from the NQF.

PN477

She said she's required to liaise and integrate with a large number of agencies including other preschools, occasional care, family day-care, primary schools, early intervention agencies, agencies and professionals involved with additional needs children, councils, TAFEs and universities. Again, it might be perfectly true about her, but to the extent that it's suggested to be typical of an ECT it's completely wrong. In the same category Ms Connell says she's at the centre 10 hours a day and must be available to parents for the whole 10 hours, and she's often expected to receive emails on her days off.

PN478

Now, again, the evidence generally was completely inconsistent with the idea that ECTs are expected to receive emails on their days off, that they work 10 hour a day or that there's any imposition on them outside of the hours for which they're paid their wages. Again, it's quite possible that Ms Connell gave every appearance of being a particularly dedicated, hardworking, enthusiastic woman who did work 10 hours and did answer emails on her days off but to the extent that it's suggested that it's broadly representative it's, in my respectful submission, clearly wrong. And that's the submission that's made by the IEU that Ms Connell's experience is representative and the point I'm trying to make is that it is not.

PN479

Again, it's not coincidence that it's her evidence that's cited time and again in support of submissions that are made because it is the only direct evidence, for example, of the idea that play based curriculum is new or that concepts of scaffolding or anything else in that category are new.

PN480

Before moving to some of the specific features of the regulatory system could I just make two points, firstly, the whole of the submission dealing with work value changes specific to ECTs, which one might've thought was the key part of the written submission, is two or three pages and about seven paragraphs, again, none of which actually explained what was being done, what's being done now, and how it differs, except at the highest level. Secondly, it is submitted in writing that the fact that the NQF has increased the workload of all involved cannot be doubted.

PN481

There's an evidence reference to a paragraph in the Productivity Commission report which in turn is citing a submission made to it by United Voice. Now, the fact that that's the best footholds in the evidence for the proposition that's been put is in my respectful submission, telling.

PN482

I don't think I need to add anything about registration beyond what we've said in writing. The points really are that the fact that registration per se says nothing at all about work value and in this case the evidence to the effect including the

evidence of Professor Aspland was to the effect that even among school teachers the standards are not really being applied because teachers are too busy. The professor said something along the lines of the teachers support the standards but they can't implement them because they're too busy. There was also evidence to the effect that the standards, as currently drafted, didn't really speak to early childhood teachers and, again, as Professor Aspland explained, there's some process whereby a new set of standards are being prepared with a view to addressing that issue. So as a general proposition and particularly in the circumstances of that evidence we would suggest that the mere fact of registration, which appears to be designed to improve staff mobility, does not demonstrate increased work value.

PN483

I think I've said what I need to say about increased reporting requirements. The short points are there's no requirement for more observations or more reports in the NQF, and the evidence Ms Vane-Tempest gave probably the pithiest evidence about the use of apps and iPads which allow some of these things now to be done, not only more quickly, but in real time, these are things that in the past had to be done during quiet time. And as Ms Hands explained may have involved cutting things out and gluing them and pasting them and so on. Now much of that is done at the press of a button including the linking of observations to EYLF outcomes.

PN484

Again, this is one of these things that's dealt with at a higher level in the IEU material without any explanation of what it actually means in terms of work. As Ms Vane-Tempest explained that what that means is, you know, there are however many EYLF outcomes, you take an observation of an activity, click on the drop down menu and you choose the relevant one. Now, to avoid criticism in reply about this, I'm not suggesting that doesn't involve the application of some skill or some pedagogical knowledge or whatever else. It's a simpler point which is that as a matter of actual implications for the work of teachers and other educators it is not any real imposition. It involves the application of some skill. I'm not suggesting that it doesn't, but it's impact on actual work is very minor.

PN485

In relation to the Early Years Learning Framework there's some debate in the IEU's submissions about whether it's a curriculum or not. It doesn't matter what it's called. It is we would rather suggest fundamentally different to the Australian curriculum, including in the sense that it's a 40 or 50 page document pitched at a high level.

PN486

Could I just identify some of the evidence describing the Australian curriculum. This was a matter I explored with Mr Donnelly, who's one of the two witnesses that the IEU identifies has been both an early childhood teacher and a primary school teacher. I explored the curriculum with him at paragraph 2644 and following and you might recall Mr Donnelly said that he had reduced the Australian curriculum to one page, and I don't know whether one would embrace that evidence or not. The point is that there was some more granular description of the Australian curriculum in that cross-examination and while I'm dealing with it could I just point out that when I suggested to him that if one compared that

curriculum to the Early Years Learning Framework he said he couldn't comment on it because of his limited knowledge of the Early Years Learning Framework. That's paragraph 2659. I suggested to him that one of the differences between the Early Years Learning Framework and the Australian curriculum is that one had changed regularly and the other had not. He said he didn't know about the EYLF. And then I asked him some questions about curriculum overcrowding and changes in pedagogical approaches and so on.

PN487

On that topic, could I just point out that there were statements from a series of teachers who were not cross-examined. They deal - we've identified some of the evidence describing the Australian curriculum and the challenges that it throws up. Those matters were also dealt with in the statements of some of the witnesses who weren't cross-examined, and could I just point out that if your Honours are looking for an exploration of those issues it's not only in the evidence that we've highlighted but some of the other statements.

PN488

In relation to increase in the visualisation and/or the child led curriculum we say two things: one is it's not new; and, secondly, as Ms Toth explained, it's not harder to program base on things that the children are interested in as opposed to making them learn about Autumn or Fiji or whatever it might be.

PN489

In terms of additional needs children the point is twofold: firstly, the evidence as far as it goes suggests that there's been no increase and if anything a decline in the number of additional needs children, at least from 2009 to date. The second point is that there's a fairly extensive evidence of additional resources that are available to deal with those additional needs including inclusion support educators and the external support services that were described by Ms Prendergast and others, and your Honours might recall that the inspection at KU during the story time we were told that there was an inclusion support educator among that group, presumably on the basis that there was an additional needs child in the group. I have to say for my own part that wasn't manifest at all, but the point simply is that you've seen that system in practise.

PN490

In relation to working conditions again I don't think I need to say very much. We've pointed out that to the extent there is evidence it's evidence of improvements, particularly technological improvements. And it was said that the impact of technology could be seen at the inspection at Bambino where a teacher was - well, the Full Bench saw it for itself, it looked to me like the teacher was playing a video and the children were singing along to it. Whatever the exact process was it seemed to be very different to the process described by some of the IEU teachers in relation to Google Classroom and so on where there is a whole different approach to teaching, as they described it, and a different set of skills required to technically handle that technology, but also they suggested an actually different approach to teaching.

PN491

It was also suggested that the inspections illustrated that the environments are noisy and chaotic.  Again, your Honours can make your own mind about that.  For my own part, I was struck by the serenity of the whole scene, but, as I say, that's a matter for your Honours.

