



Ms [REDACTED]
Person with Management or Control
FEL Child Care Centres 4 Pty Ltd
T/A Busy Bees at Oxley

Email: [REDACTED]

Dear Ms [REDACTED]

Decision to Issue Compliance Notice

1. As you are aware, Authorised Officers from the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance, recently investigated complaints concerning Busy Bees at Oxley SE-40004895 (the Service), operated by FEL Child Care Centres 4 Pty Ltd PR-40004076 (the Provider).
2. I am satisfied that the Provider did not comply with the provisions of the *Education and Care Services National Law Act (ACT)* (the Law) and the *Education and Care Services National Regulations* (the Regulations).
3. Web addresses for the Law and the Regulations are provided for your convenience at the end of this notice.

Background Facts

4. On 28 January 2020, the Authority received a direct complaint alleging inadequate staffing and an educator under the age of 18 years being left unsupervised with children.
5. In response to the complaint, the Authority carried out a risk audit at the Service on 29 January 2020 and obtained copies of prescribed records. Staffing levels could not be analysed utilising those records, as working directly with children (WDWC) records were not sufficiently complete or accurate.
6. On 7 February 2020, a further direct complaint was received concerning inadequate staffing.
7. The Authority determined to conduct an investigation into suspected offences of inadequate staffing and supervision, and failure to take reasonable precautions to protect children from harm and from hazard likely to cause injury.
8. The initial complaint was received again by the Authority on 19 February 2020.
9. Evidence gathered during the investigation included documentation from the Provider produced under section 215 of the Law and details in the initial complaint. Due to precautions initially implemented during the COVID-19 Pandemic, witness statements were not obtained.

10. On its face, such evidence supported the following allegations, related to staffing, supervision, protecting children from harm or hazard, and failure to take reasonable steps to ensure prescribed records (being WDWC records) were accurate:
 - a. It was alleged that, between 17 December 2019 and 31 January 2020, the Provider failed to ensure adequate staffing in contravention of section 169(1) of the *Law* (engaging an offence of inadequate supervision under section 165(1) and failure to take reasonable precautions to protect children from harm and hazards likely to cause injury under section 167(1) of the *Law* (Allegation One);
 - b. It was alleged that the Provider failed to ensure that any educator at the Service who is under 18 years of age does not work alone and is adequately supervised at all times between 15 and 31 January 2020 (inclusive), in contravention of Regulation 120 (Allegation Two);
 - c. It was alleged that the Provider has failed to take reasonable steps to ensure that WDWC records between 6 and 31 January 2020 (being a prescribed record) are accurate, in contravention of Regulation 177(2) (Allegation Three).
11. On 5 June 2020, a Show Cause Notice (Notice) was issued to the Provider by email. Refer Attachment A.
12. The Notice outlined the evidence obtained during the investigation and included provisions of the *Law* and *Regulations*. Attachments included analysis of child attendance records and WDWC records.
13. The Notice advised that the Authority was considering compliance action based on evidence that contraventions of the *Law* were identified during the Authority's investigation.
14. The two grounds related to staffing and supervision and inaccurate prescribed records.
15. The Provider's response to the Notice (Response) was received on 10 July 2020, within the permitted time, extended by agreement. Due to size, attachments to the Response have not been included with this Decision. Refer Attachment B.

Law and Regulations

Legislative Provisions Relevant to Allegation One

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 a 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.

Regulation 151 –Record of educators working directly with children

The approved provider of a centre-based service must keep a record of educators working directly with children that includes the following information -

- a) The name of each educator who works directly with children being educated and cared for by the service;
- b) The hours that each educator works directly with children being educated and cared for by the service.

Regulation 123(1) –Educator to child ratios – centre-based services

The minimum number of educators required to educate and care for children at a centre based service is to be calculated in accordance with the following ratios -

- a) For children from birth to 24 months of age – 1 educator to 4 children;
- b) For children over 24 months and less than 36 months of age – 1 educator to 5 children;
- c) For children aged 36 months of age or over (not including children over preschool age) – 1 educator to 11 children;
- d) For children over preschool age in a jurisdiction, the relevant ratio (if any) set out in Chapter 7 for that jurisdiction.

Regulation 122 –Educators must be working directly with children to be included in ratios

An educator cannot be included in calculating the educator to child ratio of a centre- based service unless the educator is working directly with children at the service.

Regulation 13 – Meaning of *working directly with children*

For the purpose of these Regulations a person is working directly with children at a given time if at that time the person –

- a) Is physically present with the children; and
- b) Is directly engaged in providing education and care to the children.

Legislative Provisions Relevant to Allegation Two

Regulation 120 – Educators who are under 18 to be supervised

The approved provider of a centre-based service must ensure that any educator at the service who is under 18 years of age –

- (a) does not work alone at the service; and
- (b) is adequately supervised at all times by an educator who has attained the age of 18 years.

