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BY EMAIL

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Dear Associate

C2013/6333 & 2018/9 - S.302 APPLICATION FOR AN EQUAL REMUNERATION ORDER AND S.158 VARIATION TO THE EDUCATIONAL SERVICES (TEACHERS) AWARD 2010

In accordance with directions made on 28 February 2019, please find enclosed electronic copies of the Australian Childcare Alliance Inc's (**ACA**) evidentiary material and submissions in relation to Independent Education Union of Australia's application to vary the *Educational Services (Teachers) Award 2010* (s. 158)(**Work Value Proceedings**).

ACA intends to rely on all of the evidence filed in the Equal Remuneration Order proceedings (s. 302) (**ERO Proceedings**) apart from three paragraphs in the Statement of Merran Toth dated 16 May 2018 which have been withdrawn. A new statement has been filed by Ms Toth dated 27 March 2019, with the deletions shown in mark-up, for ease of reference.

Further confidentiality order sought

ACA seeks a confidentiality order in relation to the Work Value Statement of Gary Carroll dated 29 March 2019. We have marked this statement as confidential and highlighted the confidential paragraphs in the same manner as the evidentiary material in the ERO Proceedings.

The Commission and the representatives of the IEU, CCER, AFEI, AIS and the Australian Government Solicitors have been provided with an unredacted version of this statement. We request that the unredacted version of the statement not be uploaded to the Commission's website or distributed by the parties pending the determination of ACA's request for confidentiality.

Hearing

Please advise if the Commission would be assisted by hard copies of both the ERO and Work Value evidentiary material for the hearing.

Yours sincerely



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BEFORE THE FAIR WORK COMMISSION

AM2018/9—Application to vary an award—section 158

Independent Education Union of Australia

Applicant

OUTLINE OF SUBMISSIONS FOR THE ACA

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A. The application

1. These submissions are filed by the Australian Childcare Alliance Inc (**ACA**) in relation to the applicant’s claim for an increase to minimum rates of pay the *Educational Services (Teachers) Award 2010 (Award)*. The ACA’s interest is in the rates of pay applicable to early childhood teachers (**ECTs**) and these submissions deal with that group of workers.
2. In its application the applicant asks the Commission to vary the Award minimum rates to increase the rates of pay for all teachers (including ECTs) by 18%–34%. Those dramatic increases are achieved in two steps:
 - (a) first a variation to the internal relativities in the Award, the effect of which is to increase rates of pay by 5% at Level 4 to 18% at Level 12;¹ and
 - (b) secondly, a 17.5% increase to the adjusted rates.

¹ The variation nominally involves a percentage reduction in wages for Level 1 and 2 classifications, but those classifications are inutile following the abolition of three year teaching degrees.

3. The effect of the variations is that the award rates of pay for ECTs will be the highest in the modern award system. The rates of pay for an ECT with more than eight years' experience will be higher than all other workers save for the most senior doctors, some very senior academics and some Directors of Nursing. The rates for directors of long day care centres will be on a par with senior medical specialists and internationally recognised academics. On the applicant's case, the work value of the ECTs subject of the Award is higher than the academics called by the applicant as experts.
4. That is a result which on its face improbable. The claims made in the application are ambit claims. The real question in the proceeding is not whether those increases should be granted, but whether some other increase is justifiable on work value grounds.
5. For the reasons which follow, the Commission would find that the applicant has not demonstrated that any increase is justified on work value grounds.
6. The Commission would make the following factual findings:
 - (a) The evidence in relation to primary and high school teachers is inadequate to permit any realistic assessment of the work value of those teachers.
 - (b) Changes to the regulation of early childhood teaching, while substantial, have not resulted in substantial changes to the nature of the work of ECTs, their working conditions the skills and responsibility exercised. The objective and effect of regulatory change has been to promote uniformity and consistency, not to bring about fundamental change in the work of ECTs or other educators.
 - (c) The responsibilities of ECTs are no different to any other ECEC educators: to care for and educate the children directly in their care. ECTs do not have any broader responsibility for broader educational or operational management of a service.
 - (d) The duties and responsibilities highlighted by the applicant's witnesses as indicia of increased work value attach not to the role of ECT but to the statutory positions of educational leader, nominated supervisor, approved provider and person in charge.
 - (e) There are various ways in which the work of ECTs has become easier over time. They include the prescription of child/teacher ratios and increased use of technology.
 - (f) If anything, the evidence indicates that the premiums currently paid to ECTs by comparison with diploma educators and to experienced ECTs by comparison with newer ECTs cannot be justified on work value grounds.
7. The Commission would therefore conclude that:
 - (a) the variations sought are not justified by work value reasons;

- (b) the variation is not in any case necessary to achieve the modern awards objective;
- (c) in any case, there are powerful discretionary reasons to refuse the claim, including that the grant of the claim would jeopardise the viability of many services and would substantially increase childcare costs.

B. Relevant principles

8. The principles applicable to an application of this kind were identified by a Full Bench in *4 yearly review of modern awards - Pharmacy Industry Award 2010* [2018] FWCFB 7621 (*Pharmacy Award Case*). They may be summarised as follows:

- (a) Determining whether a variation in award wages is justified by work value reasons involves a broad evaluative judgment.
- (b) Section 157(2) requires only that the reasons justifying the amount paid be “*related to*” any one of the three matters set out at (a)–(c), that is, the nature of the work, the skills and responsibilities exercise, and the conditions under which work is performed.
- (c) Although those three matters import the fundamental criteria historically used to assess work value changes, the legislature chose not to import all of the requirements of the earlier principles. For example, the legislation does not explicitly require that there be an identified change in work value from a fixed point, nor that the change should constitute such a significant net addition to work requirements as to warrant the creation of a new classification.
- (d) However, it is open to the Commission have regard to considerations which have been taken into account in previous work value cases. Despite the absence of a datum point requirement, for example, it is likely that the Commission would take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way in order to ensure that there is no “*double counting*”.
- (e) Even if the jurisdictional prerequisite in s 157(2) is satisfied, the Commission must further ensure that the variation would be necessary to achieve the modern awards objective and the minimum wages objective.