PN492

We've identified a series of improvements in working conditions.  It's in a short passage, but an important one, and it is not only technology, it's ratios, it's improved qualification requirements for non-teacher educators, it's a requirement of educational leaders, it's a requirement that there always be present a responsible person, and it's increased teaching resources including both general and curriculum resources as well as, as I've mentioned, funding and support for additional needs children and technological improvements.  All of those are matters to be weighed against any increased difficulty which your Honours might conclude has arisen in the last 20 years.

PN493

In terms of the comparison of school teachers to ECTs we pointed out that Ms Cullen's Honours thesis identified significant differences between the two fields and apparently made some suggestions as to how the divide could be narrowed. Ms James's chalk and cheese presentation, well, the chalk was the primary component of the degree and the cheese was the early childhood, but really more importantly it's the IEU witness evidence that identified and highlighted the real difference in the changes in school teaching, primary and secondary teaching on the one hand as opposed to early childhood on the other and we've summarised those over a number of pages, but as I've said we've referred to some of the evidence but not all of it and it would be difficult to summarise all that was said by the IEU teacher witnesses about these issues.

PN494

Could I just add one point, that is it was said yesterday that early childhood teachers and school teachers may be teaching children of the same ages, that is there's overlap between the first year of primary school and preschool.  That's true, but the point is that primary teachers also teach the older children, and they're dealing not only with the needs pedagogical and otherwise of the very young children, but at the other end of the spectrum they're dealing with the emotional and pedagogical needs of the students on the threshold of adolescence which, as explored with at least one of the witnesses, is a whole different set of difficulties.  But the point is that that aspect of dealing with young children is a part of primary school teachers' responsibilities but only a part and for the primary teacher there's much more.

PN495

In relation to the comparison with engineers, again we've set out what we would suggest is the effect of the evidence of the engineers and really, in my respectful submission, the evidence demonstrated that both Mr Broughton and Mr Toker had difficult jobs.  In fact, one might've thought that in the cohort of professional engineers there might've been better examples form the applicant's point of view, but that's a matter of idle speculation because we only know about these two.

PN496

Mr Toker, for example, not an engineer and computer programmer but even within that field to deal with a whole range of different programing languages he had to deal with the electrical engineering aspects of the job.  He had to deal with his client.  He had to make it every morning, and he had to work out what had happened over night, triage any problems that arose, decide whether that should be escalated to his supervisor, and so on and so forth.

PN497

For Mr Broughton, perhaps the most notable aspect of his work was that he moved from project to project.  Each one involved a whole new different set of problems and I have to say I'm not sure whether the evidence entered into this or not, but your Honours would infer that work on a railway line would be somewhere different to work on a dam.  He described the range of projects that they do, and whether or not there was specific evidence about it it's sufficiently apparent, in my respectful submission, that that involved working in different locations and in different conditions.

PN498

So our primary point, and on one view, our best point about the engineers is the evidence doesn't permit any assessment of their work value as a group.  To the extent that it does it suggests significant challenges above and beyond those which confront ECTs.  And could I just deal with the question of supervision, it seemed to be emphasised that ECTs operate without supervision and the engineers did at least in their early years.  Now, as I said the evidence isn't really to that effect, but perhaps the more basic point is that a comparison of the level of supervision might be useful if one were talking about work of similar complexity, and similar stakes, by which I mean, if one is carrying out a task, if one is a surgeon and a mistake could lead to death, the level of supervision inevitably is going to be higher than a shop clerk who is scanning items and might make a mistake that's worth $20.

PN499

It's not really useful to talk about supervision in the abstract without identifying first whether the nature of the tasks is relevantly the same.  To the extent that it's said there's supervision in one case and not in the other, even if that were accepted, it is not of itself significant from a work value point of view, in my respectful submission.  In fact, in some ways, it might weigh in the opposition, that is the lack of supervision might suggest that the level of responsibility was lower, and perhaps that the level of skill being exercised and the range of problems that might arise and so on were lower than in another case.

PN500

Could I deal with the job sizing evidence.  The first point, which our expert made and which we reiterate, is that he wasn't able to properly size these jobs because there was insufficient information.  Whatever exercise he went through was subject to that large caveat that you can't work out a job size based on the information of the kind that he had, and Ms Issko had, which is the generic job descriptors or level descriptors in the Professional Employees ward.  So the whole thing, we would say, could be put to one side.

PN501

Secondly, in terms of Ms Issko's conclusions, as we suggest was highlighted in cross-examination, as we've repeated in our written submissions, that the conclusions were enigmatic, there is no way, looking at her report, to understand how she reached the conclusions that she did. And that being the case, the report is of no use, no assistance.

PN502

Could I just add to that that as a matter of plausibility on a high level it would be one thing if Ms Issko said, 'I've decided that the job sizes of engineers and early childhood teachers are identical or virtually identical, but on the basis that there are different demands in different areas', so to pick some examples out of the air, an engineer has higher problem solving demands, but an ECT has higher requirements for inter-personal skills. I'm not suggesting that that'd be right but I'm just giving an example. That was not the case here. Ms Issko determined, with the exception of problem solving, that the jobs were identical, not only overall, but in terms of the particular components.

PN503

As a matter of - as I say, it's a little difficult to interrogate all of this without an explanation of what she took into account, let alone how she came to those conclusions, but to give an example, on the face of it, the suggestion that the problem solving component of the work of a five-year early childhood teacher is only marginally lower than the problem solving demands of a professional engineer is surprising. And that's not just true about an ECT. It could be any job. Engineering is an exercise in problem solving, and on the face of it one would think that by comparison with most jobs professional engineers' job size in that component would be significantly higher. There might be exceptions but on the face of it that's surprising but in circumstances where it's not explained that's difficult to say very much more.

PN504

The same could be said about independence. Ms Issko is dealing with early childhood teachers who are required by force of statute to have in place a director, an education leader, and to have physically available, to have available at all times, a responsible person. In that context Ms Issko decides that the level of independence of an early childhood teacher is equivalent to that of the professional engineer. Now, why is that? We don't know, but again doing our best to deal with it, as a matter of prima facie plausibility, we would suggest it is not plausible.

PN505

I think I've said what I need to say about the relative merits of ECTs and other educators. The point we deal with in the second part of the written submission is that there are many references by witnesses to material which is said to demonstrate the superior outcomes delivered by ECTs as opposed to other educators. The whole point, as we've said is mute, but we have highlighted the fact that the para-phrases of the studies and the studies themselves are not quite the same, and the para-phrase that appeared in the report that was included in the bundle yesterday for example referred to teachers and diploma educators as delivering better outcomes in at least one particular point, and that is it's not - there are one or two exceptions, but we would just suggest that in dealing with

whether it's the reports themselves and certainly in dealing with second-hand accounts of them that your Honours would carefully consider what the reports actually said as opposed to what they're reported as having said.

