



DECISION

Fair Work Act 2009

s.242 - Application for the FWC's approval of a supported bargaining authorisation

Application by the Independent Education Union of Australia and the United Workers' Union

(B2024/852)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 16 FEBRUARY 2026

Recommendation regarding proposed New South Wales Community Preschools Multi-Employer Agreement 2025

Introduction

[1] On 23 September 2024, I made a supported bargaining authorisation (the authorisation) under s.243 of the *Fair Work Act 2009* (Cth) (FW Act) in respect of bargaining for a proposed multi-enterprise agreement (the Proposed Agreement) to cover employees working in early childhood education and care services which usually operate during hours and terms which approximate those of a recognised school (leading to the common designation of 'preschool' or 'kindergarten').

[2] The application was made by the Independent Education Union of Australia (IEU) and the United Workers Union (UWU). The authorisation covers 103 employers in New South Wales (NSW) who are represented by Community Early Learning Australia (CELA).

[3] The employers covered by the authorisation are all not-for profit services. All but two employers are community managed services which means that they are managed by a volunteer parent committee (board) and the employment relationship is held by them. The Director/Coordinator of the service is an employee of the service and manages the operations of the service.¹

[4] Preschool teachers covered by the authorisation are currently covered by the *Educational Services (Teachers) Award 2020* (EST Award). Other employees including certificate and diploma qualified educators are covered by the *Children's Services Award 2010* (CS Award).

[5] In the decision in relation to the authorisation (the Decision), I concluded that I was satisfied that it was appropriate for all of the employers and employees that will be covered by the Proposed Agreement to bargain together having regard to the matters specified in s.243(1)(b) of the FW Act. These matters are:

- the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector) (s.243(1)(b)(i));

- whether the employers have clearly identifiable common interests (s.243(1)(b)(ii));
- whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process (s.243(1)(b)(iii)); and
- any other matters the Fair Work Commission (Commission) considers appropriate s.243(1)(b)(iv).

[6] In relation to s.243(1)(b)(i), I had regard to the rates of pay for early childhood education centre (ECEC) teachers being significantly less than teachers working in public schools and systemic Catholic Schools and on this basis, I found that low rates of pay prevail for ECEC teachers. Further, I noted that for educators, the median rate of pay is marginally above the low paid benchmark for Australian Bureau of Statistics Employee Earnings and Hours and for this reason, I was also satisfied that low rates of pay prevail for these employees.

[7] In relation to s.243(1)(b)(ii), I found that the employers covered by the authorisation have common interests, including a common regulatory environment and reliance on the NSW Government for funding. In this regard, I note that being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory is an example of a common interest provided by s.243(2)(c).

[8] I referred to evidence from Ms Carol Matthews, Secretary of the NSW/ACT Branch of the IEU that:

- the ECEC sector comprises highly skilled teachers and educators;
- Around 92.1% of the ECEC workforce are women;
- the workforce is not being fairly rewarded for the critical duties undertaken in the care and education of young children; and
- this had led to a workforce crisis whereby the ECEC sector has not been able to attract and retain teachers and educators in the sector.

[9] In her evidence, Ms Matthews referred to data published by the Australian Children's Education and Care Quality Authority (ACECQA) which establishes that during the period from 2017 to 2021, a majority of graduates who have completed an early childhood teaching degree (as opposed to completing a teaching degree), have chosen not to work in ECEC settings after graduation, despite their professional preference to work in ECEC settings. Across the same period, more than 50% of early childhood teacher graduates secured employment in schools. For teacher graduates the figures have been stable, with around 70% of graduates entering the profession from 2017 to 2021.²

[10] I also made the following findings under s.243(1)(b)(iv)³ which I noted were consistent with other decisions of this Commission that have considered supported bargaining authorisation applications, and which weighed in favour of making the authorisation:

- Granting the authorisation sought would open the prospect of improving rates of pay of a female dominated workforce, which would be consistent with that part of the object of the FW Act in s.3(a) concerned with the promotion of gender equality.⁴
- There has been a relatively low uptake of enterprise bargaining in the sector.⁵
- Making the authorisation will more readily facilitate participation of funding bodies in the negotiations.⁶

[11] As employees must be better off overall under a proposed enterprise agreement as a condition of the agreement being approved by the Commission, it follows that if a multi-enterprise agreement is made as a consequence of the authorisation being granted in this matter, this will improve conditions of employment (as employees will be better off overall compared to the relevant award) and enhance gender equality (given that most of the employees are women).⁷

[12] On 24 September 2024, the Commission agreed to provide assistance to the bargaining representatives to facilitate bargaining for the Proposed Agreement pursuant to s.246(2). This assistance included directing representatives of the NSW Department of Education (the Department) on behalf of the NSW Government to attend conferences convened by the Commission pursuant to s. s.246(3).

[13] The Commission conducted conferences on 25 October 2024, 6 November 2024, 16 December 2024, 5 March 2025, 26 March 2025, 7 April 2025, 30 Apr 2025, 20 May 2025, 25 June 2025, 23 July 2025, 20 August 2025, 29 September 2025 and 24 November 2025.

[14] On 7 November 2024, I issued an order requiring a representative from the Department to attend all conferences scheduled from 16 December 2024 pursuant to s.590(2)(a) of the FW Act. On 10 April 2025, I issued a Statement in which I required the Department to provide specific information pursuant to ss.590(1) and (2)(c) of the FW Act at the conference scheduled on 30 April 2025. The Department provided the required information and representatives from the Department were active participants in the conferences that they were ordered to attend.

[15] Prior to the conference on 24 November 2025, the IEU, UWU and CELA (the bargaining parties) reached agreement on the terms of the Proposed Agreement. They contend that it is necessary for the NSW Government to commit to an increase in funding to reflect the increase in wages provided by the Proposed Agreement and have requested that the Commission issue a recommendation to this effect. After hearing evidence and submissions from the bargaining parties and the NSW Government at the conference on 24 November 2025, I have decided to issue the recommendation at the conclusion of this decision for the reasons that follow.

Background

[16] The context for the recommendation sought by the bargaining parties is best understood by outlining:

- the funding arrangements for NSW preschools,
- the history of pay rates for employees of NSW preschools,
- the pay rates which apply to teachers working in other sectors including long day care, NSW Government public schools and preschools and Catholic systemic schools and preschools, and
- the pay rates in the Proposed Agreement.

Funding for NSW preschools

[17] In 2024, there were 48,907 children attending community preschools⁸ and 5,800 staff employed by community preschools.⁹

[18] The funding arrangements for NSW preschools are different to the funding arrangements for long day care services which are funded by the Commonwealth through the Child Care Subsidy, which is paid directly to providers and passed on to families as a fee reduction.¹⁰

[19] The funding for NSW preschools is provided by the NSW Government through the Start Strong for Community Preschools program (Start Strong Program). This program commenced in 20217. All of the employers covered by the authorisation are approved preschool services and receive funding under this program.¹¹

[20] The *2025 Start Strong for Community Preschools program guidelines* (the 2025 Guidelines) describe the program as follows:

The Start Strong for Community Preschools program provides funding to deliver affordable quality preschool education for 3-to- 5 -year-old children enrolled in eligible community and mobile preschools in NSW. The program value is approximately \$480 million to \$550 million.

The 2025 Start Strong for Community Preschools program operates on a calendar year from 1 January 2025 to 31 December 2025. Funding for eligible services is based on data entered in the Annual Preschool Census, including enrolment information...

The program's operational funding (Program Payment) supports the operating costs of eligible early childhood education services and enrolment of at least 600 hours per year or 15 hours per week... Evidence shows that this level of participation in a quality early childhood education program in the 2 years before school is associated with better outcomes for children.

The program's fee relief funding (Fee Relief Payment) provides community and mobile preschools with sustainable long-term funding to deliver at least 600 hours of low, or no cost preschool to eligible children...

Start Strong promotes universal access and priority of access by providing:

- higher program funding rates for preschools which operate within the lower range of Socio-Economic Indexes for Areas (SEIFA) score of relative socio-economic disadvantage
- additional funding for children 3 years old and above from low-income families, children with an Aboriginal and Torres Strait Islander background, and children with disability or additional needs
- loadings for preschools that operate in outer regional, remote and very remote areas
- further loadings and subsidies as outlined in Appendix 1: Calculation and payment of funding
- up to \$4,347 per year in fee relief for 3- to 5-year-old children enrolled in community and mobile preschools reducing the cost of early childhood education for families.

[21] NSW Preschools must meet the following requirements to be an approved provider:

- be a not-for-profit, community-based preschool or mobile preschool service

- be an approved early childhood education and care service under the *Education and Care Services National Law Act 2010* (National Law) and *Education and Care Services National Regulations*
- deliver a quality early childhood education program by a qualified early childhood teacher in accordance with the requirements under the National Quality Framework, including using the Early Year Learning Framework,
- comply with the Early Childhood Outcomes Commissioned Programs – Funding Agreement – Terms and Conditions – 1 January 2025 to 31 December 202 (Terms and Conditions).