9. In the *Pharmacy Award Case* decision the Full Bench identified some of the considerations traditionally treated as relevant to work value claims. They include the following:

- (a) Changes in work do not necessarily lead to changes in work value. What is required a “*significant net addition to work requirements*”.

- (b) The Commission’s traditional approach to wage fixation aimed to “*create appropriate relativities between different categories of workers within the award...*” and “*properly fixed minimum rates for classifications in awards, related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments*”. The Commission traditionally only approved relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards.
- (c) The introduction of a new training program is illustrative of an increased level of skill due to a change in the nature of the work. Keeping abreast of changes and developments in any profession is part of the requirements of the profession. Only basic changes in educational requirements can be regarded as constituting a change in work value.
- (d) The fact that the emphasis on some aspects of the work has changed does not in itself constitute a significant net addition to work requirements.
- (e) Increased workload generally goes to manning levels not work value. But where an increase in workload mean increased pressure on skills and the speed at which decisions must be made it may be a relevant consideration.

C. The National Law and Regulations

- 10. The applicant’s case emphasises the impact of the regulatory reform on the work of ECTs in the past twenty years. The vehicle by which much of that reform has been effected is the *Education and Care Services National Law Act 2010 (National Law)* and *Education and Care Services National Regulations 2010 (National Regulations)*.
- 11. The applicant’s evidence, and particularly lay witness evidence, alleges that the effect of the National Law and Regulations has been to impose substantial burdens on ECTs. The witness statements consistently assert that ECTs are responsible for implementation and enforcement of much of the National Law and Regulations and are otherwise charged with operational and educational leadership.
- 12. That evidence is quite wrong. It is contradicted by the National Law and Regulations themselves. A detailed summary of the relevant provisions of the National Law and Regulations are set out at Schedule A to these submissions. The following observations may be drawn from that more detailed summary.
- 13. **First**, the National Law prescribes in minute detail the responsibilities of the various participants in early childhood teaching. It carefully allocates responsibility to the various

participants including approved providers (that is owners), persons responsible for a service (directors), educational leaders (sometimes referred to as “room leaders”) and educators.

14. **Second**, the National Law does not impose any obligations at all on ECTs specifically as opposed to educators more broadly. That is to say, the National Law does not distinguish between ECTs and non-degree qualified educators and does not impose any additional responsibilities on degree qualified ECTs as opposed to non-degree educators.
15. **Third**, the obligations imposed by the National Law on educators are, with a single exception, limited to the children directly in the care of the educator. The sole exception is the requirement that an educator must ensure that every reasonable precaution is taken to protect children being cared for by the service from harm. Every other statutory duty of educators is limited to children in the educator’s care.
16. That is to say educators have no responsibility for the overall management or quality control of the service. Educators’ responsibilities are unlike those of the nominated supervisor and approved provider which are more general responsibilities for the overall operation of the service and the welfare of all of the children cared for by the service.
17. **Fourth**, the responsibilities imposed on educators are intrinsic to childcare. They are effectively requirements of adequate supervision and care, together with some simple record keeping, risk assessment and notification requirements. In that sense the National Law and Regulations had not imposed any fresh responsibilities on ECTs or other educators.
18. **Fifth**, most or all of the responsibilities described by the witnesses as attaching to ECTs in fact attach to either nominated supervisors, approved providers or educational leaders. Specifically:
 - (a) Responsibility for development and implementation of the educational program attach to the approved provider, nominated supervisor and educational leader. Educators do not have any specific obligation in relation to the educational program.
 - (b) The responsibility for development and enforcement of policies lies solely with the approved provider.
 - (c) The responsibility for preparation and maintenance of the Quality Improvement Plan lies solely with the approved provider.
 - (d) The responsibility to ensure staff ratios are observed in the service attaches to the approved provider and nominated supervisor. The educator’s responsibility is to ensure that the educator is not educating more than the prescribed number of children.