PN506

We've summarised the evidence on workforce shortages and I don't think I need to say any more about that. But I'll say something about the financial implications of the claim. It was suggested that the calculations that the IEU handed up which were said to indicate that wage increase could be paid for by modest fee increases. We suggested at 356 that the calculations are not particularly helpful for various reasons, for example, they don't deal with on-costs. They don't deal with capital cost. They don't deal with the increase in the number of ECTs required shortly. They assume utilisation for 52 weeks of the year. As Mr Fraser explained both in his calculation, exhibit 93, and in cross-examination at 6374, for his services the utilisation period is 48 weeks, not 52, so there's another seven or eight per cent out of whack.

PN507

Now, I'm not suggesting that one would add up all these percentages and work out what the true figure is. The point simply is that the calculations are not reliable statements of the financial implications of the claim, but the more basic problem with that whole analysis is the assumption that wages for ECTs could be increased by 30 per cent with no effects on the balance of the workforce. In my respectful submission, that is an assumption that would not be accepted and as a matter of industrial common sense the Full Bench would, considering this issue at least, proceed on the basis that there would be - it might be not a full flow on but it would be very difficult to perceive that there would be a huge increase for ECTs and that educators working side by side with them delivering the same learning framework, operating under the same regulations and subject to the same National Quality Standards would be unaffected. If we're right about that then these calculations are meaningless.

PN508

This was a matter that we explored yesterday in argument and perhaps I don't need to dwell on it too long, but to state the obvious it's not much use dealing with the circumstances of G8 in relation to an industry claim, because G8, as we know, is the largest operator. It is in, if not a unique and unusual circumstance, and the impact of the claim is to be assessed not by reference to affordability at the very top end but across the spectrum. And as we saw and as your Honours saw and heard from the ACA witnesses there is a spectrum between G8 and someone like Mr Fraser, who is obviously very experienced and a professional business person. There are other examples of people who are equally dedicated and enthusiastic but who operate smaller businesses on different bases.

PN509

And what I've just said goes as a general proposition but also deals with the question of the G8 pay increase. One might think that the fact that the largest operator in an industry decided to pay 10 per cent above the award is not an indication of great capacity to pay above award rates. In an industry inevitably the bigger - perhaps the more profitable players will have greater capacity and will tend to pay higher wages, so if anything it's surprising that G8, as the largest

operator in an industry, it might be thought to be unusual, but it had only paid the award until now.  That, we would suggest, would be uncommon as across the workforce as a whole.

PN510

In terms of the things that Mr Carroll said about competitiveness it's important to distinguish improvements in his competitive position or G8's competitive position vis-à-vis other services as well as schools on the one hand and from improvements and competitiveness of early childhood services and schools on the other.  Mr Carroll explained why it was beneficial from his point of view to be more competitive but that means that he's in a better position vis-à-vis the long day-care centre down the road as much as he's in a better position vis-à-vis a school.  It might be the pay increase for him might improve his competitive position within the industry.  It doesn't mean that a pay increase across the industry would have beneficial consequences that he described.  Certainly from G8's point of view it would be the opposite, it would delete the competitive advantage that he described internally within the industry.  That's the point.

PN511

As a bit of a tangent this issue of increased pay rises dealing with a shortage, it hasn't been submitted, let alone demonstrated, that an increase in these award rates would increase the number of entrants into the profession.  If that's the case, there's no real net advantage in giving early childhood services the capacity to compete a bit better against schools if it's just a matter of spreading out the shortage a bit more evenly or making the schools feel a bit of the pain.  That's not an objective that would be pursued by the Commission, nor we would say is it something further that the modern awards objective or the minimum wages objective so - - -

PN512

VICE PRESIDENT HATCHER:  Well, it depends upon the size of any increase. But if it was of the size proposed by the IEU then surely that would serve as a price signal that pull people into the occupation, particularly people currently in the industry who are working as educators might be attracted to getting their degrees if that significant salary gap opened up.

PN513

MR FAGIR:  We would resist that proposition.  It's not something that we say is self-evident at all, particularly in circumstances where the evidence is that variations in pay rates across services don't seem to have any impact on their capacity to attract teachers, and we've dealt with this in the written submission, but Ms Connell's is a good example.  She said lower wages create a difficulty in recruitment.  She then referred to in earlier statements to her own preschool, and then identified three others, one of them pay parity, and gave examples of how much difficulty they'd had attracting people, and how they couldn't get any applicants and so on.  One of them paid parity pay, the other one wasn't far behind it and the third, which was in Central West New South Wales paid 10 or 15 per cent above the award.  All of them seem to have the same problem described by all the other witnesses.  So the evidence not only is there no basis, we will say, for an assumption or a prima facie view that an increase in wages would address the problem, the evidence actively contradicts that idea.

PN514

As I said, New South Wales increases don't seem to have had any effect. And pay parity of preschools described in the evidence seemed to be in the same position. As best as I can recall Ms Cullen described this similar problem in her - not Norfolk Island, but Annandale, and Abbotsford, and again as far as we could see they paid parity pay but suffered from the same difficulties.

PN515

Finally, on affordability there have been things said about the capacity to pay for wage increases through fee increases which would in turn be subsidised. That logic highlights what we say is part of the complexity of this area is that after great controversy a public subsidy has been fixed on the basis of whatever considerations were taken into account. The idea that the Commission would be more prepared to give pay rises because they would be publicly subsidised to convert the subsidy into a pay subsidy without understanding that that was the intended purpose or the considerations that fed into the creation of the subsidy or whatever it was intended to do, or what it's consequences are just demonstrates the difficulty in wading into this, we would say, particularly difficult area of social policy on the basis of fairly superficial analysis.

PN516

As we've said it's not too hard. There are plenty of cases where the Commission has made decisions that have very significant social consequences, but we say only that it's to be done cautiously and on a basis that is clearly made out, both as a general proposition and in terms of considering things like financial implications and the extent to which impacts on profitability are ameliorated by fee increases and/or public subsidies.

PN517

I've mentioned a couple of times the four per cent loading for long day-care. I think I mentioned this during the course of the hearing, but four per cent is paid to services that are open - if I need to find the award clause I will, but the short point is that we would say that all ECTs in long day-care services are four per cent in consideration for shorter holidays compared to teachers. That's the design of the allowance as we understand it, and so we say that the real rate, which is comparable to other professionals who are operating on the same amount of leave is the rate plus for the four per cent long day-care centre allowance.

PN518

And that reminds me on a very minor point there was some evidence that early childhood teachers' pay rates are subsidised by - not subsidised but some ECTs, for example Mr Fraser's, were receiving additional annual leave entitlements. Mr Fraser said all his teachers receive between six and eight weeks' leave. Not a point that's going to determine the proceeding, but a factor to be borne in mind when considering - - -

PN519

VICE PRESIDENT HATCHER: So what's the award clause for that allowance?

