

**s.156 of the Fair Work Act 2009  
4 yearly review of modern awards**

***Educational Services (Teachers) Award 2010 [MA000077]  
AM2014/266, AM2019/17***

**SUBMISSION IN REPLY**

**20 April 2020**

1. These submissions are made on behalf of the Association of Independent Schools (AISs) which is made up of:
  - Association of Independent Schools of New South Wales
  - Association of Independent Schools of South Australia
  - Association of Independent Schools of Western Australia
  - Independent Schools Queensland
  - Independent Schools Tasmania
  - Independent Schools Victoria

The AISs represent either all or a large majority of award dependent school employers.

2. These submissions are made in response to the Statement ([2020] FWCFB 1539) and Tranche 3 Background Paper issued by the Fair Work Commission (the Commission) on 23 March 2020. The Statement requires parties to file reply submissions to address the provisional views of the Commission and other issues in the background paper.
3. In tranche 3, the AISs only have an interest in the *Educational Services (Teachers) Award 2010 [MA000077]* (the Award).

**Provisional views**

4. Question 9 of Attachment A to the Statement asks parties to comment on the Commission's provisional views set out at [73] of the Background Paper.
5. As one of the Joint parties, the AISs support the provisional view that the Exposure Draft and the draft variation determination be amended as proposed.

## Reply submissions – Schedule B

6. Question 10 of Attachment A to the Statement seeks to ascertain the AISs' position with respect to the Independent Education Union's (IEU) claim regarding Schedule B.
7. Schedule B of the Exposure Draft applies to teachers who work in an early childhood service operating for at least 48 weeks per year.
8. The IEU submits that the rates of pay in Schedules B.1.1 and B.1.2 contain an error in that they do not apply the 4% loading to casual teachers engaged in a service which operates for at least 48 weeks of the year.
9. The AISs submit this is not an error but rather represents the correct interpretation of the current Award, and the Exposure Draft.
10. Clause 14 of the current Award and clause 17 of the Exposure Draft are set out in nearly identical terms. Clause 17.2 of the Exposure Draft confers the 4% loading on teachers that work in a centre that operates for at least 48 weeks of the year. Clause 17.4 extends the 4% to part-time teachers given that *"A part-time employee will be paid pro rata, at the same rate as a full-time employee in the same classification, in accordance with the provisions of clause 11 – Part-time employees."*
11. Clause 17.5 of the Exposure Draft concerns casual teachers. Clause 17.5 is not read in conjunction with any other clause. There is nothing in clause 17.5 that extends the 4% to casual employees. The AISs submit that the effect of this is that while the 4% applies to full-time and part-time teachers, it does not apply to casual teachers.
12. The AISs understand that the 4% applies to full-time and part-time teachers in an early childhood service operating for at least 48 weeks of the year because these teachers do not receive the benefit of non-term time, or the benefit of clause 15 – Ordinary hours of work. Whilst it differs between schools and states, teachers in a traditional school setting will receive approximately 12 weeks of non-term time inclusive of annual leave per year. Teachers covered by Schedule B are only entitled to 4 weeks annual leave.
13. By nature of being a casual, a casual teacher would not be entitled to non-term time. Further, in accordance with clause 12 of the Exposure Draft, a casual teacher means employment on a *"day-to-day basis for a period of not more than 4 consecutive weeks"* or by agreement may be extended up to one school term. The restriction on the length of the engagement means that a casual teacher is not engaged for a full year and accordingly is not impacted in the same way as a

full-time or part-time teacher employed under Schedule B who does not receive the benefit of non-term time.

14. During the Award Modernisation process in 2009, the IEU's Non-Government Early Childhood Services (Teachers) Award 2010 drafts of 6 March 2009 and 27 April 2009 set out the equivalent clause 17.2 of the Exposure Draft as:

*"15.2 A full-time employee who works in an early childhood service which usually provides services over a period of at least eight hours each day for 48 weeks (such as a long day care centre) shall be paid an additional 4% to the rates set out in clause 15.1 on the basis that the employee is not in receipt of school holidays." (emphasis added)*

15. This reinforces the fact the 4% is paid for teachers who do not receive the benefit of non-term time.
16. During an Award Modernisation Hearing before Commissioner Whelan on 4 August 2009, Mr Warren of the Australian Federation of Employers and Industry makes the following point at PN147:

*"The four per cent loading, for example, that has been raised particularly by the IEU with respect to the payments currently made in the New South Wales NAPSA with respect to teachers in long day care centres, et cetera. It is important to note that that four per cent was placed in that NAPSA for a very specific reason and it was to recompense those teachers who are working in long day care centres who may work extended hours beyond those normally, and certainly will be required to work 48 weeks of the year and not tied to school holidays. If it is that the four per cent is to be continued it should be specifically noted that those are the pre-conditions for it and not beyond such a situation."*

Ms Matthews of the IEU states in the same transcript at PN43:

*"We say that the conditions for teachers should also be generally the same as in schools, although for long day care services which operate 48 weeks a year there would need to be some modification because in those services staff, including teachers, are usually rostered and they don't receive school holidays and we say the four per cent extra that applies in New South Wales should apply..."*

We submit this supports our position that the 4% should only apply to full-time and part-time teachers who do not receive the benefit of non-term time.

17. We note that the Fair Work Ombudsman's Pay Guide has never applied a 4% loading for a casual employee covered by Schedule B.
18. The AISs submit that there is no change required to the rates of pay in Schedule B.1.1 and B.1.2.