- (e) Educators must have at all times access to a responsible person (that is to say an approved provider, nominated supervisor or person in charge of a service). That is to say that it is a legal requirement that educators have support at all times.
19. **Sixth**, it is a legal requirement that every service have in place a nominated supervisor who is appropriately qualified; a person in day to day charge who is appropriately trained; a responsible person who is appropriately trained; and a person in day-to-day charge of the service. A “*responsible person*”—that is either an approved provider, nominated supervisor or person in day-to-day charge—must be present at the service at all times. Educators must have at all times access to a responsible person. Put differently, it is a legal requirement that ECTs and other educators are always supported.
20. As mentioned, the tenor of the lay witness evidence is to the effect that ECTs—as opposed to educators, directors or owners—effectively bear the burden of both educational and operational leadership of childcare services and that they commonly operate without significant support. That evidence simply cannot be reconciled with the legislative framework outlined above.
21. The following paragraph from the statement of Ms Gabrielle Connell illustrates the point:
5. As a teacher, my fundamental responsibility is to ensure that our centre is meeting the NQS and National Law and Regulations in all of its many facets. The NQS sets out 18 standards to ensure quality education in the seven areas. Centres are assessed and rated by ACECQA against the NQS and given a rating.
22. Similar evidence is given in various permutations throughout the applicant’s witness statements. It is simply untrue. There is nothing in the National Law or Regulations which creates any obligation on any ECT to ensure that a service is meeting statutory requirements.
23. Ms Connell, it appears, was for 18 years a director of the community pre-school at which she worked. Her responsibilities included ensuring the centre was compliant in some respects (including educational program and staff ratios). No doubt that explains her confusion. It is unfortunate that there was no attempt in her evidence or the other statements to distinguish between the position of ECTs and the other positions in the service.
24. This is not to say, of course, that ECTs do not provide educational leadership, do not contribute to the development of policies or the operation of a service. That will commonly be the case. What is clear, however, is that the evidence to the effect that ECTs bear a special statutory burden is untrue.
25. Those ECTs who are appointed as directors may have responsibilities of the kind described by Ms Connell and other witnesses. Those workers are paid an allowance of between 11.5% and 17.3% of the standard rate in compensation for those additional responsibilities.

D. The applicant's contentions

26. The applicant's contentions may be summarised as follows.

27. **First**, the nature of teachers' work has changed in the last two decades in the following ways:

- (a) Regulatory reform over the last two decades has raised accountability, transparency and expectations, turn increasing the complexity and volume of ECTs' work.
- (b) The introduction of the Early Years Learning Framework (**EYLF**) has significantly changed the nature of early childhood teaching by imposing rigorous new content and outcome expectations.
- (c) There has been an increase in the use of technology in the classroom.
- (d) The nature of teachers' work has been affected by changes in pedagogical practices, and in particular a shift to a focus on individual child outcomes rather than collective assessment. Teachers are now expected to differentiate and modify their teaching plan for each individual student having regard to individual capacity and particular needs. For ECTs it requires an individual plan for each student. This has significantly increased the complexity of teaching work.
- (e) Increased mainstreaming of students which additional needs has increased support and monitoring requirements placed on teachers. Teachers are also required to be alert to a range of issues including increasingly serious allergies, physical and intellectual disabilities, and emotional disorders, and to adjust their teaching accordingly.
- (f) Teachers are increasingly confronted with students with complex personal and behavioural issues. This is coupled a move away from an authoritarian style has made the management of difficult students more challenging in an environment where there are more of them.

28. **Second**, as to skill and responsibility, the applicant contends:

- (a) Increased complexity, higher expectations, and use of technology have led to a consequent increase in the level of skill required by teachers in discharging their day to day duties. Curriculum changes have required ECTs to perform more complex work, and upskill themselves quickly to meet a rapid pace of change.
- (b) ECTs have in recent years been required to prepare complex day-to-day reports on each child's learning outcomes (as opposed to a simpler description of activities). In this sense, the basic skills required of a teacher have become more complex, and additional skills are now required to perform the work.

- (c) This increased skill is reflected in changes in qualification requirements for teachers, and the ongoing accreditation regime. Registration as a teacher now requires a four-year degree. Increased standards have been imposed on pre-service teachers, both in terms of prerequisite study, the introduction of the Literacy and Numeracy Test for Initial Teacher Education, and performance assessments during the training program.
- (d) Post-qualification registration requirements have become more onerous. Teachers are now required to complete annual minimum hours of ongoing professional development, and have their teaching performance evaluated.
- (e) The Australian Professional Standards for Teachers was introduced in 2011, demonstrating an increased level of professionalisation, and is now integral to the career path of teachers. This demonstrates the fundamental increase in the skills required of teachers entering the workforce and throughout their careers.
- (f) Ongoing accreditation and registration requirements reflect a greater level of accountability, driven by and increased community expectations of accessibility.
- (g) Teachers are now required to engage with parents in greater detail and more frequently. As well as adding to workload, this requires the development of specific interpersonal and time-management skills. This is particularly so in early childhood teaching, where developmental issues are increasingly able to be identified by teachers and raised with parents; these are complex communications that require the exercise of a high level of interpersonal skill.
- (h) The level of responsibility exercised by teachers is reflected in the range of surrounding legislation governing their work, including child protection legislation. These standards, and the obligations imposed on teachers by them, have become more significant over the last decade.

29. As to working conditions, the applicant contends:

- (a) The conditions under which teachers perform work has changed markedly. The traditional classroom structure has changed and increasingly schools are moving to teaching in 'agile space' with multiple classes and year groups in a single large area. This increases not only the complexity of the work (in that more nuanced supervisory tactics are required to manage a large and diverse group) but also the level of noise, and the number of children teachers are required to interact with at any one time.
- (b) The increasing integration in technology into teachers' work has altered the conditions under which the work is performed in the sense that it has made teachers more accessible after hours.

30. Each of these matters is addressed separately below.

E. The recurrent deficiency in the applicant's evidence

31. Before dealing with the applicant's particular contentions it is necessary to make a general observation about its evidence.

32. A consistent feature of the applicant's evidence, both lay and expert, is that it takes the form of broad conclusory opinions unsupported by factual observations or reasoning. Virtually the whole of the applicant's evidence suffers from this deficiency.

