

██████████
Person with Management or Control

Communities@Work

RE: Communities@Work Maribyrnong Out of School Hours Care

Email: ██████████@commsatwork.org

Dear ██████████

Decision to Issue Compliance Notice

1. I am a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance. 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*.
2. As you may be aware, the Authority has recently assessed a Notification of Incident (NOT-40893703) relating to Communities@Work Bonython Out of School Hours Care SE-00009645 (the Service) operated by Communities@Work PR-00005824 (the Provider). The information provided with NOT-40893707 included admission of offences under the *Law*.
3. The Authority is satisfied that the Provider was not complying with the provisions of the *Law* in respect to this matter. Web addresses to the *Law* and associated *Regulations* are provided for your convenience at the end of this Decision.

Facts

4. On 22 August 2023, the Authority received NOT-40893703 from the Provider. The Provider expressly advised of the following non-compliances occurring 22 August 2022:
 - From 7:30 – 8:30 the service did not have a responsible person, first qualified educator, or first aid trained educator in attendance.
 - From 8:15 – 8:30 the service did not meet the 11:1 staff to educator ratio, having 26 children in attendance with 2 educators.
 - Two children unaccounted for an approximate time of 10 minutes, not seen exiting and found by staff.

Refer copy of NOT-40893703 with attached documents at [Attachment A](#).

Law

5. The following provisions of the *Law* are relevant to the notification:

Section 162(1) of the Law - Offence to operate education and care service unless responsible person present

The Approved Provider of an education and care service must ensure that one of the following persons is present at all times that the service is educating and caring for children –

- a) The approved provider, if the approved provider is an individual or, in any other case, a person with management or control of an education and care service operated by the approved provider;
- b) A nominated supervisor of the service;
- c) A person in day-to-day charge of the service.

Penalty: \$5 000, in the case of an individual
\$25 000, in any other case.

Section 165(1) of the Law - Offence to inadequately supervise children

The Approved Provider of an education and care service must ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service.

Penalty: \$10 000, in the case of an individual
\$50 000, in any other case.

Section 167(1) of the Law - Offence relating to protection of children from harm and hazards

The approved provider of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and care for by the service from harm and from any hazard likely to cause injury.

Penalty: \$10 000, in the case of an individual
\$50 000, in any other case.

Section 169(1) of the Law – offence relating to staffing arrangements

An approved provider of an education and care service must ensure that, whenever children are being educated and cared for by the service, the relevant number of educators educating and caring for the children is no less than the number prescribed for this purpose.

Penalty: \$10 000, in the case of an individual
\$50 000, in any other case.

Section 169(2) of the Law – offence relating to staffing arrangements

An approved provider of an education and care service must ensure that each educator educating and caring for children for the service meets the qualification requirements relevant to the educator’s role as prescribed by the national regulations.

Penalty: \$10 000, in the case of an individual
\$50 000, in any other case.

Obligations upon Regulatory Authority, Providers and Services

6. 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”.

7. The guiding principles of the National Quality Framework at sections 3(3)(a) and (f) of the *Law* have particular 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.*
8. Section 260 of the *Law* sets out the functions of the Regulatory Authority, which include:
 - (c) *to monitor and enforce compliance with this law;*
 - (d) *to receive and investigate complaints arising under this law.*
9. 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*.
10. 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.
11. 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

12. The Authority has considered all the information supplied by the Provider and is satisfied that, on balance of probabilities, the Provider has contravened sections 162(1), 165(1), 167(1), s169(1) and (2) of the *Law*.
13. The Authority is satisfied that the Provider did not ensure that that sections 162(1), 169(1) and 169(2) of the *Law* were complied with at all times that children were being educated and cared for at the Service on the morning of 22 August 2023. This is supported by admissions of non-compliance, as advised of via NOT-40893703.
14. The Authority is satisfied that, on 22 August 2023, the Provider did not ensure that all children being educated and cared for by the Service were adequately always supervised, in contravention of section 165(1) of the *Law*. This is supported by two children being able to leave the Service unnoticed by educators, as advised of via NOT-40893703.
15. The Authority is further satisfied that, on balance of probabilities, the inadequate staffing arrangements in place have contributed to the supervision being inadequate, enabling the children to leave the Service unnoticed.

16. The Authority is satisfied that, by not ensuring compliant staffing arrangements and adequate supervision when the Service was educating and caring for children, the Provider has not ensured that every reasonable precaution was taken to protect children attending the Service, in contravention of 167(1) of the *Law*.
17. The Authority acknowledges that the Provider has voluntarily notified of the non-compliances and that there appears to have been no resultant adverse outcomes for children. However, those points do not detract from the high risk of significant harm to children on 22 August 2023. Potential consequences are catastrophic when children exit the service unseen, or a service operates without a first aid trained, first qualified educator and Responsible Person.
18. All children must always have adequate supervision by educators who are appropriately qualified. These supervision and qualification requirements are key precautions to protect children from harm and hazards. In relation to the operation of the Service, staffing and supervision levels need to meet the emotional, developmental, physical, and physiological needs of children always to ensure children are protected.
19. These staffing and supervision levels may need to be adapted to ensure that educators can react accordingly to any emerging or unexpected risks relating to the environment, children's needs and any emergency or injury to a child whilst still maintaining full accountability and safety of all children.
20. Considering all the evidence obtained, the level of seriousness of the contraventions and associated potential risks engaged, the length of time advised of that staffing arrangements were not meeting minimum requirements, two children were unaccounted for at the Service for a period, and the Service's previous compliance history, the Authority has decided that that issuing a Compliance Notice is appropriate and in the best interests of children.
21. The Authority is empowered to issue a compliance notice under section 177 of the *Law*:

Section 177 of the *Law*– Compliance notices

- (1) This section applies if the Regulatory Authority is satisfied that an education and care service is not complying with any provision of this *Law*.
- (2) The Regulatory Authority may give the approved provider a notice (a **compliance notice**) requiring the approved provider to take the steps specified in the notice to comply with that provision.
- (3) An approved provider must comply with a compliance notice under subsection (2) within the period (being not less than 14 days) specified in the notice.

Penalty: \$6 000, in the case of an individual
\$30 000, in any other case.

22. The Compliance Notice is Attachment B to this decision letter. You are required to take steps directed in the Notice to comply with the relevant provisions.
23. You must produce evidence of the steps required by **the times indicated for each step within the Notice at Attachment B.**

Review Rights

24. A decision to issue a compliance notice is a **reviewable decision** as defined in Section 190 of the *Law*. Under section 191 of the *Law*, you may apply for an internal review of this decision. Any application must be lodged within 14 days after you are notified of the decision (or, if not notified, within 14 days after becoming aware of the decision).
25. An application for review may be made by completing the form AR01 Application for Internal Review of Reviewable Decision which can be obtained from the ACECQA website.

Legislation

26. The Education and Care Services National 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>.
27. 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>
28. Should you have any questions about this Decision or Compliance Notice please contact me via email at janine.fairburn@act.gov.au.

Yours Sincerely



Janine Fairburn
Assistant Director
Children's Education and Care Assurance
Education and Care, Regulation and Support

8 September 2023