[22] Material provided by the NSW Government explained that in 2025, the base rate for funding ranged from \$5,284 to \$8,193 for children enrolled for 600 hours and that this was calculated by hours of enrolment and the service’s Socio-Economic Indexes for Areas (SEIFA).

[23] Additional loadings are applied based on need and are as follows:

- Aboriginal and Torres Strait Islander children; children from families with low incomes; children with disability or additional needs receive funding at the highest end of the range (\$8,193)
- Regional loadings (paid per child based on service location) are \$1,084 for outer regional areas and \$1,594 for remote and very remote areas
- English language assistance loading per child is \$513
- Service Safety Net (assists providers with the cost of delivering preschool in regional and remote areas by topping up funding to \$163,860 where enrolments fluctuate from year to year)

[24] Paragraphs 4.1 and 4.2 of the the 2025 Guidelines provide that the Program Payment and Fee Relief can be used to meet:

- **Salary and wages:** This covers payments made to employees by the service, including ongoing salaries and compensations for full-time, part-time, and casual staff.
- **Educational resources:** These are materials that aid and help improve teaching and learning. They can be physical items, digital resources, videos, materials related to the preschool environment, or contributions from the community. This may also include training or special days dedicated to Aboriginal and Torres Strait Islander cultural education.
- **Other operating costs:** These are expenses that go beyond staff salaries and educational resources. They can include rental and license costs, maintenance, upgrades to and cleaning of the facility, utility expenses, professional development, language or cultural programs, technology, software or associated training costs, accounting and audit expenses, other costs associated with improving or maintaining the service’s quality rating to Meeting or Exceeding the National Quality Standards, etc.

[25] The NSW Government submitted that the purpose of the Start Strong Program is to improve the quality and affordability of preschool education and to incentivise enrolment of up to 600 hours per year for eligible children. It is not designed or intended to meet the total

operating costs of preschool providers or to set wages and conditions of employment (directly or indirectly) for community preschool staff.¹² The NSW Government explained that it cannot provide information about how the Start Strong Program funding is costed or modelled as the first iteration of this program was under a previous government.¹³

[26] The NSW Government submitted that community preschool operators can access other sources of funding, for example, they can charge fees. The NSW Government submitted that the Start Strong Program guidelines permit above-CPI fee increases to meet reasonable increases in operating costs and that those guidelines do not affect the bargaining parties' ability to negotiate wage increases under the Proposed Agreement. The NSW Government submitted that any increase in fees directly attributable to an increase in wage costs under the Proposed Agreement would not affect a community preschool provider's eligibility for funding.

[27] The material before me as well as previous decisions of industrial tribunals in relation to preschool teachers indicate that the charging of fees to supplement funding income has been a long-standing practice of preschools. During the financial years from 2020 to 2022 inclusive, the Department relieved many parents from the obligation of paying fees initially through the COVID-19 Free Preschool Funding program which was replaced by the Start Strong Free Preschool program in 2022.¹⁴ I understand that this funding was provided during the COVID-19 pandemic period because many parents were not sending their children to preschool during this period and therefore were not paying fees. The Free Preschool programs enabled preschools to maintain the revenue required to operate for those children who continued to attend preschool during that period. From January 2023, the Start Strong Free Preschool program was replaced by Fee Relief which 'aims to reduce the cost of early childhood education and care to families in the form of fee pass-through'.

[28] Ms Laura Stevens provided a witness statement on behalf of CELA. Ms Stevens is the Director, Policy and Strategy of CELA. Ms Stevens used available data from the Australian Charities and Not for Profits Commission (ACNC) 2023 Annual Information Statement (AIS) data and Australian Children's Education and Care Quality Authority (ACECQA) National Quality Standard (NQS) time Series data to identify 394 ACNC records for NSW stand alone preschools.¹⁵

[29] Ms Stevens said that this data showed that on average 82.93% of service income was from government revenue which is consistent with the case studies provided by CELA which showed the following percentages of government funding provided:

- a. Byron Bay Preschool: 82.04% of revenue from government funding¹⁶
- b. Toormina Community Preschool: 92.36% of revenue from government funding¹⁷
- c. Gosford Preschool: 89.61% of revenue from government funding¹⁸
- d. Bundeena Maianbar Preschool: 88.80% of revenue from government funding¹⁹
- e. Name withheld: 88.98% of revenue from government funding.²⁰

[30] Ms Stevens said that her analysis of ACNC data from 394 preschools shows that reported employee expenses make up an average of 77.62% of total expenses, consistent with the case studies provide by CELA which showed the following proportion of labour costs to total operating costs:

- a. Byron Bay Preschool: 74.22% of operating costs are wages²¹
- b. Toormina Community Preschool: 79.39% of operating costs are wages²²
- c. Gosford Preschool: 86% of operating costs are wages²³
- d. Bundeena Maianbar Preschool: 84.01% of operating costs are wages²⁴
- e. Name withheld: 79.50% of operating costs are wages.²⁵

[31] Case studies provided by the IEU in relation to Clunes Preschool, Keiraville Preschool Bradbury Preschool and Merriwa Preschool also showed the vast majority of service income was from government revenue and most of this was spent on labour costs.

[32] Ms Stevens said that analysis of ACNC data showed if employee expenses were to increase by 15% to reach minimum long day care wages, 67% of services would be in deficit, and to increase to 23% to match NSW Government schools, 90% of services would be in deficit.

[33] In relation to a claim by NSW Government representatives that NSW preschools have sufficient reserves to pass on additional wage increases to staff, Ms Stevens said that an analysis of the ACNC data shows that this is not correct. Ms Stevens said that as NSW preschools are stand alone businesses, they are required to maintain a level of reserves to ensure solvency and that generally, 6-12 months of operating expenses is considered appropriate. 70% of services reported 1 year or less of reserves in the ACNC reporting period. Ms Stevens said that as stand-alone businesses, community preschools must also ensure that sufficient reserves for significant maintenance, emergency repairs and expansion of services are available. Ms Stevens said that further, reserves are a one-off pool of resources and are not appropriate sources to fund ongoing wages liabilities into perpetuity.²⁶

[34] Ms Stevens said that the NSW Government issued revised funding guidelines for community preschools for 2026 on 27 October 2025 (2026 Guidelines). The 2026 Guidelines include a change to the Fee Relief component of the total funding received by community preschools. There is now a two-tier level of funding receivable, depending on the location of a service. Services operating in SEIFA decile 1 or 2, and services operating in inner regional, outer regional, remote or very remote areas are eligible for the maximum rate of fee relief of \$4456 per child scaled for hours of attendance. All other services are eligible to receive \$3565 per child. In 2025 all services were eligible for a maximum payment of \$4374.²⁷

[35] Ms Stevens analysed ACECQA NQS time series data to identify the number of NSW community managed preschool services who match the new Fee Relief criteria. Ms Stevens said that this analysis shows that 212 NSW community preschools will receive a cut in Fee Relief funding from 2026. Ms Stevens said that adding both Program Payment funding and Fee Relief funding, services in regions eligible for maximum fee relief will see a total funding increase of between 2.76%-3.14%. Services operating in areas not eligible for maximum fee relief will see total funding reduced by between 4.46%-6.46%. Ms Stevens said that 35.6% of respondent employers will be impacted by these cuts to funding rates.²⁸

[36] Ms Stevens noted that the 2026 Guidelines state:

The program funds providers of community and mobile preschools to reduce fees, support quality uplift, incentivise increased enrolment and attendance, and drive improved outcomes for children

...

Funding is designed to support quality uplift in preschool education and drive outcomes for children aged 3-5 in the developmentally significant years before school. Funding objectives are closely linked with ensuring equitable access (my emphasis) for eligible children.²⁹

[37] Ms Stevens said that while the guidelines indicate that the NSW Government's objective in providing funding to services is to 'ensure equitable access', the data on service income and funding levels show that there is not equitable capacity for services to pay wages that address concerns regarding professional recognition and the attraction and retention of teachers and educators in the sector. Ms Stevens said an employer's capacity to offer above award wages is dependent on the location of the service, capacity to charge fees to families without impacting attendance, fundraising capacity, and exposure to natural disasters. Ms Stevens said that given that quality of early childhood education is fundamentally tied to the experience, qualifications and consistency of staffing levels, current funding arrangements do not support services to deliver this consistently.³⁰

[38] The NSW Government submitted that NSW Government funding through the Start Strong Program has increased by 106% since 2020. The bargaining representatives explained during the conferences that this has not resulted in a corresponding increase to their income as much of this funding is in relation to payment of fees which would otherwise be paid by parents.³¹

[39] The NSW Government explained that in the past two years (2023-24 and 2024-25), and in the upcoming budget (2025-26), an additional increase was provided for grant program funding to reflect wage increases. These adjustments were based on the increase in the national minimum wage by the Commission. This rate replaced Sydney CPI as the indexation rate for major grants programs, including community preschools.³²

[40] The NSW Government agrees that professional recognition and the attraction and retention of teachers and educators in the sector is a matter that is relevant to the quality of services.³³

