

Mr [REDACTED]
Person with Management or Control
Abacus 49 Pty Ltd
RE: Genius Gungahlin
Email: [REDACTED]

Dear Mr [REDACTED]

Decision to Suspend Service Approval

- 1) I am a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance.
- 2) The Authority is the regulator of education and care services in the ACT and has the responsibility of monitoring and enforcing compliance with the *Education and Care Services National Law (ACT)* (the *Law*), together with receiving and investigating complaints arising under the *Law*.
- 3) As you may be aware, the Authority recently issued you a Show cause Notice relating to a risk audit and quality assessment undertaken in November 2024 at Genius Gungahlin SE-40001554 (the Service) operated by Abacus 49 Pty Ltd PR-40015589 (the Provider).
- 4) The Authority is satisfied that the Provider has not complied with the provisions of the *Law* in this instance. Web addresses to the *Law* and the associated *Regulations* are provided for your convenience at the end of this Decision.

Facts

- 5) On 6 December 2024, the Authority sent the Provider a Show Cause Notice (the Notice), advising that the Authority had determined there was sufficient evidence to support a case to answer regarding suspected offences under the *Law*.
- 6) The Notice outlined the grounds for issue, relevant evidence supporting the suspected contraventions of the *Law*, and potential compliance actions, including suspension of service approval, being considered if the allegations were substantiated. Refer copy of Notice at Attachment A.
- 7) The Notice set out twelve allegations for the Provider's response regarding observations and findings of an Assessment and Rating visit undertaken on 4, 5 and 6 November 2024, and a risk audit undertaken on 26 November 2024. The Provider was afforded 30 days to respond to the Notice, in the interests of procedural fairness, and as required under section 71 of the *Law*.
- 8) On 19 and 20 December 2024, the Provider sought clarification regarding the Notice. Refer copy of email correspondence at Attachment B.

- 9) On 6 January 2025, the Provider's response to the Notice was received by the Authority. The response consisted of a response letter, copy of a six-month training plan, and a zipped folder containing 21 documents.
- 10) Within the zipped folder were attachments identifying the following:
- a) Summary of identified non-compliances and evidence list to support rectification;
 - b) Two copies of emails sent to team members on 11 November 2024;
 - c) Two photos of an inside egress of the service;
 - d) One photo of the display of evacuation procedures and map;
 - e) Seven photos of the nursery garden and toddler garden;
 - f) One photo of an excerpt of an opening checklist;
 - g) Copy of a Laundry Risk Assessment dated September 2024;
 - h) Copy of Visitor Log for 4 November 2024;
 - i) Four separate witness statements by [REDACTED] dated 8 November 2024; and
 - j) Copy of an estimate for cleaning by Ozzie Tech Pty Ltd dated 10 November 2024.

Refer copy of Provider's Response at Attachment C.

Law

- 11) Provisions of the *Law* and *Regulations* engaged by the matter, and as outlined via the Notice, can be referred to at Attachment D.

Obligations upon Regulatory Authority

- 12) The foundation for the Authority's obligations is the *Law*. Section 3 of the *Law* sets out objectives and guiding principles. Relevant to this decision is the objective at section 3(2)(a), namely: "*to ensure the safety, health and wellbeing of children attending education and care services*".
- 13) The guiding principles of the National Quality Framework at sections 3(3)(a) and (f) of the *Law* have specific application in this instance, being:
- (a) that the rights and best interests of the child are paramount; ...*
 - (f) that best practice is expected in the provision of education and care services.*
- 14) Section 260 of the *Law* sets out the functions of the Regulatory Authority, which includes:
- (c) to monitor and enforce compliance with this law;*
 - (d) to receive and investigate complaints arising under this law.*
- 15) The *Law* works to protect a particularly vulnerable group in our society – children – when they are in the care of people other than their parents or guardians. The *Law* authorises providers and services to participate in a regulated environment and requires those participants to comply with the *Law*.

- 16) A key objective of the *Law* is to protect children in the context of education and care services. The Authority looks to exercise its powers to emphasise and require best practice, as the *Law* requires, which is also inherently in the best interests of children.
- 17) The *Law* is predominantly a protective *Law* and the exercise of disciplinary powers in this type of regulatory context is recognised by Courts as not being punitive: *New South Wales Bar Association v Evatt* (1968) 117 CLR 177.