33. One example taken from the expert evidence illustrates the point. Professor Aspland's report deals with the question of the introduction of technology into teaching in the following paragraphs (which represent the whole of the Professor's consideration of the question and form the bulk of the applicant's evidence on the point):

3. The introduction of technology into classroom teaching

3.1 There is little choice but for teachers to incorporate ICT across the curriculum, whether they have been trained in the field of technology or not. It is a curriculum requirement and an expectation of students and many parents. The push in the broader society for schools and classrooms to reflect increased digitalised mediums of communication and learning is intensifying.

3.2 This is a cause of great consternation for many teachers who may be ill-equipped to integrate technology into their profession repertoire of practice. Further the research that advocates the benefits of doing so is still evolving. Debates about the ethical use of digital devices in classrooms are prevalent, particularly in relation to the increasing presence of cyberbullying.

3.3 Appropriate access to technical support and infrastructure and time allocated to incorporate new technologies are major challenges for teachers.

3.4 The integration of technology is moving faster than teachers can cope with and consequently causing challenges for many professionals. Most teachers are ideologically predisposed to enhancing learning through technology, particularly technological supports for students with disabilities, but they have little time or resources to engage in professional learning.

3.5 An educational revolution is underway; the value of teachers works potentially integral to its success. However, the rapidity of technological change is outpacing teacher's capability to reconceptualize their work, and as a consequence, causing widespread demoralization and frustration across the profession.

34. Professor Aspland does not take even the most elementary step of identifying the technology said to be recently incorporated into the classroom. Still less has the Professor made any attempt to explain how the technology has impacted on teachers' work, how it has affected the difficulty of teachers' work, whether and to what extent the position differs as between primary and ECEC contexts, and the range of other matters which must be explored if the Commission is to meaningfully consider this question.

35. The evidence simply requires that the tribunal accept on faith the Professor's assertions that the introduction of technology has been a "*case of great consternation*" for "*teachers*". It does not permit the tribunal, or the respondents, to assess the validity of the opinions offered.
36. The lay witness suffers from the same deficiencies. It is replete with broad conclusions, commonly couched in passive tense, describing the alleged requirements and expectations of ECTs. It consistently fails to reveal the source and extent of the alleged demands on ECTs and lacks any serious attempt to distinguish the duties of ECTs from directors, educational leaders, room leaders and non-teacher educators.
37. A further recurrent problem in the lay evidence is that it simply does not describe the day-to-day work of ECTs in any comprehensible way. For reasons which are unclear, the lay witnesses adopt an academic and abstract style of description which conceals more than it reveals. A passage from the statement of Ms Cullen illustrates the point:
- [27] Through play I guide children in extended investigations designed to scaffold their higher order thinking and problem solving, building continuity of learning over a period of time. I achieve this through intentional teaching strategies including modelling behaviour, open ended questioning, speculating, explaining, and engaging in shared thinking and problem solving. I then observe the children, analyse the effectiveness of teaching decisions, strategies and approaches, and use this to inform future planning.
38. It is impossible to discern from that passage what it is Ms Cullen actually does, how often she does it, whether the work is different today from work in the past and if so whether the job is now more difficult than it used to be.
39. Ultimately, neither the expert or lay evidence makes any serious attempt to explain in a comprehensible way the way in which the actual day-to-day work and conditions of ECTs have changed over recent years. In fact the only evidence which describes the actual day-to-day work of ECTs in a comprehensible way is that filed by the ACA.
40. It is unclear why the applicant has chosen to lead evidence in this form. Whatever the reason, the result is that the applicant has given the tribunal little assistance in understanding the matters which are essential to the determination of the application—the real nature of ECTs' work, the conditions under which it is done, and the way in which the work and the conditions have changed over time. Once the broad assertions are put to one side, the Commission may find that little remains of the applicant's voluminous but rather hollow evidentiary case.

F. Nature of the work

Regulatory reform has increased accountability and expectations

41. A great deal of the applicant's evidence is devoted to a description of the ways in which the regulation of the ECEC sector has changed and increased in recent years.

42. It is not in doubt that there has been significant regulatory change in recent years. That is not of itself an indicator of work value changes. The question is whether and to what extent the regulatory changes have in fact impacted the work of ECTs.
43. The true position is that the extensive reform which affected the sector in recent years has had the purpose and effect of codifying and harmonising (although imperfectly) standards in ECEC and, perhaps, has established a common minimum standard. What has not been demonstrated is that the standards are more demanding than those which have applied in the past or that they have resulted in a greater degree of difficulty in the work of ECTs.
44. As mentioned, the applicant's evidence alleges that the introduction of the National Law and Regulations, and the EYLF and NQS, have increased the responsibilities of ECTs. The tenor of the evidence is that ECTs—as opposed to non-degree educators, directors, nominated supervisors and operators—are now largely responsible for the educational and operational management of the centres in which they are employed.
45. For the reasons outlined Part C above, that evidence must be rejected. The National Law and Regulations prescriptively allocate operational and educational responsibilities to the various participants in ECEC. The various broader educational and operational responsibilities claimed to attach to ECTs in fact attach variously to operators, directors and educational leaders. The responsibilities of ECTs are limited to the children directly in their care and are identical to the responsibilities of non-degree qualified educators.
46. Rather than impose fresh and onerous responsibilities on ECTs, the National Law and Regulations require that educators have responsibility for children in their care while the broader managerial responsibilities are allocated to other participants.