[41] The NSW Government noted that the case studies all report employing above ratio staff and that these are local decisions, which the Government is not responsible for.³⁴ In response, Ms Stevens said that NSW preschools are required to comply with the National Law and the seven quality areas outlined in the NQS. The National Law sets out minimum child to staff ratios which must be maintained at all times. Currently in NSW these are 1:10 for children from 36 months and up to preschool age. Quality Area 2 of the NQS which provides for Children's Health and Safety and Quality Area 4 in relation to Staffing Arrangements set out the requirements services must meet in regards to staffing, including the obligation to provide adequate supervision. Section 165 of the National Law provides that it is an offence to inadequately supervise children, and penalties are attached to this offence.³⁵

[42] Ms Stevens said that ACECA guide to the National Quality Framework indicates that adequate supervision means children are, 'being supervised in all areas of the service, by being in sight and/or hearing of an educator at all times, including during toileting, sleep, rest and transition routines, and throughout children's use of digital devices'. Educators are also required to '[adjust] their levels of supervision depending on the area of the service and the skills, age

mix, dynamics and size of the group of children they are supervising.’ Ms Stevens said that as such, factors including the layout and design of buildings and play areas, as well as the number of children with additional needs, or behavioural concerns reasonably impacts the services staffing obligations, which impacts total labour costs.³⁶

[43] Clunes Preschool provided a case study on behalf of the IEU and provided further explanation about this issue as follows:

The numbers of children requiring additional support in the early years is growing. It’s not enough to just accept the enrolment of children with complex needs, but they also need to be adequately supported – this could be learning support, behavioural interventions, speech and language supports, physical modifications and supports, and family supports. This is complex and challenging work – staff require specialised skills and knowledge and a willingness to take on new challenges and learn new skills. It should be noted that the prescribed ratios in NSW do not allow for the level of attention and care that these children need.

Community preschools have a role to play in the early identification and referral of children who need additional support. In the private sector, a combination of high ratios, high staff turnover and casualisation, and lack of skill on the part of educators means that some children slip through the cracks and are not identified until starting school.

In some cases, centres reject or exclude these children from attending as they recognise that their staff lack capacity or the children themselves are seen as ‘unprofitable’ – the resources to support them exceeds the amount of funding received. For this reason, we often see greater numbers of children with disabilities in community-managed preschools.³⁷

History of pay rates for employees of NSW Preschools

EST Award

[44] The history of award regulation of NSW preschool teachers is comprehensively set out in the decision of the Full Bench in *Independent Education Union of Australia (2021 Teachers decision)*.³⁸ This decision concerned two applications made by the IEU. The first application was for an equal remuneration order pursuant to s.302 of the FW Act, to apply to early childhood teachers employed in long day care centres and preschools who are covered by the EST Award which was ultimately dismissed. The second application was made pursuant to s.158 of the FW Act, and sought to increase the minimum salaries for all teachers covered by the EST Award on work value grounds.

[45] In its decision the Full Bench observed that nearly all school teachers covered by the EST Award receive rates of pay and conditions of employment pursuant to collective agreements that are significantly more beneficial than those in the EST Award and that there is a low incidence of collective bargaining, in respect of early childhood teachers, particularly in the for-profit sector.³⁹ The Full Bench noted that it was not in contest that early childhood teachers earn less than government and Catholic systemic school teachers in NSW and that the EST Award rates constitute the actual wage rates (or close to) for the large majority of early childhood teachers.⁴⁰

[46] The Full Bench observed that teachers (whether in government schools, Catholic schools, independent schools, preschools or childcare) have traditionally been regulated by

State industrial relations systems, that federal award coverage is a relatively recent phenomenon and that the origin of the rates of pay in the EST Award may be traced back to the *Teachers (Victorian Government Schools Interim) Award 1993*.⁴¹

[47] The Full Bench then outlined the history of the *Teachers (Victorian Government Schools Interim) Award 1993* and the making of the *Victorian Independent Schools - Early Childhood Teachers - Award 2004* (ECT Award),⁴² and in particular the findings of Senior Deputy President Watson that the minimum rates proposed for the latter award fell within the range of rates for classifications for similarly qualified employees in the *Metal, Engineering and Associated Industries Award, 1998 Part I*.⁴³ The Full Bench concluded that these findings of Senior Deputy President Watson were not correct and that the ECT Award rates were not properly fixed as minimum rates of pay⁴⁴ in accordance with the following principles stated in the *ACT Child Care* decision:⁴⁵

1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA [minimum rates adjustment] process with particular reference to the current rates for the relevant classifications in the Metal Industry Award. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.
2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.
3. If the existing rates are too low they should be increased so that they are properly fixed minima.⁴⁶

[48] The Full Bench then considered a number of pre-FW Act decisions of the Industrial Relations Commission of NSW (NSW IRC) concerning the work value of teachers employed under State awards. Three of these decisions related to early childhood teachers. The first of these decisions was that of Justice Schmidt in *Teachers (Non-Government Pre Schools) (State) Award* issued on 14 December 2001 (2001 decision).

[49] The 2001 decision explained that the agreed position in 1970 was that teachers in preschools and long day care centres should be paid the same as those employed in schools. When the first award for these teachers was made by the NSW IRC by consent in 1970, rates for both preschool teachers and those employed in long day care centres were fixed at 80% of those of school teachers, with parity phased in over the period until 1974. That parity was reinstated from time to time over the following years, until 1990, where rates 4% higher than those paid to salaried teachers was agreed for teachers in long day care. This 4% margin was in recognition of long day care teachers not receiving school holidays. In 1999, there was a departure from the position of pay parity between early childhood and school teachers, resulting in the IEU making claims for pay increases for teachers employed in preschools and long day care centres. This departure appears to have arisen, as least in part, from a decision by the NSW Government to freeze the state funding of preschools, which had been in place since 1990.⁴⁷ The claim before Justice Schmidt sought to establish rates similar to those provided by awards applying to school teachers in NSW Government and some Catholic schools, with rates for teachers employed in long day care centres being 4% higher.⁴⁸

[50] The remedy ultimately granted by Justice Schmidt was for an initial pay increase of 5%, followed by five increases of 3% phased in at six monthly intervals. In relation to the work of directors, Justice Schmidt found that this had been affected by the changes identified to an even greater degree than teachers, and awarded an increase of 30% to the directors' allowance, to be phased in over six stages, each six months apart.⁴⁹

[51] The rates of pay for early childhood teachers were again the subject of proceedings before the NSW IRC in 2005-2006 which were ultimately resolved by agreement between the parties that a 13.5% payrise would be phased in over two years, paid in three equal instalments of 4.5% (the 2006 decision).⁵⁰

[52] The third decision concerned further applications by the NSW IEU for new awards to cover teachers in non-government preschools and long day care and to provide for substantial wage increases. The matter was heard by a Full Bench of the NSW IRC and its decision was delivered on 24 November 2009 (the 2009 decision). The NSW IEU's case, which was upheld by the Full Bench, had two aspects. First, the NSW IEU contended that wage increases should be granted on special case grounds because of the shortage of early childhood teachers. The second aspect of the NSW IEU's case was that wage increases were justified on the basis of changes in work value. In respect of the first matter, the Full Bench said:

[76] We find that a special case has been made out by the applicants for increases to rates of pay under the two Awards. There is a critical shortage of early childhood teachers that is almost certainly going to get worse as the Commonwealth's policy agenda on early childhood is implemented. As we have noted, without adequate intervention, a shortfall of at least 7000 early childhood education and care workers by 2013 is estimated.

[77] We are satisfied that the very large gap of up to 27 per cent between the pay of early childhood teachers in the non-government sector compared to the government sector, is a significant contributing factor to the teacher shortage. The gap is not justifiable on any test, especially when what is at stake in early childhood education. Ms Press noted in her evidence that the link between poor wages and conditions and the shortage had been identified in numerous reports over recent times. Her unchallenged evidence concluded:

Unless teachers in early childhood programmes achieve wages parity the early childhood sector will continue to be beset with teacher shortages. These shortages seriously erode the quality of children's care and education and undermine policies designed to improve children's educational outcomes.

[78] It was submitted for the respondents that the shortage of teachers could not be resolved by industrial means and that a political solution was required. A political solution is not likely to repair the pay gap. Significant extra funds have been made available by governments in relation to early childhood services. We deal with the detail of that funding later in this decision, but part of it is to enable centres to employ more teachers. The Commission may facilitate the application of that funding to employ more teachers by increasing current award rates of pay and, in doing so, assist in ameliorating a major disincentive to teachers being attracted into and retained in the early childhood sector.

