

IN THE FAIR WORK COMMISSION

Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia

Matter No: (B2023/538)

AGREED STATEMENT OF FACTS

Introduction

1. For the purpose of the hearing of the application, *Re Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* (B2023/538) (**Application**) the parties agree on the following facts.
2. Each of the following unions are a party to the Application (**Union Parties**):
 - a. United Workers' Union (**UWU**);
 - b. Australian Education Union (**AEU**); and
 - c. Independent Education Union of Australia (**IEU**).
3. In the Application, the Union Parties seek a supported bargaining authorisation in relation to a proposed multi-employer agreement (**Proposed Multi-employer Agreement**) covering the employers listed in Schedule A to the Application (as amended on 25 July 2023) (**Relevant Employers**) and their employees who perform specified types of work.
4. The proposed supported bargaining authorisation would not specify any employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date..
5. The Relevant Employers are located in various locations in New South Wales, South Australia, Queensland, Australian Capital Territory, Western Australia, Tasmania and Victoria.

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6. The proposed supported bargaining authorisation would not cover employees in relation to general building and construction work.
7. Each of the Union Parties are, and have been at all relevant times:
 - a. employee organisations within the meaning of section 12 of the *Fair Work Act 2009* (Cth) (**FW Act**);
 - b. for the purposes of section 242 of the FW Act, employee organisations that are entitled to represent the industrial interests of an employee in relation to work to be performed under the Proposed Multi-employer Agreement.
8. Each of the Relevant Employers is a national system employer within the meaning of the FW Act.
9. Some of the employees that will be covered by the Proposed Multi-employer Agreement are represented by the UWU, AEU and IEU.

The early childhood, education and care sector

10. The early childhood, education and care sector (**ECEC sector**) means the industry of long day care, occasional care (including those occasional care services not licensed), nurseries, childcare centres, day care facilities, family-based childcare, out-of-school hours care, vacation care, adjunct care, in-home care, kindergartens and preschools, mobile centres and early childhood intervention programs¹.
11. There are more than 216,000 employees working in the ECEC sector².
12. The ECEC workforce is highly feminised — 92.1 per cent of ECEC workers are women.³
13. The ECEC sector is dominated by small providers:⁴

Provider size	Number of providers	% of providers
Small (1 service)	5,733	79%

¹ *Children's Services Award 2010* [MA000120] cl 3 - 'Definitions and interpretation'.

² Social Research Centre, *2021 Early Childhood Education and Care National Workforce Census*, (Report prepared for the Australian Government Department of Education, August 2022), p 5 (**Annexure 1**).

³ *Ibid* p 9.

⁴ <https://snapshots.acecqa.gov.au/Snapshot/stateofthesector.html>.

Medium (2 – 24 services)	1,425	20%
Large (25 or more services)	66	1%
Total	7,224	100%

14. Most employees in the ECEC sector hold an ECEC related qualification.⁵

15. The most common qualifications held by employees in ECEC are:

- a. Diploma or Advanced Diploma in Early Childhood Education and Care (or similar) — about 42 per cent;⁶
- b. Certificate III or IV in Early Childhood Education and Care (or similar) — about 30 per cent;⁷
- c. Relevant Bachelor's degree – about 12 per cent.⁸

16. Pay rates for 57.8% of employees in ECEC are based on one of the relevant awards. 20.9% of employees in ECEC are paid between 0.01% and 10% above the award rate of pay.⁹ The relevant awards are the *Childrens Services Award 2010 (CS Award)* and the *Educational Services (Teachers) Award 2020 (ES (Teachers) Award)*.

17. There is a relatively high level of Award dependency in the ECEC sector. The number of employees in the ECEC sector who are covered by enterprise agreements is relatively low. The method of setting pay for ECEC occupations and overall workforce is as follows:¹⁰

- a. Award only – 61.8%
- b. Collective agreement – 29.7%
- c. Individual arrangement – 7.7%

⁵ Social Research Centre, *2021 Early Childhood Education and Care National Workforce Census*, (Report prepared for the Australian Government Department of Education, August 2022), 14.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid 13.

¹⁰ Australian Bureau of Statistics. (May 2021). *Employee Earnings and Hours, Australia*. ABS. [TableBuilder], accessed 14 June 2023.

18. The award rates paid to the most common qualification levels in ECEC are:¹¹

CS Award level			Award weekly rate of pay
Level 3.1	Certificate III qualified		\$995.00
Level 3.2		After 1 year	\$1,029.30
Level 3.3		After 2 years	\$1,061.70
Level 4.1	Diploma qualified		\$1,172.00
Level 4.2		After 1 year	\$1,190.00
Level 4.3		After 2 years	\$1,207.70

19. Employers in the ECEC sector who are not covered by an enterprise agreement and whose primary industrial instrument are the CS Award and the ES (Teachers) Award generally pay their employees at or around the levels set in those awards.