Introduction of the EYLF

47. The applicant submits that the introduction of the Early Years Learning Framework (**EYLF**) has changed the nature of early childhood teaching by formalising new pedagogical understandings about the importance and nature of early childhood education and imposing rigorous new content and outcome expectations.
48. The EYLF is a high level document identifying broad principles to be applied in early childhood education. It is not directed to nor limited to ECTs but applies to all educators and providers. There is nothing on the face of the document which meets the description of “*rigorous new content and outcome expectations*”. Nor is there any evidence to suggest that the EYLF operates so as to increase the burden on ECTs.
49. It is quite unclear from the applicant's evidence and submission how it is said the EYLF has actually translated into changes in day-to-day work. None of the applicant's witnesses deal

with the issue in any meaningful way. The expert evidence characteristically asserts that the EYLF has “*increased expectations*” without troubling to explain how or why.

50. The evidence dealing with the actual impact of the EYLF (and other reforms) is that of the ACA witnesses. Those witnesses explain that the EYLF, NQS and related innovations have established a common guideline which effectively codified existing expectations of educators. They explain that the objective of the regulatory reforms was to rationalise and harmonise standards—not increase them. Importantly, each of them indicates that the introduction of the EYLF and NQS have not affected the day-to-day work of educators employed by them.

Increased technology in classrooms

51. There is nothing in the applicant’s evidence to explain how the increased integration of technology into the classroom has created more difficult working conditions.
52. The ACA evidence indicates that the use of technology has made the job easier in various respects. For example, the preparation of daily reports using iPad applications has reduced the time and effort required to produce the reports.

Changes in pedagogical understanding have increased work complexity

53. The applicant submits that the nature of teachers’ work has been affected by changes in pedagogical understanding and practices, and in particular a shift to a focus on individual child outcomes rather than collective assessment. Teachers are now expected to differentiate and modify their teaching plan for each individual student, to take into account individual capacity and particular needs. For ECTs it requires an individual plan for each student, who at that age can be at significantly different developmental stages. This has significantly increased the complexity of teaching work.
54. This subject matter is acutely affected by the tendency to assert (in obscure academic language) rather than explain. The evidence produced by the applicants does not include any example of an individual plan for any student, let alone each student. The evidence does include some evidence, characteristically pitched at a high level, to the effect that the ECTs take into account each child’s capacity in interacting with them.
55. That may be accepted as an uncontroversial proposition. What is controversial is that the notion that this is a recent innovation and which indicates increased work value. That an educator would not teach a child to walk until they had learned to crawl would appear to be a basic element of an educator’s role, not a result of some recent advances in pedagogy.

Changing student demographics

56. The applicant asserts that the increased mainstreaming of additional needs students into classrooms has increased the degree of difficulty of the work of ECTs. It also asserts that ECTs are now required to identify and address a range of issues including allergies and complex personal issues.
57. Once again, these assertions find little support in the applicant's evidence. There is little evidence dealing with the changing prevalence of additional needs children in classrooms. There is little evidence which would identify the ways in which any increase in additional needs children bears on the work of ECTs, aside from patently implausible assertions in some lay evidence to the effect that ECTs are required to interpret specialist medical reports.
58. The useful evidence on this issue comes from the ACA witnesses. Those witnesses explain that there has been little or no increase in the inclusion of additional needs students into mainstream classrooms. They also explain that the burden imposed by additional needs students has if anything been reduced as a result of funding increases associated with additional needs students, and the increased presence of teachers' aides appointed to assist with those students (both matters ignored by the applicant).
59. As to the notion that ECTs are required to be alert to allergies and similar conditions, it is difficult to see how such requirements involve a novel imposition on ECTs. Those requirements are properly regarded as inherent in the role of a person who care for children, not a recent imposition.

G. Skill and responsibility

Increased complexity and higher expectations require increased skill

60. The applicant submits that increased complexity, higher expectations, and use of technology have led to a consequent increase in the level of skill required by teachers in discharging their day to day duties. Curriculum changes have required teachers to perform more complex work, and upskill themselves over short periods of time to meet a rapid pace of change.
61. These assertions are characteristic of the applicant's case insofar as they are pitched at such a broad level as to be meaningless. There is no attempt in the applicant's submissions to explain exactly how the complexity of the work of ECTs has increased in recent years.
62. For the reasons explained at 51 above, the evidence does not demonstrate that the introduction of technology of the EYLF has affected the work of ECTs, save to the extent that some technological innovations have reduced the burden of report writing and similar tasks.

ECTs required to prepare complex day to day reports

63. The applicant submits that early childhood teachers have in recent years been required to prepare complex day-to-day reports on each child's learning outcomes (as opposed to a simpler description of activities). In this sense, the basic skills required of a teacher have become more complex, and additional skills are now required to perform the work.
64. This contention would simply be rejected as a matter of fact. There is no real evidence to suggest that ECTs prepare complex day-to-day reports, that there has been a change in the nature of reports produced, or that the production of such reports has increased in a substantial way the burden on ECTs. Rather the evidence suggest that reports are more easily generated now than in the past using software.

Increased skill is reflected in increased qualification requirements

65. The applicant submits that registration as a teacher now requires a four year degree, and that pre-requisites for admission to a teaching degree have become more stringent. This, it is said, is an indicator of increased work value.
66. This contention can be dealt with quickly. The requirement of a four year degree is already comprehended in the Award, which provides that a four year degree trained teacher commences work at Level 3. The Award rates therefore comprehend the work value associated with the four year degree qualification.
67. The introduction of basic numeracy and literacy requirements in some degrees does not alter the position. Literacy and numeracy are inherent in a four year bachelor qualification. There is no warrant for a wage increase on the basis that ECTs are literate.
68. There is a suggestion in the applicant's submissions that the universal four-year degree requirement for registration is the product of increased complexity introduced by the NQS, EYLF, National Law and Regulations.
69. The logical difficulty with that proposition is that the requirements referred to apply not to ECTs but to all educators. There is no part of the regulatory framework which distinguishes the position of ECTs from other educators. All educators, including those with no qualifications at all, are subject to the same obligations as ECTs.
70. That being the case, the proposition that a four year degree is a necessary condition of compliance with a more challenging regulatory framework or with "*increased community expectations*" cannot be accepted.
71. Finally, it may be noted that the conditions of entry to the relevant bachelor degrees are among the very lowest of all bachelor degrees. For example, the Bachelor of Early Childhood

at the University of Sydney has the lowest ATAR entry requirement of any course at the university. The guaranteed entry point in 2018 was 77. Entry to a Bachelor of Education (Primary) was 85. The lowest entry point to an engineering degree, for example, was 92.