[79] In our opinion, for the reasons we have explained the public interest would be best served by increasing rates of pay in the subject awards...⁵¹

[53] The Full Bench in the 2009 decision ultimately concluded that it would award three wage increases of 4 percent each, operative respectively from the date of the decision, 1 September 2010 and 1 September 2011. It also increased directors' and supervisors' allowances by 12 percent, in three instalments.⁵²

[54] The Full Bench in the *2021 Teachers decision* then compared the salaries outcome of the NSW IRC's comprehensive work value assessments of the work of early childhood teachers in the 2001, 2006 and 2009 decisions with the salaries in the EST Award at the time the EST Award took effect on 1 January 2010. It stated that the differential in these rates illustrated the difference, between award minimum rates which have been fixed on the basis of a proper work value assessment and those which have not.⁵³ The Full Bench noted that the awards made following the 2006 and 2009 decisions:

- had limited application after incorporated employers were moved into the federal system when the main amendments to the *Workplace Relations Act 1996* effected by the *Workplace Relations Amendment (Work Choices) Act 2005* commenced on 27 March 2006; and
- ceased to have any practical application on 1 January 2010 when the State of NSW transferred its industrial relations powers in the private sector to the Commonwealth pursuant to *Industrial Relations (Commonwealth Powers) Act 2009* (NSW).⁵⁴

[55] Consequently, NSW early childhood teachers lost the benefit of award minimum wages which had been the subject of a proper work value assessment.⁵⁵

[56] After reviewing the evidence before it, the Full Bench found that the exercise of professional skills and judgment, and the overall work value, involved in early childhood teaching in accordance with the Early Years Learning Framework and the National Quality Framework is the same or equivalent to that of school teachers.⁵⁶

[57] The Full Bench then turned to assess the degree to which the work of early childhood teachers has changed over time. The Full Bench concluded that an adjustment to the minimum rates of teachers covered by the EST Award was justified by the following work value reasons:

- (1) The rates for teachers under the EST Award and its federal predecessors have never been fixed on the basis of a proper assessment of the work value of teachers nor are they properly fixed minimum rates. In particular, the rates of pay do not recognise that teachers are degree-qualified professionals and accordingly do not have an appropriate relativity with the Metal Industry classification structure.
- (2) There have been substantial changes in the nature of the work of teachers and the level of their skills and responsibility since 1996. This constitutes a significant net addition to their work value which has not been taken into account in the rates of pay in the EST Award.⁵⁷

[58] The Full Bench determined that for the purpose of properly fixing rates of pay under the EST Award, the key classification would be a Proficient Teacher who has a degree and has obtained registration (or, in the case of an early childhood teacher, if registration was not yet required in their jurisdiction, has met the requirements for registration as if they applied). The

Full Bench observed that a teacher at that level is fully qualified and capable of exercising the skills and discharging the responsibilities of the profession in an entirely unsupervised and autonomous way.⁵⁸ The Full Bench considered that the appropriate alignment of the Proficient Teacher classification would be with Level C1(a) in the Metal Industry classification structure.⁵⁹ and adopted a new classification structure based on the ‘Standards Based Remuneration Structure’ in the *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2020* (the award covering teachers in NSW Government schools at the relevant time) This resulted in the commencement salary of a Proficient Teacher increasing from \$54,956⁶⁰ to \$65,085⁶¹ in the EST Award. At that time, the rate of pay for an entry level Proficient Teacher employed by either a NSW Government school or a Catholic systemic school was \$87,157.⁶²

CS Award

[59] The CS Award has recently been considered in the *Gender-based undervaluation – priority awards review (Gender-based undervaluation case)*⁶³ case. In that case, the Expert Panel reiterated the findings of the Full Bench in *Application by United Workers’ Union, Australian Education Union and Independent Education Union of Australia*⁶⁴ that as at September 2023, the ECEC sector was award-reliant to a significant degree, with pay rates for 57.8 per cent of employees in the ECEC sector derived from the applicable award (the CS Award or the EST Award), and pay rates for a further 20.9 per cent were between 0.01 per cent and 10 per cent above the award rate of pay.⁶⁵ The Expert Panel went on to state:

However, this position has since altered as a result of two intersecting developments. The first is that, on 27 September 2023, the Commission granted an authorisation for supported bargaining in the ECEC sector. This ultimately led to the Commission approving the *Early Childhood Education and Care Multi Employer Agreement 2024-2026* (ECEC Agreement) on 10 December 2024, with the ECEC Agreement taking effect from 17 December 2024. The second is that, pursuant to the *Wage Justice for Early Childhood Education and Care Workers (Special Account) Act 2024* (Cth) (Wage Justice Act), which commenced on 11 December 2024, the Commonwealth has established the Early Childhood Education and Care Worker Retention Payment (Retention Payment) scheme. Under this scheme, employers may access the funding mechanism constituted by the Retention Payment, provided they have entered into a ‘compliant workplace instrument’ prescribing minimum wage rates at least 10 per cent above the CS Award rates for CSEs (or the EST Award in the case of ECEC teachers) from 2 December 2024 and a further 5 per cent from 1 December 2025. It is also a condition of the Retention Payment that employers adhere to the ‘Fee Constraint Condition’, the effect of which is to cap the increases in fees which providers can charge. The ECEC Agreement is designed to be a compliant workplace instrument for the purpose of the Retention Payment scheme, and consequently provides for the wage increases required by the scheme. The ECEC Agreement is the primary mechanism giving effect to the Retention Payment scheme, and as at 15 April 2025, applies to 289 employers and approximately 40,000 employees in the sector. It is anticipated that a substantial number of additional employers will, in the near future, seek to be covered by the ECEC Agreement by way of applications under s 216AA of the FW Act. The effect of this will be to substantially reduce award reliance in the ECEC sector.⁶⁶

[60] It should be noted that the ECEC Agreement covers Commonwealth funded long day care centres and does not cover ‘a stand alone preschool or kindergarten’. Similarly, NSW Preschools are not eligible to receive the Retention Payment.

[61] The Expert Panel explained the origins of the rates of pay in the CS Award and how the work of Children's Services Employees (CSEs) had been subject to gender-based undervaluation as follows:

[543] As we have earlier explained, the current minimum wage rates in the CS Award find their immediate origin in the ACT Child Care decision. That decision identified the skills to which we have referred, but was unable to reflect their proper value in the minimum wages set because of the constraints imposed by the C10 Metals Framework Alignment Approach which, as articulated in the Paid Rates Review decision, required alignment with the masculinised C10 benchmark and prevented an ab initio assessment of work value. That approach was founded on assumptions about gender and has resulted in a situation whereby the historically female-dominated work of CSEs is undervalued in respect of the award minimum wage rates that apply to them. We find therefore that CSEs under the CS Award have been subject to gender-based undervaluation.

[544] In addition, although the case in this respect was not fully articulated, there are strong grounds to consider that there have been changes in the work value of CSEs since the ACT Child Care decision — in particular, changes to the educational role of CSEs as a result of the introduction of the NQF and the EYLF. In the *Teachers decision*,⁶⁷ these changes were found to have led to increases in the work value of ECEC teachers, and there is evidence before us that there have been analogous developments in the work of Educators.⁶⁸

[62] The Expert Panel then considered whether the findings it made justified the wage rates for CSEs being set by reference to an alignment with the Caring Skills benchmark rate.⁶⁹

[63] The Caring Skills benchmark rate has its genesis in the Stage 3 Aged Care decision. In that case, the Expert Panel identified the correct approach to rectify gender-based undervaluation of the work of aged care workers as being to select a benchmark pay rate for a key classification and then construct a new and uniform pay structure on the basis of that benchmark rate. In respect of personal care workers, aged care home care workers and assistants in nursing, the Expert Panel selected the key classification as being that applicable to Certificate III-qualified employees.⁷⁰ The Expert Panel determined that this benchmark rate, referred to as the Caring Skills benchmark rate, should be the minimum weekly wage rate applicable to Certificate III-qualified social and community services (SACS) employees established by the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS Award) operating in conjunction with the equal remuneration order (ERO) arising from the SACS Equal Remuneration decisions.⁷¹

[64] The Expert Panel concluded that CSEs at the Certificate III-qualified level perform work that is of equal or comparable value to personal care workers in aged care and disability support workers under the SCHADS Award with an equivalent qualification and that, accordingly, an alignment with the Caring Skills benchmark rate is justified.⁷²

[65] The Expert Panel expressed the provisional view that there should be a new, simplified classification structure which is substantially based on the qualifications framework for the ECEC sector, with the rates of pay structured by reference to the Caring Skills benchmark rate.⁷³

[66] In a subsequent decision, the Expert Panel confirmed its provisional view in relation to rates of pay and the new classification structure, resulting in increases to CE Award rates

ranging from 9.4 to 27.8 per cent⁷⁴ with many increases being one or two per cent over or under the 23 per cent increase for a Certificate III qualified CSE.⁷⁵

[67] After considering submissions of the parties, the Expert Panel decided that the increases should be phased in as follows:

- 5% increase from 1 March 2026
- 5% increase from 30 June 2026 (if applicable)
- 5% increase from 30 June 2027 (if applicable)
- 5% increase from 30 June 2028 (if applicable)
- Any remaining increase from 30 June 2028⁷⁶

[68] The Expert Panel observed that employees of employers in receipt of the Retention Payment would have already received the first three increases as employers were required to pay them at least 15 per cent above Award rates from 1 December 2025.⁷⁷

Comparable rates of pay

[69] I have noted above that the *2021 Teachers decision* resulted in the commencement salary of a Proficient Teacher increasing from \$54,956 to \$65,085 in the EST Award and at that time, the rate of pay for an entry level Proficient Teacher employed by either a NSW Government school or a Catholic systemic school was \$87,157. On 8 October 2023, the gap between earnings of teachers paid pursuant to the EST Award and teachers working in NSW Government schools became even greater. On that date, the rates of pay for teachers working in NSW Government schools increased significantly. The entry level Proficient Teacher rate for a teacher working in a NSW Government school increased from \$91,413 to 95,317. At that time, the commencement salary of a Proficient Teacher paid in accordance with the EST Award was \$73,793. A further recent development relevant to this matter is the commitment by the NSW Government to open 100 preschools, whose employees will received the same pay and conditions as employees of NSW Government schools.