PN520

MR FAGIR: I have no idea. But I'm about to sit down and I'll find my note in five minutes. I'm sorry, before I started talking about it I should have made sure that I knew something about the topic, but if I could - 14.2.

PN521

VICE PRESIDENT HATCHER: Thank you.

PN522

MR FAGIR: Ms Saunders is well ahead of me as usual. Unless I can assist your Honours further they're my submissions.

PN523

VICE PRESIDENT HATCHER: Thank you. Mr Warren?

PN524

MR WARREN: I'll just sort my papers. I'm not blessed with an iPad unfortunately. Your Honours, can I just commence by indicating that I understand those instructing me from AFEI have forwarded to your Honour the Vice President's Chambers an updated table which is found at paragraph 101 of the submissions filed by AFEI on 1 April 2019. There's a comparison table in that and it's been updated to reflect current rates. If your Honours don't - I'm not going to refer to it in any further than just advise your Honours that that table has been updated. And if your Honours need hard copies I'll arrange that to occur but it's certainly come through in soft copy to your Chambers.

PN525

Can I indicate at the opening that AFEI notes and supports the comprehensive written submissions filed by ACA, and wishes to make some short points, particularly with respect to the equal remuneration order. The AFEI has filed two sets of submissions in these joint proceedings. With respect to the ERO order it was filed on 14 May 2018 and it relied upon those submissions, and filed on 1 April 2019, with respect to the work value claim it has filed submissions there and relies upon those.

PN526

Could I take the Commission with respect to the ERO case to the 2015 equal remuneration decision? For the record it's at [2015] FWCFB 8200. Your Honours would be obviously well familiar with that decision. The decision in part addressed the SACS Case No 1 and stated at paragraph 252:

PN527

> *As earlier stated, cogent reasons are necessary for a departure from a previous Full Bench decision. It is therefore necessary to consider whether there are cogent reasons for a different view to be taken on the comparator question.*

PN528

And here there was concentration on the comparator and the need for the comparator and what should the comparator be. And this was addressing of course section 302 of the Act. In paragraph 254 the Full there said:

PN529

*The concept of 'gender-based undervaluation' referred to in the above passage as being the foundation for an equal remuneration order was heavily relied upon by the applicant unions to support their submission that no male comparator was required. For example the IEUA submitted that remuneration of female employees in a particular industry or occupation is not equal to the remuneration paid to those doing work of equal or comparable value 'whenever the remuneration is considered, by comparison, objectively below the true work value of that work' and that it will be sufficient to justify the making of an equal remuneration order 'to identify that there are characteristics of that industry or occupation that arise from the fact that it is female-dominated that have given rise to the undervaluation ...'*

PN530

The Full Bench then went on to consider over various parts of the decision, the various development of that position and came to paragraph 277:

PN531

*The remuneration of any given worker or group of workers may be the product of any one or more of a number of pay-setting mechanisms - modern awards, enterprise agreements, transitional instruments, over award payments, non-statutory collective arrangements, individual employment contracts and/or employer policies. There is nothing in Part 2–7 which suggests that it is concerned only with remuneration produced by modern awards or the national minimum wage order, and no party submitted otherwise.*

PN532

It then continues to examine Part 2-7 and concludes:

PN533

*it is apparent therefore that Part 2–7 is not, as the unions submitted, concerned with making orders to ensure that a group of workers receives remuneration in accordance with what is independently considered to be the proper valuation of their work.*

PN534

278:

PN535

*'Equal', according to its ordinary meaning, posits one thing being the same or alike in quantity, degree or value as another thing. Therefore when section 300 and section 302(1) refer to ensuring equal remuneration for employees, this must necessarily involve making the remuneration for one employee or group of employees equal to that of another employee or group of employees in circumstances where the Commission is satisfied under section 302(5) that they do not currently have equality of remuneration.*

PN536

A bit further down the same paragraph:

PN537

*The nature of this comparison - that is, who is to be compared with whom for the purposes of section 302 - is described by the words 'for men and women workers for work of equal or comparable value'.*

PN538

279:

PN539

*The words 'for men and women workers' (as used in sections 300 and 302(2)) are clearly fundamental, since -*

PN540

It refers to the Sex Discrimination Commissioner having a right of application -

PN541

*they are the only express indicator in Part 2–7 that the Part is concerned with gender inequity in remuneration, and not inequity based on other criteria such as, for example, race or disability. No party before us contended that Part 2–7 had any non gender-related purpose. The words must therefore do the work of ensuring that the comparative task under Part 2–7 is based on gender. They can only do that work if the 'and' in the expression is given a dispersive effect, so that the words are read as meaning 'for male workers on the one hand and female workers on the other hand'. An alternate reading whereby 'men and women workers' is read as referring to a single undifferentiated group within which equal remuneration for work of equal or comparable value must be ensured would mean that the gender foundation of Part 2–7 is removed. This approach cannot be accepted as correct for that reason.*

PN542

We take that rather lengthy precursor to note in the submissions of AFEI filed on 14 May 2008 at paragraph 7 that speaks that the Full Bench authority of the comparative task is based on gender. It then goes on to refer the Commission to the balance between male and female teachers in New South Wales public primary schools in 2017 82.2 per cent of teachers were female. The submission then proceeds.

PN543

The fundamental point here is it is essential for the gateway to an equal remuneration order, the gateway be that the comparator group be in essence in this case a male comparator group. The comparator group that has been referred to here with respect to the primary school teachers is a female comparator group. It is a female comparator group with the vast majority of the persons who are employed as primary school teachers are females. It is a falsehood for the unions to come before this Commission and suggest that male primary school teachers is in some way a comparator group which gets them through that gateway, that initial gateway of section 302, because there has been equal remuneration for teachers in the New South Wales teaching system for years. I think it commenced being introduced in the late 1960s and was finalised by the mid-70s. So male and female teachers have always had remuneration for going on 50 years in New South Wales and that's comparator that the union is seeking this Commission use as a comparator for saying that male teachers in primary schools in New South

Wales should be using an appropriate comparator for section 302. It cannot be because that comparator is a female comparator and for the reasons set out in the submissions of AFEI of 14 May we say the union's comparator of a primary school teacher in New South Wales, male primary school teacher, doesn't get them through that gateway, the gateway being a gender gateway as emphasised by the Full Bench in the 2015 decision.