72. It may be accepted that ATAR is affected by factors such as demand and is not a perfect proxy for the difficulty of subject matter. It is nonetheless a broadly useful indicator. It is difficult to see how increased pre-qualification requirements could be said to be an indicator of increased work value in circumstances where the pre-qualification requirements are among the lowest of any bachelor degree.

Post qualification requirements more onerous

73. The applicant argues that post-qualification conditions of registration are more onerous because ECTs are required to complete annual minimum hours of ongoing professional development.
74. As the Full Bench explained in the *Pharmacy Industry Award Case*,² professional development is fundamental to any professional pursuit. The evidence demonstrates here, as in the pharmacy context, that the introduction of CPD requirements merely formalised and systematised something that was (or should have been) already occurring.
75. It may be noted for completeness only that the obligation on ECTs is for 20 hours of professional development every five years, together with 80 hours of “*self-identified*” professional development. The requirement of four years’ professional development activity a year, even if novel, is not a significant additional to the burden of the job.

Professional Standards for Teachers demonstrate an increase in skills required

76. The applicant contends that the Australian Professional Standards for Teachers (**APST**) was introduced in 2011, demonstrating an increased level of professionalisation, and is now integral to the career path of teachers. This demonstrates the fundamental increase in the skills required of teachers entering the workforce and throughout their careers.
77. The APST do not on their face say anything about the nature of the work to be carried out by ECTs or the level of skill and responsibility involved. As the applicant’s expert acknowledges, the matters addressed in the APST “*have historically been recognised as important*” and were previously dealt with in state by state standards.³
78. The expert evidence does go on to assert that the APST “*sets new benchmarks for teaching and performance*”. It does not explain how or why that is so, or how or why the APST impacts on the day to day work of ECTs.

² At [184].

³ Irvine Work Value Report [33].

79. Neither the APST itself nor the evidence give any insight into:
- (a) the extent to which the APST has increased, as opposed to formalised, teaching standards in the ECEC sector;
 - (b) the extent to which the APST requires a level of teaching skill which is higher than that inherent in any four year teaching degree; or
 - (c) the way in which the allegedly new standards impact on the nature of the work, the skill and responsibility exercised, and the working conditions.
80. In the absence of any such explanation, it could not be concluded that the APST have in fact altered the work value of ECTs.

Accreditation and registration requirements reflect greater accountability

81. The applicant submits that accreditation and registration requirements reflect a greater level of accountability among ECTs.
82. Neither registration nor accreditation requirements, of themselves, demonstrate any increase in work value. Together with many of the regulatory changes introduced in recent years, the registration and accreditation requirements are directed to regularisation and harmonisation of standards.
83. Registration in particular has no bearing on work value. It is a mechanism primarily for the achievement of interstate mobility of teachers and, probably, a means for monitoring and enforcement of professional development and related standards. As the NSW Education Minister put it during the Second Reading Speech of the *Teacher Accreditation Amendment Bill 2014* (NSW):

In 2011 all education Ministers reached agreement to implement nationally consistent teacher registration. The agreement requires that all accredited teachers have a current Working with Children Check clearance to maintain accreditation. This change will enhance interstate teacher mobility, as currently only Victoria, the Australian Capital Territory and the Northern Territory automatically recognise the accreditation status of New South Wales teachers.⁴

84. The applicant's evidence similarly indicates that the purpose of the national registration system was to address a "*concern about perceived limitations and variability in teacher registration across jurisdictions at this time, and argued for a strengthened national approach to teacher registration*"⁵ which arose in circumstances where "*prior to the introduction of national professional standards for teachers, there was considerable variation in state registration approaches and requirements*".⁶

⁴ NSW, *Parliamentary Debates*, Legislative Assembly, 10 September 2014 (Adrian Piccoli Education Minister).

⁵ Irvine Second Report [28].

⁶ Irvine Second Report [33].

85. Registration has no relationship to work value. It is simply a procedure for achieving national uniformity. Accreditation requirements are, similarly, a mechanism for enforcement of basic qualification standards.
86. It may be noted that the applicant asked one of its expert witnesses, Professor Dockett, to indicate whether the common registration requirements across primary and ECEC indicated comparability of work value. The Professor did not answer the question except by pointing out that both primary and ECEC teachers complete the same course work.⁷

Teachers required to engage more frequently with parents

87. The applicant alleges that teachers are now required to engage with parents in greater detail and with greater frequency. This, it is said, results in an increased workload and a requirement for new inter-personal and time management skills particularly so in early childhood teaching, where developmental issues are increasingly able to be identified by teachers and raised with parents; these are complex communications that require the exercise of a high level of interpersonal skill.
88. There is once again an absence of evidence to support these contentions.