[70] Rates of pay for Catholic systemic schools in NSW and ACT are provided in the *NSW and ACT Catholic Systemic Schools Enterprise Agreement 2025* and mirror those of teachers working in NSW Government schools. Currently the commencement salary of a Proficient Teacher under the EST Award is \$79,240 compared to \$101,122 paid to the equivalent role at either a NSW Government school or a Catholic systemic school.

[71] Rates of pay for teachers employed by long day care centres have been increasing since December 2024 when both the ECEC Agreement and Retention Payment commenced. The effect of these developments and the approval of many single enterprise agreements referencing the Retention Payment has resulted in a majority of teachers employed by long day care centres being paid an additional an annual salary of at least \$83,371.55.

[72] Rates of pay for educators employed by long day care centres have also been increasing since December 2024 arising from the commencement of both the ECEC Agreement and Retention Payment. Educators are set to receive further increases as a result of the *Gender-based undervaluation –priority awards review* increases to CS Award rates. The increases to

the CS Award will apply to educators employed by NSW Preschools who will be entitled to receive an initial pay increase of 5% from 1 March 2026.

[73] When all of these developments are considered, it is understandable why the bargaining parties wish to make a multi-enterprise agreement which provides pay increases for employees in NSW preschools. Given the significant difference between pay rates of NSW preschool employees (which are largely award dependent) on the one hand, and the payrates of teachers in schools, NSW Government preschools, and of employees in many long day care centres on the other, it is difficult to see how NSW preschools can continue to attract and retain the skilled and qualified employees necessary to run their services and programs.

Pay rates in the Proposed Agreement

[74] The bargaining parties intend to bridge this gap by largely replicating the outcome of the *Gender-based undervaluation case* in the rates sought in the Proposed Agreement. As noted above, rates in the CS Award will increase from 9.4 to 27.8 per cent with many increases being one or two per cent over or under the 23 per cent increase for a Certificate III qualified CSE. The Proposed Agreement seeks to rationalise this range of increases by providing that all rates of pay will increase by a uniform 20 per cent over the life of the Proposed Agreement. This proposed increase applies to the actual rate of pay received by an employee, so if the employee is receiving an award rate of pay and is eligible to receive an increase of more than 20 per cent in accordance with the *Gender-based undervaluation case*, it will be necessary for the full quantum of the increase to be paid to the employee. The proposed 20 per cent pay increase will be paid in addition to Annual Wage Review increases and will be phased in by four equal instalments of five per cent payable on 1 March 2026, 1 July 2026, 1 December 2027 and 1 July 2027.

[75] I note that the Proposed Agreement provides that the first increase of 5% plus the 3.5% Annual Wage Review increase will be payable on 1 March 2026. The application of the 3.5% Annual Wage Review increase appears to be incorrect as the ‘Award rate 1 July 2025’ column in the Proposed Agreement already reflects rates that incorporate the 3.5% increase awarded in the 2025 Annual Wage Review decision. It is possible that the 3.5% increase has been proposed for employees who are receiving above award pay and who may not have received a payrise in 2025. This is a matter which requires further consideration by the parties.

[76] While the *Gender-based undervaluation case* has resulted in increases to the rates under the CS Award, it did not consider the rates in the EST Award. Notwithstanding this, the majority of teachers (as well as CS Award covered employees) in long day care centres are receiving pay of at least 15 per cent above the relevant award because of the Retention Payment and ECEC Agreement (or a relevant single enterprise agreement). Consequently, the current relativities between teaching and non-teaching staff in long day care centres are currently maintained (but may diverge after the initial 15 per cent pay increase under the CE Award is phased in).

[77] In its submissions, the IEU made a number of contentions about the pay rates of teachers under the EST Award including that in setting the rates in the *2021 Teachers decision*, the Commission did not appear to have regard to ‘caring skills’ and that the rates commence from a starting point which continues to be set in a way ‘in which the assumption of an alignment

with the masculinized C10 rate at the Certificate III level' is 'play[ing] a major role'.⁷⁸ In this regard the Expert Panel in the *Gender-based undervaluation case* observed that in the *2021 Teachers decision*:

The Full Bench did not make a specific finding of gender-based undervaluation since the applicant's case was primarily advanced as one concerned with work value change occurring from an identified datum point.

[78] The resolution of any issues in relation to the appropriateness of the rates in the EST Award are beyond the scope of the Commission's role in facilitating bargaining for the Proposed Agreement. However, as a matter of logic, given that the current relativities between most teaching and non-teaching staff in long day care centres are currently maintained, it makes sense for the bargaining parties to make a multi-enterprise agreement covering NSW Preschools which both gives effect to the *Gender-based undervaluation case* and maintains the current relativities between teaching and non-teaching staff in community preschools.

[79] The table below shows the difference between the current rates of pay for Graduate and Proficient Teachers:

- Paid pursuant to the EST Award;
- Employed in long day care whose employer received the Retention Grant; and
- employed by NSW Public School and Systemic Catholic Schools.

[80] I have chosen to present payrates for teachers in this way rather than other preschool employees as the payrates for teachers are more readily comparable to equivalent roles in other sectors.

[81] The final column below shows the rates that would apply in the Proposed Agreement once they are fully implemented by 1 July 2027. I have recalculated the rates in the Proposed Agreement to reflect the proposed 20 per cent increase and excluded the proposed 3.5 per cent annual wage review increase as it is already reflected in the EST Award rates.

| NSW Public School and systemic Catholic School Classifications | Equivalent Modern Award Classifications | EST Award rates of pay (from 1 July 2025) | ECEC Multi – enterprise agreement/Retention grant rates (15% above EST Award from 1 December 2025) | NSW Public School and systemic Catholic School rates of pay (from 9 October 2025) | MEA proposed rates of pay (20% fully implemented by 1 July 2027) |
|--|---|---|--|---|--|
| Level 1 | Level 1 | 72,497 | 83,371.55 | 90,177 | 88,120.56 |
| Level 2 | Level 1 | 72,497 | 83,371.55 | 96,980 | 88,120.56 |
| Level 3 | Level 2 | 79,240 | 91,126.00 | 101,122 | 96,316.72 |
| Level 4 | Level 2 | 79,240 | 91,126.00 | 105,263 | 96,316.72 |
| Level 5 | Level 2 | 79,240 | 91,126.00 | 112,594 | 96,316.72 |
| Level 6 | Level 3 | 86,264 | 99,203.60 | 121,064 | 104,854.4 |
| Level 7 | Level 3 | 86,264 | 99,203.60 | 129,536 | 104,854.4 |
| Level 7 | Level 3 | 86,264 | 99,203.60 | 129,536 | 104,854.4 |
| Level 7 | Level 4 | 93,289 | 107,282.35 | 129,536 | 113,393.4 |

[82] The table below indicates the percentage difference between the current EST Award rates of pay and the NSW Government and systemic Catholic schools rates of pay.

| NSW Public School and systemic Catholic School Classifications | Equivalent EST Classifications | EST Award rates of pay (from 1 July 2025) | % difference between EST Award and NSW Public School and systemic Catholic School rates of pay | NSW Public School and systemic Catholic School rates of pay (from 9 October 2025) |
|--|--------------------------------|---|--|---|
| Level 1 | Level 1 | 72,497 | 24% | 90,177 |
| Level 2 | Level 1 | 72,497 | 34% | 96,980 |
| Level 3 | Level 2 | 79,240 | 28% | 101,122 |
| Level 4 | Level 2 | 79,240 | 33% | 105,263 |
| Level 5 | Level 2 | 79,240 | 42% | 112,594 |
| Level 6 | Level 3 | 86,264 | 40% | 121,064 |
| Level 7 | Level 3 | 86,264 | 50% | 129,536 |
| Level 7 | Level 3 | 86,264 | 50% | 129,536 |
| Level 7 | Level 4 | 93,289 | 39% | 129,536 |

[83] The table below shows rates payable to employees covered by the Proposed Agreement pursuant to the phasing in schedule. It should be noted that the rates will ‘catch-up’ with the pay of teachers employed in long day care centres whose employer received the Retention Grant by 1 December 2026.