PN544

We then move of course to the engineers. They've said, well, if you don't like our male primary school teachers we look to engineers. And we note indeed the submissions of ACA and indeed particularly the extraction of the 2018 decision of this Bench that was citing the 2015 decision at paragraphs 39 through to 40 of their submissions, of the ACA's submissions. And I note at paragraph 219 of the 2018 decision it's there cited with respect to the comparator group:

PN545

*It will ultimately be up to an applicant for an equal remuneration order to be on a case based or an appropriate comparator which permits that the Commission be satisfied that the jurisdiction prerequisite in section 302(5) is met. It is likely that the task of determining whether 302(5) is satisfied will be easier with comparators that are small in terms of number of employees in each and are capable of precise definition than with large comparators, large, diverse and involving significant different work under a range of different conditions.*

PN546

What is crystal clear in this case is that the engineer, the engineers that have been drawn as the second comparator group, there's no doubt it's a male group. There can be no dispute on the table here that it's a male comparator, but it's a male comparator of such diverse nature that it's virtually impossible for this Commission to relate what is the appropriate rate of pay found within that male comparator group. You've got engineers who work in offices, and out to mines in the west of Cobar in New South Wales. It's such a diverse comparator group as has been indeed expressed at times by my learned friend, Mr Fagir, in his submissions, that the type of decisions, the type of variety of the work of those engineers is so disparate as to be impossible for this Commission to use that as an appropriate comparator group.

PN547

If that isn't sufficient you then move to the, for example, the evidence of Mr Egan, which then spoke of the way an engineer, and a graduate engineer, the growth of that graduate engineer's experience over the first several years of his or her employment, and principally his employment for the purpose of this comparator group.

PN548

The way the disparate nature of the work of an engineer is found, and it's highlighted in the AFEI's submissions of 1 April 2019 when assessing the IEU's claim, and the extensive nature of the type of work that an engineer is involved in, and the way that that is expressed by Mr Egan in his evidence that you have heard. The difference in the rates of pay is quite significant between the

assessment of Ms Issko and Mr Egan.  The assessment of difference in the work value scores, although criticised I note by my learned friend, Mr Taylor, is clear and factual on the evidence that's been before this Commission with respect to Mr Egan's experiences and assessment of that type of work.

PN549

So the difficulty with using professional engineers as an appropriate comparator is extenuated when one looks to the type of work that the engineer does, technical skills, the work locations, the career mobility, the market factors, and the increase in market rates as the skills grow.  It's critical that this Commission not fall into what we could respectfully call error by using the wrong comparator.  You've got two comparators being put up, neither of those comparators are appropriate for an equal remuneration order and on that basis alone the equal remuneration order application should fail if for no other reason.

PN550

Can I just briefly go now, please, to the - I note that your Honour, the Vice President, raised the issue with my learned friend, Mr Fagir, of section 134, the modern awards objectives, this morning, and as I understood what your Honour has said it was along the lines of there needing to be - or an attraction rate fits within the modern awards objective.  If I've heard that incorrectly your Honour will no doubt correct me.

PN551

VICE PRESIDENT HATCHER:  I didn't put it at that level.  I simply said that the issue of shortage might arise for consideration in respect of some of the matters to be taken into account under the modern awards objective or the minimum wages objective.  I wasn't assessing that a particular conclusion would be reached but merely that it may become a relevant consideration.

PN552

MR WARREN:  On that basis, your Honour, I don't need to address that because we would descent from that view.  We also note the statement of the President that has been referred to earlier in these proceedings, the statement of the President of 27 August 2019, and this is perhaps a submission best put to any future Full Bench assembled for that purpose, but can I indicate that AFEI would obviously be greatly concerned if the influence that a decision here might have on some overall principle of what a graduate should be paid when one is looking at purely graduate teachers in this regard here, and the effect that that might have on graduate salaries elsewhere by award and by minimum award determination.

PN553

But, as I indicated, that's probably a submission, and I note in the President's statement that submissions are invited to be made by interested parties, and I'm instructed that AFEI will certainly be doing such, but that is a concern that we would express, that in some way that teachers would set the darg for what would be an appropriate graduate rate of pay.  There is no doubt that a Full Bench decision on what is an appropriate graduate rate of pay for a teacher would be in some way not necessarily overly influential but would certainly be of interest in considering what an appropriate rate would be for a different graduate, but AFEI just wishes me to express a concern that that not be taken to be the case.

PN554

If there be - - -

PN555

VICE PRESIDENT HATCHER:  I think the statement does - - -

PN556

MR WARREN:  Pardon?

PN557

VICE PRESIDENT HATCHER:  I think the statement does contain a reference to taking into account the outcome of these proceedings.

PN558

MR WARREN:  Yes, it does indeed.  In paragraphs 12, 13 - probably 13, and 12 is the Pharmacy Award and 13 were these proceedings.  As I said it's probably a submission better saved for that area rather than - or for the matter of the anticipated Full Bench to consider those as to what effect any decision here might have on ongoing rates for graduates in other industries.  But we note your Honour's observations on that.

PN559

And so in summary with respect to the work value case we note and rely and support the comparative written submissions by ACA with respect to the work value case, but with respect to the ERO case we press our concerns of the appropriate comparator and raise issues with respect to whether the comparator that has been listed by the union in this matter sits within the 2015 decision and we say it doesn't, and raise issue with that.  If the Commission pleases.

PN560

VICE PRESIDENT HATCHER:  Thank you.  Ms Eastman?

PN561

MS EASTMAN:  Your Honour, the Commonwealth doesn't seek to make any further submissions today.  You have a copy of our 4 July 2018 submissions and we rely on those submissions.

PN562

VICE PRESIDENT HATCHER:  Thank you.  Mr Taylor in reply?

PN563

MR TAYLOR:  Yes, please.  What I'm proposing to do with the leave of the Commission is to reply - - -

PN564

VICE PRESIDENT HATCHER:  Sorry, before we go on, Mr Fagir, had you reached a perfected view about the admissibility of the ABS document that was handed up?

PN565

MR FAGIR:  I'll have a look at it now.

PN566

VICE PRESIDENT HATCHER:  And also the amended application yesterday.  I think you were reserved on one but not the other.

PN567

MR FAGIR:  Could we just have five minutes to confirm it's - - -

PN568

VICE PRESIDENT HATCHER:  I'll come back to it.

PN569

MR FAGIR:  Thank you.

PN570

VICE PRESIDENT HATCHER:  Yes, Mr Taylor.

PN571

MR FAGIR:  I'm sorry, I should have dealt with it.

PN572

MR TAYLOR:  Thank you, your Honour.  They were the first two things I was going to try and do.  What I was going to say is just by way of timing what I intended to do is spend the time over the next sort of half hour or so dealing with some matters that have arisen in oral submissions today.  There are some matters of detail that emerge out of the written submissions of ACA that we received in the last sort of couple of days.  We got a good working draft on Monday afternoon.  We've identified 14 issues of fact in that.  We've started work on providing references to other evidence which rather points the other way, and we thought the most convenient way to do that, rather than do that today, which we frankly haven't had a chance to complete, is to have leave to file a document to deal with that.

PN573

VICE PRESIDENT HATCHER:  Perhaps that should follow the filing of the agreed statement of facts so that we know what facts remain in contest.