Level of responsibility is reflected in the range of surrounding legislation

89. The applicant argues that the level of responsibility exercised by teachers is reflected in the range of surrounding legislation governing their work, including child protection legislation. These standards, and the obligations imposed on teachers by them, have become more significant over the last decade.
90. In early childhood teaching, the important role and level of responsibility has been recognised in recent years by mandated increases to the minimum teacher to student ratios in early childhood centres.
91. The applicant does not identify the surrounding legislation said to demonstrate increased levels of responsibility. For the reasons previously identified, neither the National Law nor Regulations have added to the responsibilities of ECTs; to the contrary, they have confirmed that those responsibilities are no more than the fundamental responsibilities to ensure the welfare of children directly in their care.
92. The notion that new student ratios are an indicator of increased responsibility is difficult to understand. The introduction of ratios and the reduction in the number of students have plainly reduced the responsibility of ECTs.

⁷ Dockett Report, Question 6 page 7.

H. Working conditions

Physical layout of classrooms

93. There is no evidence of any significant changes—or any changes at all—to the physical layout of classrooms in the early childhood sector. Still less is there evidence to suggest that there have been changes which have made the job of ECTs more difficult.
94. The assertion that physical changes have “*increased... number of children teachers are required to interact with at any one time*” is simply wrong. Ratio requirements have reduced the number of children teachers are required to interact with across the board.

Increased integration of technology

95. There is nothing in the applicant’s evidence to explain how the increased integration of technology into the classroom has created more difficult working conditions.
96. The ACA evidence indicates that the use of technology has made the job easier in various respects. For example, the preparation of daily reports using iPad applications has reduced the time and effort required to produce the reports.
97. As to contact out of hours, there is little evidence that ECTs (as opposed to primary and secondary students) are required to be contactable out of hours.

I. Other relevant matters

Improvements in working conditions

98. The evidence further indicates that the working conditions of ECTs have improved substantially in recent years. They include:
- (a) the introduction and/or lowering of mandatory ratios, which have reduced the number of students for which an ECT is responsible;
 - (b) increased levels of funding and support for additional needs children, including the increased use of teachers’ aides; and
 - (c) the use of technological aides which simplify and expedite some tasks, including the preparation of daily reports.
99. Each of those matters weigh against the conclusion that there has been a net addition to the work requirements of ECTs in the past twenty years.

Comparison with NSW rates

100. The applicant contends that higher wage rates in NSW teachers’ awards indicate that higher rates in the Award are justified on work value grounds.

101. The divergence between NSW and modern awards rates for the same work is not peculiar to teaching. The same gap exists across most or all industries. The difference is not demonstrative of a failure to reflect work value in modern awards but is the function of fundamentally different approaches to wage fixation as well as differences in award coverage.
102. NSW awards are made pursuant to the NSW tribunal's mandate to make award establishing fair and reasonable conditions of employment. Modern awards are created as part of a "*fair and relevant minimum safety net of conditions*".
103. The fact that certain rates were determined to be fair and reasonable for teachers employed by the Crown in NSW does not demonstrate that the same rates are appropriate for minimum safety net award applying to early childhood services across Australia.

J. Jurisdictional requirements not met

104. The Commission would find that the jurisdictional requirements of s157 are not satisfied.

Variation not justified for work value reasons: s157(2)(a)

105. The Commission would find that no variation is justified for work value reasons. Put simply, the evidence does not demonstrate that there has been a significant net addition to work requirements. Putting the same point differently, there has been no significant change in the nature of the work, the skills and responsibility required or the conditions under which the work is performed. In particular:
 - (a) The introduction of a significant degree of national regulation—has codified and to an extent harmonised standards for ECEC. It has not influenced in any significant way the day-to-day work of ECTs.
 - (b) The changes which may have affected the work value of primary school teachers—including notably the introduction of the Australian Curriculum and the requirements of standardised testing—do not apply in ECEC.
 - (c) There has been no change in the training and qualification requirements for Level 3 ECTs. The work value inherent in a four year degree is and has always been incorporated into the Award through the classification of four year trained ECTs at Level 3 on commencement.
 - (d) There are various changes which have, if anything, improved the working conditions for ECTs. In particular the reduction of mandated ratios has reduced the difficulty of the work by reducing the number of students for which each ECT is responsible.

Variation not necessary

106. The applicant argues that the variation is necessary to be made outside the four-yearly award review because the claim cannot be dealt with in the current review.
107. The difficulty with this contention is that the variation could readily have been considered within the four yearly review but for the applicant's own intransigence. The applicant has, for years, refused to bring a work value claim despite various suggestions to that effect. It consistently refused to do so until after the fatal flaws in its equal remuneration application became perfectly clear in the first few days of that hearing. It was only then that it brought the current application (incidentally at a point where both the Commission's resources and hundreds of thousands of dollars in legal fees were wasted).
108. Having delayed for several years, the applicant should not now be heard to argue that there is some urgency to the claim that requires that it be dealt with forthwith, as opposed to being addressed in the same way as other award variation claims.

K. Variation inconsistent with a fair and stable minimum safety net

109. The grant of the claim would create serious disconformity between the Award and other modern awards. The relativities which would result from granting the claim, by comparison with the internal relativities in the current Award and with the C10, are as follows:⁸

Level	Proposed Rate	Current internal relativity	Proposed internal relativity	Proposed relativity C10
1	\$55,453	100%	100%	127%
2	\$58,534	102%	106%	134%
3	\$61,615	105%	111%	141%
4	\$64,696	109%	117%	149%
5	\$67,776	112%	122%	156%
6	\$70,857	116%	128%	163%
7	\$73,938	119%	133%	170%
8	\$77,019	123%	139%	177%
9	\$80,099	127%	144%	184%
10	\$83,179	131%	150%	191%
11	\$89,341	135%	161%	205%
12	\$92,422	138%	167%	212%

⁸ Noting that the standard rate under the Award is the Level 1 rate, not, as the IEU submissions imply, Level 3: clause 3.1 of the Award.