20. The median weekly full-time earnings for “child carers” based on ABS Employee Earnings and Hours (EEH) data is \$1059 per week.¹²

21. The median weekly full-time earnings for “child carers” based on the ABS Characteristics of Employment (COE) is \$1000 per week.¹³

22. Two thirds of the median adult ordinary time earnings for all full-time employees based on COE data was \$1016.67 (one of the “low paid thresholds”).¹⁴

23. Two thirds of the median adult ordinary time earnings for all full-time employees based on EEH data is \$1062.00 (the other “low paid threshold”).¹⁵

The National Quality Framework

24. In 2009, the Council of Australian Governments (COAG) developed and introduced:

¹¹ *Childrens Services Award 2010* cl 14.

¹² Australian Bureau of Statistics (2021). Survey of Employee Earnings and Hours May 2021. Retrieved 24 July 2023 from: <https://labourmarketinsights.gov.au/occupation-profile/child-carers?occupationCode=4211>.

¹³ Australian Bureau of Statistics (2023), Characteristics of Employment, 2014 to 2022, [TableBuilder], accessed 24 July 2023.

¹⁴ In the *2022-23 Annual Wage Review Decision*, FWC noted that “There are two different measures of median earnings by which this threshold may be calculated: (1) Based on ABS Characteristics of Employment (COE) data published in August 2022, the low paid threshold is \$1016.67.82 (2) Based on ABS Employee Earnings and Hours (EEH) data published in May 2021, the threshold is \$1062.00.83.” *Annual Wage Review 2022-23* [2023] FWCFB 3500, [89].

¹⁵ *Ibid.*

- a. The “Early Years Learning Framework” (EYLF). Version 2 of the EYLF, entitled *Belonging, Being and Becoming: The Early Years Learning Framework for Australia (V2.0)*, was introduced in 2022 (**Annexure 2**).¹⁶ Its purpose is described as follows (at p 4):

“The aim of Belonging, Being and Becoming: The Early Years Framework for Australia is to support early childhood providers, teachers and educators to extend and enrich children’s learning from birth to 5 years and through the transition to school.”

- b. The “My Time, Our Place – Framework for School Age Care in Australia” (**Framework for School Age Care**) (**Annexure 3**)¹⁷. Its purpose has been described as follows (at p 4):

“The Framework has been designed for use by school age care educators working in partnership with children, their families and the community, including schools. It represents Australia’s first national framework for school age care to be used by school age care educators, and aims to extend and enrich children’s wellbeing and development in school age care settings.”

25. All ECEC employers, including the Relevant Employers, are required to base their educational program on one of two approved learning frameworks (though in Victoria, ECEC employers are required to comply with the Victorian Early Years Learning and Development Framework (**VEYLDF**) (**Annexure 4**), which is based on the EYLF).

26. In 2012, following COAG reform processes,¹⁸ the “National Quality Framework” (**NQF**) was introduced. The NQF applies to all employers in the ECEC sector delivering centre based care including long day care and kindergarten/preschool, family day care and outside hours school care including each of the Relevant Employers.

27. The NQF is comprised of:

¹⁶ Australian Government Department of Education for the Ministerial Council, *Belonging and Becoming: The Early Years Learning Framework for Australia (V .0, 2022)*.

¹⁷ Australian Government Department of EDUCATION AND Training for the Council of Australian Governments (COAG), *My Time, Our Place – Framework for School Age Care in Australia*.

¹⁸ In August 2008, the Early Childhood Development Sub-group of the COAG Productivity Agenda Working Group published a discussion paper, *A national quality framework for early child education and care* (Discussion Paper, Early Childhood Development Sub-Group, August 2008) (**Annexure 5**).

- a. A model law — the *Education and Care Services National Law Act 2010* (**National Law**) (enacted by each State and Territory)
- b. The *Education and Care Services National Regulations* (**National Regulations**)
- c. The National Quality Standard (see further below)
- d. An assessment and quality rating process
- e. National approved learning frameworks
- f. A regulatory authority in each state and territory responsible for the approval, monitoring and quality assessment of services in their state or territory
- g. A national body, Australian Children's Education and Care Quality Authority (**ACECQA**), which guides the implementation of the NQF, works with regulatory authorities and promotes consistency across all states and territories.

28. The National Quality Standard (**NQS**) applies to the majority of employers in the ECEC sector and is comprised of seven quality areas that form a benchmark for the nature of the education and care services provided by ECEC employers, as follows:

- a. Educational program and practice
- b. Children's health and safety
- c. Physical environment
- d. Staffing arrangements
- e. Relationships with children
- f. Collaborative partnerships with families and communities
- g. Governance and leadership

29. Each of the quality areas within the NQS contain operational requirements which all ECEC employers (including the Relevant Employers) must comply with, and which result in a high degree of commonality in the nature of the ECEC services provided.