PN574

MR TAYLOR:  Yes.  We're perfectly content with that.  As to the agreed statement of facts we remain of the view that as a matter of principle it's a good thing for all concerned.  I think the position is that it's not clear to us, or it certainly wasn't prior to today what things ACA were agreeing with and what they weren't.  Some greater clarity has been provided by the written submissions.  If the Bench so directs the parties will engage in a process of seeking to draft agreement as far as it can be done.  I think it would be convenient if the Bench were to be so directed to be clear as to which parties are agreeing; whether it's just us and ACA or whether it's us, ACA and AFEI, or whether we're going beyond that to other people.  But if that's to be done it can be done.  I can say straightaway that I don't think it would be a quick exercise unless you ended up with a document that was so short as to be not very helpful.

PN575

VICE PRESIDENT HATCHER:  We usually start off with the IEU is a registered organisation of employees something like that.

PN576

MR TAYLOR:  Yes.  We have standing to bring to proceedings.  I mean, there's a lot of things which could be agreed which are not in contest.

PN577

VICE PRESIDENT HATCHER:  It would really make our task easier if the regulatory framework was set out in an agreed fashion in a single document.

PN578

MR TAYLOR:  Yes.

PN579

VICE PRESIDENT HATCHER:  That might be a starting point and the way these things usually work is the applicant does a draft and then sends it to the other parties and see what they're prepared to agree to with or without modifications.

PN580

MR TAYLOR:  And in that regard, notwithstanding what Mr Fagir has been saying about our experts, much of that material is found in the expert reports and was not subject to cross-examination, but it may well be that it is convenient for us to take that material and put it into an agreed statement of facts document.

PN581

VICE PRESIDENT HATCHER:  And I expect that if there's disagreement about something it's because there was some evidence adduced to put it in contest.

PN582

MR TAYLOR:  Yes.

PN583

VICE PRESIDENT HATCHER:  Not that you don't feel like agreeing to it.

PN584

MR TAYLOR:  Yes.  Yes, that might take a little while.  I was discussing with Ms Saunders her availability over the next couple of weeks.  It turns out she is away, so that might affect the timing as well but - so that can be done.  While we're on things that can be done going forward - - -

PN585

MR FAGIR:  Can I just indicate that I'd wish to be heard on the idea that there should be further written submissions.  I'm in your Honour's hands as to whether I do that now or when Mr Taylor's finished?

PN586

MR TAYLOR:  I don't want to go into the reasons and the background and the history of this.  I just want to - I make no complaint about the fact that we received the written submissions only in very recent times.  It's just a statement of fact that there are matters of detail in there.  We've identified, as I said, 14 which it would just be useful for us to be able to reply to.  We think it would assist the

Bench, and we don't see that there's any reason why that shouldn't be done. But they are matters which would not be affected by agreed statement of facts because they're, by their very nature, things that we're challenging by statements that were made in the written submission.

PN587

What we want to do is do things like, to give a specific example, I mean, these are the sort of things I didn't want to take time having to do on my feet. The chalk and cheese PowerPoint presentation and it's presented in the written submission in a certain way. Mr Fagir referred to it again on his feet. It's a matter of just simply identifying that there is a particular exhibit that is a PowerPoint presentation that contains the expression 'chalk and cheese', is this true, which is apparently said to be something said by a fourth year graduate, and then goes on to have some discussion about whether there are important differences or not between early childhood teachers and primary/secondary school teachers and refers, amongst other things, to significant differences in working conditions and pay and holiday.

PN588

We thought we could just deal with that, for example, in two or three dot points. There are a number of things like that. We just thought it would be easier to put into a written document, and we may well have done so if we'd had time. As I said, I'm not criticising when it was provided, it's just - it was the way in which it's been done that we think it's important for us to have that opportunity to respond.

PN589

Two other things which may be on the list of things that the Bench would like us to do just so - things that were raised yesterday and again this morning. One, the table behind tab 3 of the folder, I provided to the Bench yesterday, an updated version of the schedule that was attached to our reply submissions which compares public sector rates to the IEU claim. I indicated we could do the same by way of Catholic and independent schools. We just remind the Bench that if it's something that the Bench does find useful we can do that. Although I note what Mr Fagir said today that it seems to be an agreed position that our claims in all respects are for amounts below that which would be paid to primary and secondary school teachers.

PN590

I also put on the agenda, if the Bench needs this, and I'm not suggesting the Bench does, but if it does, some short note from us as to where in the material you'll find or a summary of the evidence going to the nature of state based funding which might complement the Commonwealth's aide memoire as to Commonwealth funding, because there are of course parts of the early childhood sector which are funded by state rather than Commonwealth.

PN591

So can I now deal in the usual way with matter that arose today in oral submissions, and note in a couple of cases where there are matters of detail which we intended to deal with in the written document if we were given leave to be able to file that in response to Mr Fagir's written submission. Can I start with the two documents that were handed today with comparative rates. So I handed up first thing this morning the adjusted C1 rates in Manufacturing Award as made

document.  So that was the document which recorded in the first table that the C1A rate and the C1B rate today, if it simply had the annualised increases would be, in the first case, 1289, in the second case, 1458.

PN592

The ACA approach, as we understand it, accepts that teachers are professionals and says, but they shouldn't be paid more than other professionals.  That's a submission that they've put and AFEI puts again strongly the same thing.  One thing that we should understand is that before you even get to questions of compression and dealing with compression, just the rates as in the Manufacturing Award which is said to be relied upon by the employers as the properly fixed professional rates, those rates if you then compare it to Mr Fagir's document, which says what we're claiming, you'll see that the ECT LDC level 7 claim, that's the last of the things on his page that he handed up comparing it to nurses, doctors and engineers, is an amount which is very similar to what the C1B professional rate would be right now if it was still in the Manufacturing Award as a dollar figure simply applying annualised rates.

PN593

So can we just say, on that basis, can we put to one side a concern that what we're doing is somehow affecting in some fundamental way professional rates.  We reject that proposition and we say that those figures and just that straight comparison, if indeed that was what you were doing, would not cause a concern.  As I said yesterday what we're doing in this case is simply bringing a case for identifying substantial work value change and what we're doing in that last submission is simply responding to the allegation that somehow by doing so it's going to fundamentally affect external relativities.

PN594

Moving on to this question of whether there has in fact been substantial work value change, and the submissions put by Mr Fagir this morning pointing to a difference between early childhood teachers and other teachers, what that submission didn't, we say, embrace or come to terms with is the fact that this award applies equally to all teachers, and Mr Fagir's written submissions and oral submissions today properly acknowledged that in respect to primary/secondary school teachers the IEU has through this case demonstrated very substantial workplace change.  I accept he doesn't go so far as to say we demonstrated very substantial workplace change, but he, both in his written submissions, I mentioned paragraphs 120 and 121, but there are many other later paragraphs which acknowledge change which we say is a substantial change in respect of primary/secondary school teachers.  So paragraph 294 dealing with standardised testing, paragraph 300 dealing with the new curriculum, although apparently the EYLF doesn't get rated as a significant change even if the Australian curriculum does, 308 acknowledgement about technology changes and yet when technology comes into the ECEC sector apparently that's not requiring any substantial change.  The increased accountability for teachers is acknowledged at 317 of the written submission but denied in respect of ECEC.