Internal relativities

110. The IEU contends that first variation appropriately made by the Commission is a variation of rates to significantly adjust internal relativities. The stated justification for the variation to internal relativities is to reverse the allegedly inappropriate compression of relativities caused by the grant of flat dollar wage increases.
111. A relevantly identical application was made and rejected in the *Pharmacy Award Case*. As the Full Bench there explained:⁹
- (a) flat dollar rate increases were the product of a deliberate policy decision taken at the behest of the union movement;
 - (b) there is no proper basis to reverse that approach on an award by award basis; and
 - (c) acceptance of this argument would have undesirable flow-on consequences for the whole award system.
112. That is sufficient basis to reject this aspect of the application. For completeness two other points may be made.
113. **First**, there is no apparent logical or principled basis for the proposed relativities. The quantum of the increases is justified only on the basis that they “*more closely reflect what is commonly found in the actual rates of pay for most teachers*” and “*more appropriately reflect the comparative higher work value of teachers who have been determined to be proficient (or equivalent) and those who have obtained additional years of experience*”. Assertions of that kind are not a proper basis for the variations sought.
114. **Second**, the classification structure is service based. There is nothing in the evidence which would justify an adjustment such that the relativity of the top rate is 67% higher than the standard rate. To the contrary, the applicant’s contention is that graduate ECTs perform the full range of tasks carried out by more experienced workers. If that contention is accepted, it follows that the work value of a graduate is not substantially different to that of a more experienced ECT. It follows that a 50% differential in rates of pay cannot be justified on work value grounds.

External relativities

115. The applicant’s claim would leave the Award Level 1 rate as equivalent to the C2(a) metals classification, or 130% of C10, while the Level 12 rate would be 212% of the C10 rate.
116. The grant of the claim would mean that the award rates of pay for early childhood and other teachers will be the highest in the modern award system. The rates of pay for an ECT with

⁹ [191]–[192].

more than eight years' experience will be higher than all other workers save for the most senior doctors, some very senior academics and some Directors of Nursing.¹⁰ The rates for directors of long day care centres will be on a par with senior medical specialists and internationally recognised academics. On the applicant's case, the work value of the ECTs subject of the Award is higher than the academics called by the applicant as experts.

117. A stable system of minimum wage relativities has developed through the award system over time. The Commission traditionally only approved relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. A departure from that approach would have the potential to destabilise minimum wage fixation and generate unsustainable claims.¹¹ The statute requires the maintenance of that principled approach as a condition of stable minimum safety net.
118. The grant of this claim would produce serious disconformity between the Award and other modern awards and would be quite inconsistent with the notion of a stable safety net established on the basis of proper interrelations between awards. It should on that basis be rejected as inconsistent with the modern awards objective.

Other considerations

119. Further, and for reasons more fully articulated in the ACA's submissions in ERO proceedings, the grant of the claim would be inconsistent with the modern awards objective in other ways, including in that it risks reducing workforce participation by reducing the affordability of childcare and will have a seriously harmful impact on business and employment costs.

L. Discretionary considerations

120. Assuming, contrary to the foregoing, that the discretionary requirements of s157 are met, the claim would nonetheless be rejected on discretionary grounds including the following.

Affordability of childcare

121. The stakes in this case are increased because the result of granting the application will be an increase in childcare fees.
122. The affordability of childcare is an important and complex social issue. It bears upon female workforce participation and other matters. The unaffordability is already a factor which tends to suppress female workforce participation. There is a risk that the grant of a large pay increase will further suppress that participation.

¹⁰ *Higher Education Industry—Academic Staff—Award 2010*, cl 18 and Sch A; *Nurses Award 2010*, cl 14.3.

¹¹ [2009] AIRCFB 345 at [43].

123. The Commission would be slow to grant an application with serious implications except in the face of a clear demonstrated industrial injustice.

Capacity to pay

124. The childcare industry has a low level of consolidation. The four main players (Goodstart, G8 and two others) together account for only 20 per cent of industry revenue, while 39 per cent of approved child care providers have only one centre: IBISWorld.

125. Some operators have some capacity to pay increased wages. It is doubtful whether any operator has the capacity to give pay increases of the order sought in this claim. For many even a more modest increase will represent an existential threat.

M. Conclusion

126. For these reasons, the claim should be rejected and the application dismissed.

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WITNESS STATEMENTS FOR THE ACA

(Documents provided to the Fair Work Commission on 3 April 2019)

ERO proceedings – additional material

- Work Value Statement of Merran Toth 27 March 2019 - new statement – previous statement has been withdrawn - (subject confidentiality order)

Work value proceedings:

- [Work Value Statement of Jennifer Mary Kearney](#) sworn 28 March 2019
- [Work Value Statement of Jae Dean Fraser](#) affirmed 29 March 2019 (2)
- [Work Value Statement of Alexandra Hands](#) sworn 28 March 2019 (2)
- [Work Value Statement Karthika Viknarasah](#) affirmed 29 March 2019
- Work Value Statement Gary Carroll affirmed 29 March 2019 (subject to confidentiality application by ACA)