| EST Award Classification | Rate of Pay as at 1 July 2025 | Proposed pay rate 1 March 2026 (5%) | Proposed pay rate 1 July 2026 (5%) | Proposed pay rate 1 December 2026 (5%) | Proposed pay rate 1 July 2027 (5%) |
|--------------------------|-------------------------------|-------------------------------------|------------------------------------|--|------------------------------------|
| Level 1 | \$72,497.00 | \$76,121.85 | \$79,927.94 | \$83,924.34 | \$88,120.56 |
| Level 2 ⁷⁹ | \$79,240.00 | \$83,202.00 | \$87,362.10 | \$91,730.21 | \$96,316.72 |
| Level 3 | \$86,264.00 | \$90,577.20 | \$95,106.06 | \$99,861.36 | \$104,854.43 |
| Level 4 | \$93,289.00 | \$97,953.45 | \$102,851.12 | \$107,993.68 | \$113,393.36 |

Proposed recommendation and findings

[84] The bargaining parties submitted that the Commission should make the following findings based on the material before it:

1. NSW Preschools are reliant on NSW Government funding for the public provision of preschool services.

2. Labor costs represent the vast majority of standard operating costs of NSW community preschools, being around 80% of total costs.
3. The current funding model, ‘start strong for community preschools’, does not provide adequate funding for dedicated preschools services to address the systemic concerns regarding professional recognition and the attraction and retention of teachers and educators in the sector which are not accounted for in the current (or any proposed) funding model for NSW Preschools.
4. Rates of pay in comparable sectors including long day care and public (government run) preschools are substantially higher. Wages in these sectors are approximately between 15 – 25% higher than current award rates. This also includes the recent (and continuing) transformative pay up lift in the education and care sector (school settings, long day care and the gender equity review).
5. Outside of government funding NSW community preschools can only generate revenue through fees to families. Without additional funding, the impact of addressing wages gaps in the long day care and government preschool sector and implementing the gender undervaluation decision will result in increased out of pocket costs for families.
6. The current funding model does not provide any certainty as to any future rates of funding a service may receive which is a significant barrier for services to budget for future wage increases.
7. The current funding model has led to the following serious concerns in regard to prevailing pay and conditions in NSW Preschools:
 - a. low rates of pay prevail across the sector,
 - b. the differential between rates of remuneration and conditions provided in school settings (public and independent), is substantial and a cause of systemic problems in attracting and retaining teachers and educators in the sector,
 - c. rates of remuneration and conditions provided in the NSW Preschool sector are unreasonable having regard to prevailing pay and conditions in the education/early childhood education and care sector,
 - d. they are a cause of inequity including systemic gender undervaluation of the work being performed, and
 - e. rates of remuneration and conditions in the NSW Preschool sector threaten the ability of NSW Preschools to continue to provide high quality education and care and threaten their ongoing viability.
8. There is substantial in principle agreement between the bargaining representatives on the terms of an enterprise agreement which will go a significant way to addressing the matters listed above.

9. However, final agreement is not able to be reached due to funding constraints, and absent a commitment from the NSW Government to increase funding in line with the proposed wage increases it is unlikely that bargaining will conclude successfully.⁸⁰

[85] The bargaining parties requested that I make a recommendation in the following terms, having regard to these proposed findings:

- (1) That any agreement made between the parties contain a pay structure the same or similar to that in the draft agreement, as it provides rates of pay that are fair and reasonable in that they:
 - a. work to address the gap between current preschool rates of pay and the prevailing rates of pay in comparable sectors for teachers,
 - b. provide for the application of the outcomes of the Commission's own-motion gender undervaluation proceedings in respect of staff covered by the CS Award,
 - c. preserve the current relativity between staff covered by CS Award and staff covered by the EST Award, in circumstances where the qualified teacher rate has been set only by reference to the masculinized metal trades C1(a) rate, and
 - d. will assist in addressing attraction and retention issues in the NSW community preschool sector.
- (2) In order to ensure that an agreement containing fair and reasonable rates is able to be made, the NSW Government should commit to an increase in Start Strong funding to reflect the increase in wages provided by the draft agreement.⁸¹

Position of NSW Government

[86] The NSW Government made written and oral submissions in relation to the recommendation sought by the bargaining parties.

[87] The NSW Government submitted that the Commission should not make the findings sought by the bargaining representatives concerning the sufficiency of NSW Government funding under the Start Strong Program to the extent that such findings would suggest either:

- that Start Strong Program funding is intended or designed to fully offset the operating costs of relevant preschool providers; or
- that an increase in Start Strong Program funding is the only means by which the wage increases set out in the Proposed Agreement may be achieved.

[88] The NSW Government opposed the Commission making findings that:

- community preschools are reliant on NSW Government funding,
- the funding model under the Start Strong Program is the cause of various identified concerns in the sector, and
- an increase in that funding is the only means by which those concerns can be addressed.

[89] The NSW Government submitted that the Commission should not make a recommendation to increase the Start Strong Program funding to reflect the proposed wage increase because it goes beyond the scope of the Commission's:

- powers to make recommendations under s 595(2)(b) of the FW Act; and
- remit in these proceedings.

Legislative Framework

[90] Section 246 permits the Commission to provide assistance to the bargaining representatives for a proposed multi-enterprise agreement. This assistance includes directing a person who is not an employer specified in the authorisation to attend a conference if the Commission is satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement that the participation of the person in bargaining is necessary for the agreement to be made. It provides:

246 FWC's assistance

Application of this section

- (1) This section applies if a supported bargaining authorisation is in operation in relation to a proposed multi-enterprise agreement.

FWC's assistance

- (2) The FWC may, on its own initiative, provide to the bargaining representatives for the agreement such assistance:
 - (a) that the FWC considers appropriate to facilitate bargaining for the agreement; and
 - (b) that the FWC could provide if it were dealing with a dispute.

Note: This section does not empower the FWC to arbitrate, because subsection 595(3) provides that the FWC may arbitrate only if expressly authorised to do so.

FWC may direct a person to attend a conference

- (3) Without limiting subsection (2), the FWC may provide assistance by directing a person who is not an employer specified in the authorisation to attend a conference at a specified time and place if the FWC is satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement that the participation of the person in bargaining is necessary for the agreement to be made.
- (4) Subsection (3) does not limit the FWC's powers under Subdivision B of Division 3 of Part 5-1.

[91] Section 246(4) makes plain that the Commission's power to direct a person who is not an employer to attend a conference under s.246(3) does not limit the Commission's powers under Subdivision B of Division 3 of Part 5-1 which are in relation to the conduct of matters before the Commission and provide for:

- Procedural and interim decisions at s.589
- Powers of the Commission to inform itself at s.590

- The Commission not being bound by rules of evidence and procedure at s.591
- Conferences at s.592
- Hearings at s.593
- Confidential evidence at s.594
- The Commission's power to deal with disputes at s.595

[92] Sections 590, 592 and 595 are relevant to the matter before me. Section 590 provides that the Commission may, except as provided by the FW Act, inform itself in relation to any matter before it in such manner as it considers appropriate including by requiring a person to attend the Commission or to provide copies of documents or records, or any other information to the Commission. Section 592 provides that for the purpose of performing a function or exercising a power of the Commission (other than a function or power under Part 2-6), the Commission may direct a person to attend a conference. At that conference, the Commission may mediate or conciliate or make a recommendation or express an opinion. Similarly, s.595 provides that the Commission may deal with a dispute (other than by arbitration) as it considers appropriate, including by mediation or conciliation or by making a recommendation or expressing an opinion.

[93] In *Health Services Union & Australian Education Union*,⁸² a Full Bench of the Commission made the following observations in relation to s.246(3):

...lack of financial capacity to bargain appears to be one of the reasons why the Commission has the power under s.246(3) to compel a person who is not an employer to attend a conference. Before exercising such power, the Commission must be satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement that the participation of the person in bargaining is necessary for the agreement to be made. In other words, a pre-condition of the exercise of the power is that the Commission must be satisfied that the employers and employees covered by the supported bargaining authorisation will not be able to reach agreement without the participation of the person in bargaining.⁸³

[94] In that case, the Full Bench also accepted that where an employer's operation is dependent upon a fixed funding model provided by the Government either directly to the employer or to its clients, that this is an obstacle to bargaining and that this is contemplated by the Commission's powers under s.246(3).⁸⁴

Consideration

Does the Commission have the power to make the recommendation sought?

[95] The NSW Government submitted that the power of the Commission to make recommendations under s.595(2)(b), which is an aspect of the Commission's general powers to 'deal with a dispute', is necessarily limited by reference to the subject-matter, scope and purpose of the relevant provisions of the FW Act and is therefore limited to the making of recommendations directed to the parties to a dispute.