PN595

The employers have told you again and again that there is no basis to differentiate ECEC teachers from the rest of teachers in the sense that they've been all

recognised as teachers by industrial tribunals since 1970; that there's no difference; that they're all paid the same. That's raised in respect of the ERO claim but it's repeated. And yet creeping in without any actual application is the semblance of an invitation to start treating ECEC teachers as deserving different rates of pay. No application is made, nothing is before this Commission which would lead you to start considering that, we say, and yet submissions are made by Mr Fagir which start travelling in that way.

PN596

We say there is a real danger in that suggested approach of starting to introduce the gender based difference which the employers insist don't exist at the moment. The suggestion that early childhood teachers, who are dealing with younger children, and it is submitted by employers are really doing the same job as educators as if people with a Cert IV are doing the same job as a teacher focusing on the caring responsibility and therefore ECEC teachers should be on some different level. There's a real danger that you then start introducing the very gender concerns that have been removed by industrial tribunals quite appropriately because they are not working at a lower work value than other teachers.

PN597

Mr Fagir put submissions about the fact of the absence of us identifying some specific new tasks which require additional training in the form of a traditional work value exercise that might arise in a manufacturing type scenario where people have to be retrained to learn a particular task. I think with great respect it's wrong to say that we haven't identified new tasks, and technology was one. One of the things we wanted to do in our written note in respect to the suggestion that nothing changed in NQF is identify all the evidence which demonstrates substantial new policies, whole lists of new policies that have come in subsequent to the NQF because childcare centres understand that for them to comply with the National Quality Framework they must have a series of policies which the witnesses accepted it must be understood by educators including teachers. Technology, with great respect, you can't just assume that someone who hasn't used a technology before knows how to use it, whether it's a smart board. We had the evidence and we want to give you the list in response to the written submission that the technology is being introduced in the method of teaching of children in early childhood as well as primary/secondary school. There was evidence of children using iPads, particular apps and the like in addition to the teachers using technology to communicate and the like. So there are additional skills.

PN598

But if you examine in a case involving professionals like teachers, what they do, it's more than - it is much more than simply identifying a particular set of tasks; reading a story, ensuring that the children are supervised during a break. It's not just a series of tasks. What we learned is that what teachers are doing in this situation, to take such a group activity as reading a story, is that they are engaged in an exercise of preparing a developmentally appropriate activity which is often pre-planned but sometimes it's spontaneous, which is developed in line with the new outcomes focused curriculum, ELYF. Yes, there were in some places some

earlier versions of curriculums. But this is a new national curriculum and they are all required now to be doing this planning against these new outcomes using pedagogical techniques which they learnt at university at a higher level than before. No longer a three year Degree, it's now a four year Degree or a two year Master's Degree, so it is the same work but it's work being done at a higher level against new outcomes focused curriculum.

PN599

Can I just step aside for a minute on this topic and just say something about the statements made today about Professor Irvine. As I understood the submission it was suggested that the credit of her statements could somehow be called into question on the basis of an assertion that she says in her statements that the National Quality Framework is new and had no precedent, and in particular references to prior quality systems. Now, there is no - having had a look we can't find any references in her material to saying that NQF introduced quality for the first time. Her reply statement, exhibit 13, said it introduced a strengthened focus on early learning. The EYLF she said was not the first ever curriculum but the first mandated national curriculum.

PN600

The Bench has to be a little careful in accepting propositions, and some of the things in writing we want to address as well, that these experts can't be relied upon as to their considered opinions in their reports, because of matters that are put by the ACA that were not put to them in cross-examination. This is an example of one. So we just want to identify some others. Professor Irvine gave very good comprehensive evidence about the nature of this industry. Perhaps a different submission might be put, that what she wasn't asked and therefore didn't deal with is precisely what existed before NQF and precisely how it changed, but the submission went much further than that, and we reject it, and we say that the Bench could not make adverse findings about her particular conclusions that were not cross-examined upon.

PN601

The same thing can be said by the by about some of the comments made this morning about Ms Issko and her failure to have a proper justification for failing to differentiate between an engineer and a teacher in respect to a particular sub-classification. I need to check to be confident about this, but standing here I can't recall Ms Issko being cross-examined about that. If I'm wrong I'll acknowledge that in any further written note.

PN602

What the teacher is doing, throughout the day, monitoring the children to assess their interests and their learning needs, their progress against development milestones and these are the new national framework milestones and they are now recording them. We want to provide the evidence references to demonstrate contrary to the submission that this is not any new activity and certainly no increase in activity. The evidence indeed demonstrated that some places on a daily basis are recording observations and sending them to parents which identify how their child has done an activity which can be measured against EYLF milestones. It's not a feature of what happened 20 years ago, not just because the technology for doing so wasn't available.

PN603

We want to deal with this issue of teachers being leaders. There is, we think, a number of evidence references that can assist the Bench to the view that ECTs are invariably leaders, room leaders or educational leaders. And while it may well be the case that there is some examples, such as the one Mr Fagir mentioned today of Ms Toth, who has an ECT who is in the 0 to 2 room, and our recollection is - and we want to double check this - that Ms Toth also - that it was firstly over ratio on ECTs so that wasn't the only ECT she had, and that she had an ECT leading the kindergarten room. For whatever reason she has employed more than she has to and is finding it useful to have a further teacher in another room, but it doesn't take away from the broad proposition, as demonstrated by the position descriptions that I asked you to look at yesterday in G8, in Fraser, and Ms Kearney, that as a matter of fact what teachers are doing is usually leadership roles which do in fact require them to lead the other educators in a room. So that's part of their role; mentoring and supporting colleagues. And that is very much tied in with NQF.

PN604

There's a written submission we want to respond to as to provide evidence reference which go to demonstrating this fact, that contrary to the assertion that the only people who have to be concerned with compliance with NQF is effectively the owner of the business, what all these businesses do is in turn by policy and approach require their educators, and in particular the educators who are leaders, which are usually the ECTs, to take the steps to comply with the National Quality Framework. So they do have to understand the detail of the National Quality Framework.