These requirements are clarified and explained by the ACECQA's, *Guide to the National Quality Framework* (dated July 23) (**Annexure 6**)¹⁹.

30. ECEC employers, including the Relevant Employers, must comply with ratio requirements as part of compliance with the NQF²⁰.
31. ECEC employers, including the Relevant Employers, must comply with the National Law and National Regulations in relation to provider and service approval before operating an ECEC service.
32. ECEC employers, including the Relevant Employers, are monitored to enforce compliance with the National Law and Regulations by the relevant state based regulatory authorities.
33. ECEC employers, including the Relevant Employers, are assessed by their state based regulatory authority against the NQS and can be given ratings in respect of these such as "Excellent", "Exceeding", "Meeting", "Working Towards" and "Significant Improvement Required".

Funding arrangements

34. Employers (including the Relevant Employers) operating in a long day care setting in the ECEC sector are substantially funded, directly, by the Commonwealth.
35. The Australian Government, through the Department of Education and Services Australia, administers the Child Care Subsidy (**CCS**) which funds ECEC providers across Australia. The legislation that underpins CCS is called "Family Assistance Law" (**FAL**), which primarily consists of the following legislation and delegated legislation:
 - a. *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) (and any instruments made under that Act);
 - b. *A New Tax System (Family Assistance) Act 1999* (Cth) (and any instruments made under that Act);

¹⁹ Australian Government Department of Education and Training, *Child Care Provider Handbook* (May 2023).

²⁰ ACECQA, *Guide to the National Quality Framework* July 2023 pp 448 – 453.

- c. *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (Cth).
 - d. *Child Care Subsidy Minister's Rules 2017* (Minister's Rules);
 - e. *Child Care Subsidy Secretary's Rules 2017* (Secretary's Rules);
 - f. Schedules 5 and 6 to the *A New Tax System (Family Assistance and Related Measures) Act 2000* (Cth).
36. In order to obtain the CCS, ECEC sector providers, including the Relevant Employers, must be an "approved provider". The process for becoming, and remaining, an approved provider is detailed in the *Child Care Provider Handbook* (May 2023) (**Annexure 7**).
37. The CCS is available for the following kinds of care:
- a. Centre Based Day Care;
 - b. Family Day Care;
 - c. Outside School Hours Care;
 - d. In Home Care.
38. Providers in the ECEC sector, including the Relevant Employers, must be approved to operate a service by the relevant State or Territory government and be deemed suitable to ensure the health, safety, wellbeing and educational outcomes of children. This is done through the NQF as outlined above.
39. CCS is paid directly to approved providers and passed on to families as a fee reduction. The CCS is determined by family income, the number of children a family has in care, the results of an activity test and the type of eligible child care services. There are some caps on the amount of subsidy families can receive. There is also an additional CCS to support vulnerable and disadvantaged children (that is, the "Additional Child Care Subsidy").
40. Approved providers all use the same digital platform (known as "Provider Digital Access" or "**PRODA**") via a "Provider Entry Point" (**PEP**) to receive the CCS and then pass on to families.

41. The amount of the CCS that is paid to an ECEC sector provider (including to Relevant Employers), is based on an hourly rate cap which indicates the maximum amount the Australian Government will subsidise care provided at an approved child care service. The hourly rate caps vary across service types to reflect differences in operating costs and average fees charged and providers set their own fees. Parents pay the gap between these fees and the subsidy provided.

42. The current hourly rate caps are as follows:²¹

Service type	2022-23 Hourly rate cap (children below school age)	2022-23 Hourly rate cap (school-age children)
Centre Based Day Care	\$13.73	\$12.02
Outside School Hours Care	\$13.73	\$12.02
Family Day Care	\$12.72	\$12.72
In Home Care (per family)	\$37.34	\$37.34

43. The amount of fee reductions families receive is dependent on their income and the number of before school aged children in an eligible service. From 10 July 2023, families earning \$80,000 or less get a 95% fee reduction and then these decrease by 1% for each \$5000 of family income. No subsidy is given for families earning upwards of \$530,000.²²


44. Total Australian, State and Territory real government recurrent and capital expenditure on ECEC services was \$12.4 billion in 2020-21.²³


²¹ <https://www.education.gov.au/early-childhood/resources/child-care-provider-handbook>; p 68.

²² <https://www.education.gov.au/early-childhood/child-care-subsidy>


²³ <https://www.pc.gov.au/ongoing/report-on-government-services/2022/child-care-education-and-training/early-childhood-education-and-care>


Signed:

For the United Workers Union	
Name	Ben Redford
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Signature	

For the Australian Independent Education Union	
Name	Brad Hayes
Position	Federal Secretary – IEU
Signature	

For the Australian Education Union	
Name	Cara Nightingale

Position	Vice President Early Childhood AEU Vic Branch
Signature	

For the Community Child Care Association	
Name	Julie Price
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Name	Michele Carnegie
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