[96] The NSW Government referred me to the decision of the Commission in *Construction, Forestry, Mining and Energy Union v Clermont Coal Mine Pty Ltd*⁸⁵ in which the power to make recommendations was described in the following terms:

A recommendation is properly characterised as an advisory function where an independent third party sets forth an option which the parties to the dispute may or may not find to be a mutually acceptable settlement of the dispute between them. A recommendation will not be binding in its terms and will depend on the consent of the parties for its adoption.⁸⁶

[97] The NSW Government relied upon this decision to contend that the essence of a recommendation is that a tribunal, not yet seized of compulsory arbitration powers, will recommend to the parties to a dispute a course of action that the tribunal considers will, if adopted by the parties, either resolve or assist in resolving the dispute between them.

[98] The NSW Government submitted that it is not part of the Commission's dispute resolution function to make recommendations to third parties and that the supported bargaining framework makes clear that the role of the Commission is to support bargaining between the parties.

[99] I note that the decision in *Construction, Forestry, Mining and Energy Union v Clermont Coal Mine Pty Ltd* 'concerns the provisions of the [FW Act] in relation to the Commission's power to deal with disputes, as provided by ss 595, 738 and 739 and the terms of cl 4 of the Agreement'.⁸⁷ As this matter dealt with a dispute brought under an enterprise agreement between an employer and certain employees, it is unsurprising that it refers to a recommendation as applying to the 'parties to the dispute'. In this context there are no other persons who the recommendation could logically have applied to.

[100] In my view, this decision is not authority for the proposition that a recommendation made pursuant to the Commission's power to provide assistance to the bargaining representatives pursuant to s.246(2) can only apply to those bargaining representatives. The Commission's power to provide assistance in this context must be viewed against the objects of Division 9 of the FW Act as contained in s.241 as follows:

- (a) to assist and encourage employees and their employers who require support to bargain, and to make an enterprise agreement that meets their needs; and
- (b) to address constraints on the ability of those employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and
- (c) to enable the Commission to provide assistance to those employees and their employers to facilitate bargaining for enterprise agreements.

[101] The nature of the assistance which the Commission is permitted to provide to the bargaining representatives is that which the Commission considers 'appropriate' and which it could provide if dealing with a dispute. According to s.246(3), this assistance may involve requiring a person who is not an employer to attend a conference if the Commission is satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement that the '*participation of the person in bargaining is necessary* for the agreement to be made'. [emphasis added].

[102] The words used in ss.246(2) and (3) explicitly provide for ‘participation’ in bargaining at a conference by a person who is not an employer so that an enterprise agreement can be made. There is nothing in the text of ss.592(4) or 595(2) considering the words themselves read in their context and having regard to their purpose which limits the Commission’s power to make recommendations which apply to specific persons. In this respect, ss.592(4) and 595(2) do not specify that a recommendation can only apply to parties to a dispute or bargaining representatives, nor do these provisions expressly prohibit a recommendation from applying to a person who is required to attend a conference under s.246(3). Further, having formed the prerequisite view that participation of the person in bargaining is necessary for the agreement to be made, there would be little utility in the Commission requiring a person to attend a conference if the Commission was constrained in exercising the full suite of dispute resolution powers available to it with respect to that person.

[103] For these reasons, I find that the Commission is empowered to make the recommendation sought under ss.246(2), 592(4) and 595(2).

Does the proposed recommendation go beyond the remit of the Commission?

[104] The NSW Government accepts that the Commission’s remit includes determining what will constitute fair and reasonable conditions of employment for national system employees. However, the NSW Government submits that proposed Recommendation 2, which concerns the allocation of funds within the NSW Government budget, necessarily impacts matters beyond the Commission’s scope. The NSW Government submitted that for the State to increase expenditure in one budget area (including the Start Strong Program), the State would need to either deprive another budget area of funding or increase the State’s debt. The NSW Government submitted that the allocation of funds within the State’s budget involves broad balancing of competing public interests. The NSW Government submitted that this exercise is political in nature, and not within the remit of courts or tribunals.

[105] The material before the Commission shows that most of the revenue received by community preschools is provided by the NSW Government through the Start Strong Program and that about 80 per cent of that income is used to fund staffing costs. This is consistent with the 2001 decision in which Justice Schmidt observed that labour costs accounted for a large part of operating ECEC services⁸⁸ and the 2009 decision which referred to evidence that staffing costs can represent up to 85% of overall costs in the not-for-profit sector.⁸⁹

[106] It appears to me that while the decision of the NSW Government to provide most of the funding relied upon by community preschools may be correctly described as political in nature, once it has committed to provide that funding, it must ensure that the funding is adequate for the recipient to adhere to the funding conditions. These conditions include the requirement that a community preschool ‘deliver a quality early childhood education program by a qualified early childhood teacher in accordance with the requirements under the National Quality Framework, including using the Early Year Learning Framework’. To meet this requirement, it is necessary for a community preschool to have the financial resources to employ sufficient qualified staff which is likely to become increasingly difficult as long as long day care centres and schools provide teachers much higher pay. In this regard, it was recognised in the 2009 decision that the very large gap of up to 27 per cent between the pay of early childhood teachers in the non-government sector compared to the government sector, was a significant contributing

factor to the teacher shortage and that the gap was not justifiable on any test, especially having regard to what is at stake in early childhood education.⁹⁰ The Full Bench in that case observed that a political solution is not likely to repair the pay gap⁹¹ and that significant extra funds had been made available by governments in relation to early childhood services and part of it was to enable centres to employ more teachers.⁹² The Full Bench described its role in increasing current award rates of pay as ‘facilitat[ing] the application of that funding...and, in doing so, assist[ing] in ameliorating a major disincentive to teachers being attracted into and retained in the early childhood sector’.⁹³ In other words, the Full Bench regarded it as entirely appropriate to make a decision which would inevitably result in NSW Government funding being specifically diverted to fund wage increases to employees of preschools.

[107] Similarly, I do not regard a recommendation of this Commission which suggests that the NSW Government take action in respect of funding appropriate rates of pay for community preschool employees as being political in nature. The actions of the NSW Government in increasing the funding it provides to community preschools annually in accordance with the Annual Wage Review is an acknowledgement that the majority of funding that it provides to community preschools is in respect of employees’ pay as there is no other reason for it to provide such increases. It is therefore important that the NSW Government is made aware by the Commission that the pay issues that the Proposed Agreement seeks to address are ones which have been raised on behalf of preschool employees with industrial tribunals on successive occasions for at least 25 years. This will ensure that the NSW Government can consider the role that funding may play in both exacerbating and addressing these issues and take the necessary steps to support the bargaining representatives to make the Proposed Agreement and to give effect to the *Gender-based undervaluation case*.

Should the Commission make the recommendation sought?

[108] Some of the findings proposed by the bargaining parties appear to me to be uncontroversial and potentially self-evident. Other findings are unlikely to be available in the absence of a close examination by the Commission of the financial position of each of the employers covered by the authorisation and in circumstances where the NSW Government opposes the Commission making some of these findings and there was no contradictor with respect to most of the evidentiary material and submissions by the bargaining parties.

[109] The findings which I regard as uncontroversial and available for me to make, based on the material before me and the findings of the 2001 decision, 2009 decision and the 2021 *Teachers decision* are:

1. NSW preschools are reliant on NSW Government funding for the public provision of preschool services.
2. Labor costs represent the vast majority of standard operating costs of NSW community preschools, being around 80% of total costs.
3. Rates of pay in comparable sectors including long day care and public (government run) preschools are substantially higher.

4. Outside of government funding NSW community preschools can only generate revenue through fees to families. Without additional funding, the impact of addressing wages gaps between community preschools and the long day care and government preschool sector and implementing the *Gender-based undervaluation case* will result in increased out of pocket costs for families.

[110] Alarmingly, the issues raised by the bargaining parties in this matter have been a recurring problem according to the award history set out in the *2021 Teachers decision* since at least 1990 leading to the 2001, 2006 and 2009 decisions in the NSW IRC and more recently in the *2021 Teachers decision* and the *Gender-based undervaluation case*.

[111] Both the 2009 decision and the *2021 Teachers decision* refer to the significant gap between the pay of early childhood teachers and school teachers. The Full Bench in the 2009 decision expressed the view that unless salary levels are increased, teachers will not be attracted to work in preschools and attempts to achieve an exponential improvement in childhood education standards will fail. The Full Bench in the 2009 decision said that ‘it is not a fair and reasonable state of affairs, nor in the public interest, to have preschool teachers being paid 21 to 27 per cent less in salary’ however that is precisely what is occurring on a much more significant scale now, 17 years later. This is matter which clearly needs to be addressed urgently and decisively. In my view, the Proposed Agreement does just that by providing rates of pay that are fair and reasonable in that they:

- a. work towards address the gap between current preschool rates of pay and the prevailing rates of pay in comparable sectors for teachers,
- b. facilitate the application of the outcomes of the *Gender-based undervaluation case* in respect of staff covered by the CS Award,
- c. preserve the current relativity between staff covered by CS Award and staff covered by the EST Award, and
- d. will assist in addressing attraction and retention issues in the NSW community preschool sector.