PN605

In respect of Ms Connell it's said, well, you can disregard her because when she talks about what her particular service does to comply with the National Quality Framework you can't assume that's what everyone does. What Ms Connell was doing was responding to a request to identify what has changed amongst other things as a result of the National Quality Framework at her workplace. True it is that a new requirement, a newly and higher level requirement for parental and community involvement, which is now embedded in NQF that wasn't there before might be interpreted in different ways by different services. She was giving examples of how it applies to her and it didn't before. And a number of the things that were said today by Mr Fagir would fall into that same category. Ms Connell is someone who can be relied upon by the Bench as one of the few witnesses who had a working knowledge in ECTs over the relevant period. And not just a working knowledge but a working knowledge which clearly required her to think carefully about it and therefore could put matters, we say, at a level of value to the Commission that would, far from the submission put today, be given real weight.

PN606

What else is the teacher doing on that day? They're dealing with parents, and the suggestion that somehow accountability to parents is fundamentally or is - I withdraw 'fundamentally'. The suggestion that there is proper evidence that we have put before this Commission to show that there has been a change in respect of dealing with parents for primary/secondary but not for EC we say is wrong.

ECEC parents are similarly more interested, more involved, more expecting teachers to be delivering for their children, and that is particularly the case because of a combined or related change to an increased focus on children with additional needs. It's not only that we have evidence, and we will give you the references in response to Mr Fagir's written submission that there is evidence that there are increases in the amount of children with special needs, but there's clearly increased focus and increased information which teachers at every level including ECEC have to deal with and address as part of an individualised approach to teaching which has come in at every level.

PN607

So we reject the proposition that we have established a case in respect of primary/secondary school teachers but for some reason that would not lead to a general work value increase for all teachers and we certainly reject the hint of a suggestion that somehow the Bench, in the absence of any application, should start treating early childhood teachers differently from a rates of pay point of view contrary to the historical way they have been understood all this time as being a teacher just like any other teacher by way of work value.

PN608

The submission that was put by Mr Fagir as to the effect of the New South Wales Industrial Relations cases being the entire cases were about whether early childhood teachers should be paid the same as other teachers and be lifted up to a paid rates award we say doesn't bare out if you actually read the decisions, both the decision of Schmidt J in 2001 and the Full Bench in 2009. Schmidt J's decision involved a detailed analysis of work value change. At the end of the decision, towards the end, she then comes to grips in the context of the separate special case as to whether it would be appropriate to vary the award in a way that would lift the rates to the same rates as primary school teachers. And her Honour says whilst she - I think she uses the words 'tempted to do so' because she can't see any reason why they should be paid less. She nevertheless doesn't do so because she says, 'I can't say how those higher rates were set. They were set by consent. I am not prepared to do that'. So the rates don't get lifted to that level.

PN609

It's not a paid rates award as I think Mr Fagir accepted in the traditional sense. He says, nevertheless it sets the rates that were paid. Well, in a long day-care centre this award sets the rates that are paid. It doesn't make it a paid rates award. So we reject the notion that - the two notions that were put today about the nature of those cases. They really do bare reading and they do examine on a work value basis many of the same issues, both factually and from a principle point of view that are raised by the parties in these proceedings.

PN610

That, as I said, leaves me with the matters of greater detail that we wanted to have leave to put a note on about, and if there's something more has to be said about whether we should get that leave or not then I can do that. If that is rejected then I will then seek to put further submissions.

PN611

VICE PRESIDENT HATCHER:  Then it's back to Mr Fagir, the amended application, is that - - -

PN612

MR FAGIR:  There's no objection.

PN613

VICE PRESIDENT HATCHER:  So that's allowed.  So the ABS statistics?

PN614

MR FAGIR:  There's no objection.

PN615

VICE PRESIDENT HATCHER:  So the document handed up this morning will be marked, I'll call this ABS Occupational Statistics, will be marked, I think it's exhibit 135.

**EXHIBIT #135 ABS OCCUPATIONAL STATISTICS**

PN616

VICE PRESIDENT HATCHER:  And the further submissions.

PN617

MR FAGIR:  It's been made as an application really to put on submissions about matters that could have and should have been dealt with in-chief.  A decision was made not to enter into any evidence about, for example description of what evidence existed about increases in additional needs children, then that's a matter for the author of the submissions.  The fact that the matter wasn't grappled with at all doesn't mean that there should now be a new front opened up and another 30 page submission.  I should say I suggested that if a submission were to be produced in a short amount of time and within some reasonable time limit then we wouldn't be heard to argue against it.

PN618

VICE PRESIDENT HATCHER:  If it was simply confined to identifying factual propositions in your submissions that were contested and the evidence references that might point the other way, is that something of concern?

PN619

MR FAGIR:  It is, but, I mean, that's why we're here.

PN620

VICE PRESIDENT HATCHER:  I mean, I could make Mr Taylor get up and read out the evidence references but - - -

PN621

MR FAGIR:  So be it.

PN622

VICE PRESIDENT HATCHER:  It'll be a bit boring but - - -

PN623

MR FAGIR: No, I'm not being glib about this, but your Honours can anticipate a 30-page submission.

PN624

VICE PRESIDENT HATCHER: I'm not talking about a 30-page submission. I'm talking about simply a document that refers to propositions contained in your submissions and the evidence references which are said to point the other way.

PN625

MR FAGIR: Then we will ask for the opportunity to do the same thing and point out the evidence that points the other way to the new evidence. I mean, that's why we're here. That's why we put on 75 pages of submissions. Could I just say this and I'll sit down and leave myself in your Honour's hands, this is going to be a substantial task on any view of it. The case has been running long enough. I'm not going to be able to assist in further submissions, so someone else is going to have to be found, and in circumstances where there's been every opportunity to say anything that any party might wish to say there's no reason why the other parties should be put to this further expense or your Honours to be burdened with another volume of material. That's what I wish to say about that. Other than to say that we would - given that we will now be getting the IEU's first statement on these matters of fact, it's appropriate that we have an opportunity to reply given that we're the party that's actually first grappled with these issues, if the Commission pleases.

PN626

VICE PRESIDENT HATCHER: The approach we propose to take is this, firstly, there's a direction applying jointly to the - I'll call them the contestant parties - to file an agreed statement of facts. The Full Bench won't put any particular time limit upon that. We've already indicated that it would be of assistance to us if the agreed statement of facts at least described in an obviously non-contentious way the regulatory framework in which the early childhood sector operates and ECTs operate including not just as current form but how it has changed over the relevant period of time. And obviously if the Commonwealth wants to participate in that process and assist it may do so.

PN627

When that document has been filed the IEU may within seven days file a document not exceeding three pages in length and 12 point font giving evidence references that point to evidence to contradict factual propositions contained in ACA's submissions, and if ACA wishes to respond to that it may do so within a further seven days, but there's no direction that they have to do so. Is that understood?

PN628

Are there any other outstanding matters? We thank counsel for their very useful submissions. We'll, subject to the receipt of the further information indicated, reserve our decision and we'll now adjourn.

**ADJOURNED INDEFINITELY [12.41 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #135 ABS OCCUPATIONAL STATISTICS ....................................PN615**