Reasons and Decision

- 18) The Authority has considered all evidence gathered via regulatory functions, the show cause process, inclusive of the Provider's response to the Notice, the Provider's compliance history, the compliance history of the services operated by the Provider, and the objectives and guiding principles of the *Law*.
- 19) The Authority is satisfied on the balance of probabilities, all allegations are proven, therefore substantiating five contraventions of section 167(1) of the *Law*, and breaches of *Regulation* 75(a), 76, 77(1), 79(1)(b)(ii), 97, 103(1), 105, 106(2), 155 and 170(1).
- 20) The Authority is not satisfied that the Provider's response to the Notice mitigates or disproves the credibility of the evidence put to the Provider by way of the Notice.
- 21) The Provider's response does not expressly deny or concede the allegations as specified in the Notice, however, appeared to explain the circumstances and advised of actions taken by the Provider to rectify matters of non-compliance put to them.
- 22) The Provider did not contest the occurrence of the non-compliances observed by Authorised Officers between 4 and 6 November 2024 and 26 November 2024, as outlined in the Notice.
- 23) In relation to allegations one through six, relating to Authorised Officers observations during the Assessment and Rating process, the Authority is satisfied, on the balance of probabilities, that the Provider did not ensure required compliance was being met between 4 and 6 November 2024 as detailed by the allegations.
- 24) The Authority notes that the Provider was advised on 20 December 2024, that it received an assessment and rating status of Significant Improvement Required, which was not contested by the Provider.
- 25) In relation to allegations seven through twelve, relating to Authorised Officers observations during the Risk Audit process, the Authority is satisfied, on the balance of probabilities, that the Provider did not ensure required compliance was being met on 26 November 2024 as detailed by the allegations.
- 26) Regarding Allegations one, two, three, seven and eight, a Provider's obligation under section 167 of the *Law* is positively and strongly framed – the Provider must ensure that every

reasonable precaution to be taken to protect children from harm and hazard likely to cause injury or illness.

- 27) The Authority is satisfied that, by not always complying with the minimum requirements of the *Regulations* when children are being educated and cared for by the Service, the Provider has failed to meet compliance with section 167 of the *Law* in these instances.
- 28) The Authority notes that a previous audit, undertaken at the Service on 5 August 2024, found similar non-compliances, specifically relating to section 167(1) of the *Law* and *Regulations* 103, 75, 105, 106(2), 155. This audit resulted in a compliance notice being issued to the Provider on 17 September 2024.
- 29) Additionally, it is noted that the Provider was unable to satisfy the requirements of the compliance notice within the stipulated timeframe of 14 days and was subsequently afforded an additional opportunity to comply by the Authority.
- 30) Considering the previous compliance history, along with the findings of regulatory visits to the Service during November 2024, the Authority is satisfied that the above substantiated offences support that the Provider is not complying with the conditions of a service approval held, as required by section 51(8) of the *Law*.
- 31) A service approval is granted subject to the condition that the education and care service is operated in a way that –
 - (a) Ensures the safety, health and wellbeing of the children being educated and cared for by the service; and
 - (b) Meets the educational and developmental needs of the children being educated and cared for by the service.
- 32) The findings of both the Assessment and Rating process, and the Compliance and Risk audit process satisfies the Authority that the Provider's governance and oversight responsibilities were insufficient to have identified any of these failings prior to the matters being raised by the Authority.
- 33) The Authority is satisfied that the Provider's response to the Notice did not contain sufficient evidence to demonstrate that the Provider was ensuring the ongoing safety of the environment that children were being educated and cared in.
- 34) The Authority is satisfied that the Provider was not ensuring educator practice was monitored or mentored effectively. The Provider is responsible to ensure not only children's safety, but also educator awareness, understanding and implementation of practice relating to the provision of education, care and interactions with children was occurring at all times, consistent with the expectations of the *Law* and *Regulations*.
- 35) People and entities that choose to participate in regulated activities have a legal responsibility and an obligation to accept the consequences of that responsibility. In this case, as an

approved provider, you chose and consented to participating in the education and care of children and have a responsibility to comply with the standard of care under the *Law*.

- 36) Considering all the evidence obtained, the level of seriousness of the contraventions, the Provider's response in its entirety, and previous compliance history of the Provider, the Authority has decided that suspension of the Service's approval is appropriate and in the best interests of children based on grounds outlined under section 70(a) and (c) of the *Law*.
- 37) The Authority is empowered to suspend a service approval under section 72 of the *Law*. Refer relevant provisions of the *Law* relating to service approval suspensions at Attachment E.
- 38) As required pursuant to section 74 of the *Law*, the Service Approval Suspension Notice is at Attachment F to this Decision. The suspension of the service approval takes effect 14 days after the date of this decision.
- 39) The Authority has determined that the timeframe for the suspension will be 14 days from time of effect.
- 40) The Authority determines the length of time determined for suspension to be appropriate to allow the Provider to put into place action plans for ensuring compliance moving forward, undertake a review of current educator practices and implement staff training, review the safety and appropriateness of service premises and resources, and make decisions regarding how the Service's approval will be maintained after this timeframe.

Review Rights

- 41) A decision to suspend a service approval under section 72 of the *Law* is a **reviewable decision** as defined in Section 192(b)(iii) of the *Law*.
- 42) Pursuant to section 193 of the *Law*, a person who is the subject of a reviewable decision for external review may apply to the relevant tribunal or court for a review of the decision. An application must be made, to the relevant tribunal or court, within 30 days after the day on which the applicant is notified of the decision that is to be reviewed.

Legislation

- 43) The *Law* applies to you as an approved provider and any service you operate.
The National *Law* is applied in the ACT by the *Education and Care Services National Law (ACT) Act 2011* <http://www.legislation.act.gov.au/a/2011-42/default.asp>.
- 44) The *National Law* is made up of an Act and Regulations which can be viewed at:
 - <http://www.acecqa.gov.au/national-law>, and
 - <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
- 45) Should you have any questions about this decision please contact me via email at Jo.Williams@act.gov.au

Yours sincerely



Jo Williams
Director, Regulatory Operations
Education and Care Regulation and Support
Education Directorate

5 February 2025