[112] The parties may wish to consider the date of timing of the final pay increase in the Proposed Agreement in light of the phase in arrangements for the increases to the CS Award pursuant to the *Gender-based undervaluation case*.

[113] In relation to the role of the NSW Government in making the Proposed Agreement, I note that there are references to funding and fees throughout 2001 and 2009 decision and the *2021 Teachers decision*. In the 2001 decision, Justice Schmidt said that wage increases, whether agreed or awarded by the Commission, were likely to be reflected in fee increases for parents, unless increased funding flowed from Governments or other operating costs can be reduced, (which seemed unlikely on the evidence).⁹⁴ In determining pay increases, the 2009 decision referred to government funding to incentivise the employment of more teachers being unavailable until 2011 as a consideration which ‘recommends a more conservative approach than what might otherwise prevail’.⁹⁵

[114] In a subsequent decision⁹⁶ concerning the implementation the *2021 Teachers decision*, the Full Bench referred to a submission by Community Connections Solutions Australia (CCSA) that it supported a proposed operative date of 1 January 2022 because the NSW

Government had included additional funding in its latest Budget by creating the Start Strong Free Preschool program, which will provide approximately \$4,000 per enrolment per year in additional funding to each community preschool that opts-in to the program from 1 January 2022, leaving not-for-profit community preschools in a sound financial position to meet the additional wages cost without needing to pass the increased fees to families, as preschool in NSW will be free for services participating in the new program.⁹⁷ The Full Bench took this submission into account in determining that the variation to the EST Award to give effect to the *2021 Teachers decision* should have an operative date of 1 January 2022, and that there should be no phasing-in of the increases.⁹⁸

[115] To suggest as the NSW Government does in this case, that significant pay increases can be met by NSW preschools by simply increasing fees ignores successive decisions of industrial tribunals spanning 25 years which gave significant weight to the availability of government funding in determining both the quantum and timing of pay rises for preschool employees. Although it may be the case that individual preschools, especially those attended by children from affluent families may be able to meet the cost of pay rises by increasing fees, this will not be the case for many preschools, especially those who service low-income families. The data provided by CELA indicates that a significant proportion of preschools may not be able to comply with the *Gender-based undervaluation case* increases to the CS Award unless the NSW Government increases their funding which will inevitably affect the viability of those services and their capacity to deliver affordable quality preschool education.

Conclusion and Recommendations

[116] I am satisfied that in providing the majority of funding required by NSW preschools to operate, the NSW Government exercises such a degree of control over the terms and conditions of the employees who will be covered by the Proposed Agreement that the participation of the NSW Government in bargaining is necessary for the Proposed Agreement to be made. I am also satisfied that making the Proposed Agreement would improve the rates of pay of a female dominated workforce, which would be consistent with that part of the object of the FW Act in s.3(a) concerned with the promotion of gender equality.

[117] In the circumstances I make the following Recommendation:

1. That the NSW Government take all necessary action, including reviewing and increasing funding to NSW preschools to:
 - a. give effect to the *Gender-based undervaluation case* with respect to the CS Award; and
 - b. ensure that the Proposed Agreement can be made; and
2. That the bargaining representatives make the Proposed Agreement subject to the NSW Government agreeing to implement this Recommendation.



DEPUTY PRESIDENT

Appearances:

Mr L. *Saunders*, Counsel for the IEU
Mr J. *Johnson*, Industrial Officer for the UWU
Ms L. *Stevens*, Director of Policy and Strategy for CELA
Mr B. *Madden*, Counsel for the State of New South Wales

Hearing details:

2025
24 November
In person, Sydney

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¹ Witness Statement of Laura Stevens dated 11 November 2025 (Stevens Statement) [7], Digital Hearing Book (DHB) 404

² *Ibid*, [9].

³ [2024] FWC 2583 [47], DHB 404

⁴ *Application by UWU, AEU and IEU* [2023] FWC 176, [55]; *Australian Municipal, Administrative, Clerical and Services Union v Australian Capital Territory Council of Social Service Inc T/A ACTCOSS and Others* [2024] FWC 2036, [59]-[60]; *Australian Municipal, Administrative, Clerical and Services Union v Inner Melbourne Community Legal Inc T/A Inner Melbourne Community Legal, Young People's Legal Rights Centre Inc T/A Youthlaw* [2024] FWC 2491, [40]; *Health Services Union & Australian Education Union* [2025] FWC 131, [315]

⁵ *Application by UWU, AEU and IEU* [2023] FWC 176, [56]; *Australian Municipal, Administrative, Clerical and Services Union v Australian Capital Territory Council of Social Service Inc T/A ACTCOSS and Others* [2024] FWC 2036, [61]; *Health Services Union & Australian Education Union* [2025] FWC 131, [315]

⁶ *Australian Municipal, Administrative, Clerical and Services Union v Australian Capital Territory Council of Social Service Inc T/A ACTCOSS and Others* [2024] FWC 2036, [62]; *Australian Municipal, Administrative, Clerical and Services Union v Inner Melbourne Community Legal Inc T/A Inner Melbourne Community Legal, Young People's Legal Rights Centre Inc T/A Youthlaw* [2024] FWC 2491, [43]; *Health Services Union & Australian Education Union* [2025] FWC 131, [315]

⁷ *Health Services Union & Australian Education Union* [2025] FWC 131, [316]

⁸ DHB 388

⁹ DHB 391

¹⁰ *Application by UWU, AEU and IEU* [2023] FWCFB 176, [51]

¹¹ Witness Statement of Carol Matthews dated 26 August 2024 [27]-[29], Decision [41]

¹² DHB 1154

¹³ DHB 393

¹⁴ DHB 389

¹⁵ DHB 485

¹⁶ DHB 350

¹⁷ DHB 357

¹⁸ DHB 363

¹⁹ DHB 371

²⁰ DHB 377

²¹ DHB 351

²² DHB 358

²³ DHB 363

²⁴ DHB 371

²⁵ DHB 377

²⁶ DHB 408

²⁷ Stevens Statement [36], DHB 408

²⁸ Ibid [37], DHB 408-409

²⁹ Ibid [38], DHB 409

³⁰ Ibid [39], DHB 409

³¹ Statement of Michael Aird dated 11 November 2025 [37], DHB 117

³² DHB 399

³³ DHB [383]

³⁴ Letter from the NSW Department of Education to the FWC dated 19 August 2025 [6a], DHB 382

³⁵ Stevens Statement [19]-[21], DHB 406

³⁶ Stevens Statement [22]-[23], DHB 406-407

³⁷ DHB 144

³⁸ [2021] FWCFB 2051

³⁹ Ibid, [661]

⁴⁰ Ibid, [96]

⁴¹ Ibid, [540]

⁴² Ibid, [540]-[554]

⁴³ Ibid, [554]

⁴⁴ Ibid, [555]

⁴⁵ *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* [2005] AIRC 28, PR954938

⁴⁶ Ibid [560]

⁴⁷ Ibid [572]

⁴⁸ Ibid, [565]

⁴⁹ Ibid, [573]

⁵⁰ Ibid, [575]

⁵¹ Ibid, [576]

⁵² Ibid, [581]

⁵³ Ibid, [583]

⁵⁴ Ibid, [584]

⁵⁵ Ibid

⁵⁶ Ibid, [629]

⁵⁷ Ibid, [645]

⁵⁸ Ibid, [653]

⁵⁹ Ibid, [654]

⁶⁰ Ibid, [68]; [71]

⁶¹ Ibid, [657]

⁶² Ibid, [97]; [99]

⁶³ [2025] FWCFB 74

⁶⁴ [2023] FWCFB 176

⁶⁵ Ibid, [47]

⁶⁶ [2025] FWCFB 74, [488]

⁶⁷ *Independent Education Union of Australia* [2021] FWCFB 2051

⁶⁸ [2025] FWCFB 74, [543]-[544]

⁶⁹ Ibid, [547]

⁷⁰ Ibid, [61]

⁷¹ [62]

⁷² [551]

⁷³ [557]

⁷⁴ Ibid, [3]

⁷⁵ Ibid, [20]

⁷⁶ Ibid, [23]

⁷⁷ Ibid, [21]

⁷⁸ Footnote

⁷⁹ Entry level for Proficient Teacher

⁸⁰ DHB 1144-1145

⁸¹ DHB 1146

⁸² [2025] FWCFB 131

⁸³ Ibid, [279]

⁸⁴ Ibid, [282]

⁸⁵ [2015] FWC 2023, Undisturbed on appeal, in *Clermont Coal Pty Ltd v Construction, Forestry, Mining and Energy Union*

[2015] FWCFB 3332

⁸⁶ [2015] FWC 2023, [22]

⁸⁷ Ibid, [7]

⁸⁸ Ibid [572]

⁸⁹ NSWIRComm 198, [262]

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid [576]

⁹⁴ Ibid

⁹⁵ NSWIRComm 198, [264]

⁹⁶ [2021] FWCFB 6021

⁹⁷ Ibid, [14]

⁹⁸ Ibid, [19]