Penalty: \$1000

Legislative Provisions Relevant to Allegation Three

Regulation 177 – Prescribed enrolment and other documents to be kept by approved provider

- (1) For the purposes of section 175(1) of the Law, the following documents are prescribed in relation to each education and care service operated by the approved provider-
 - (h) in the case of a centre-based service, a record of educators working directly with children as set out in relation 151;
- (2) The approved provider of the education and care service must take reasonable steps to ensure the documents referred to in subregulation (1) are accurate.

Penalty: \$2000

Consideration of Provider’s response to the Notice

Allegation One – Inadequate Staffing Arrangements – Substantiated

16. In relation to Allegation One (inadequate staffing numbers), the Notice referred to evidence consisting of an extract of the complaint, and analysis of prescribed documents obtained from the Provider under section 215 of the *Law*. Days were unable to be analysed at random, due to incomplete WDWC records. The five most complete days were analysed, being:

- a. Tuesday 7 January 2020;
- b. Wednesday 15 January 2020;
- c. Thursday 16 January 2020;
- d. Monday 20 January 2020;
- e. Friday 31 January 2020.

17. In the Response, the Provider denied Allegation One and, in summary:

- a. *Stated that all reasonable steps had been taken to ensure adequate staffing and supervision, including training, advice, policies, procedures and governance, with training, written communication and verbal reminders;*

22. Having considered the evidence relevant to Allegation One (including that contained in the Response) and the submissions of the Provider, I am satisfied that Allegation One has been substantiated on the balance of probabilities.
23. I am satisfied that the Provider contravened sections 165(1), 167(1) and 169(1) of the *Law* by failing to ensure adequate staffing at all times that children were educated and cared for at the Service between 17 December 2019 and 31 January 2020.
24. I am satisfied that the Provider contravened section 169(2) of the *Law* on each day between 4 and 8 November 2019 (inclusive).

Allegation Two – Failure to Supervise Educator under 18 – NOT Substantiated

25. In relation to Allegation Two, the Notice referred to the initial complaint and staff records for an educator aged 15 [REDACTED] who was working directly with children between 15 and 31 January 2020. The Authority stated that no witness statements were obtained due to Pandemic restrictions.
26. In its Response, the Provider stated that a 15-year-old educator was present, inducted and introduced to staff. I note that the email sent to staff on 8 January 2020 entitled “Next Week’s Roster” stated “please take some time to introduce yourself to [REDACTED] and [REDACTED] who will be commencing with us this week ...” and does not mention her age. However, in the email of 24 June 2020 to [REDACTED] the Service manager stated that she was sure all educators were aware of her age as she had specifically introduced her to every team member, and spoke more specifically with the Lead Educator in the Voyager room about [REDACTED] duties and her age.
27. Having considered the evidence and the lack of witness statements due to hygiene precautions, I am not satisfied that Allegation Two has been substantiated on the balance of probabilities.

Allegation Three – Inaccurate Prescribed Records – Substantiated

28. In relation to Allegation Three, the Notice referred to prescribed documents (being WDWC records) produced by the Provider under section 215 for the period 6 January 2020 to 31 January 2020. The bulk of the WDWC records produced were incomplete and inaccurate on their face, in that educators had not recorded all sign in and sign out times.
29. In the Response, the Provider *acknowledges that some of the documents required by the Authority under section 215 were not completed accurately in some areas* and refers to *inadequate completion of Working Directly with Children Checks* (meaning working directly with children records).
30. Having considered the evidence relevant to Allegation Three and the Provider’s concession in the Response, I am satisfied that Allegation Three has been substantiated on the balance of probabilities.
31. I am satisfied that Regulation 177(2) was contravened on numerous occasions between 6 and 31 January 2020.

Obligations upon Regulatory Authority

32. 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".

33. 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.

34. 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*.
35. 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.
36. 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.

Compliance History

37. In determining appropriate compliance action, I have considered the compliance history of the Service, which has had no compliance history prior to this Decision.

Decision

38. Considering the evidence obtained in the investigation, the Response to the Notice, the Service compliance history, and the objectives and guiding principles of the *Law*, I have determined that issuing a compliance notice would be appropriate and in the best interests of children.
39. The Authority is empowered to issue a compliance notice under section 177 of the *Law*

177 – 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.
40. The compliance notice is Attachment D to this Decision letter. You are required to take the steps directed in the Notice to comply with the relevant provisions.
41. You must produce evidence of the steps required by **the time indicated within the Notice at Attachment D.**
42. The Authority will also be maintaining its auditing of the Service to ensure compliance is appropriately monitored, so as to ensure the health, safety and wellbeing of children being educated and cared for.

Rights of Review

43. 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).
44. 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

45. The *Law* applies to you as a provider and any service you operate. The *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>.
46. The *Law* and Regulations can be viewed at:
<http://www.acecqa.gov.au/national-law>, and
<http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
47. Should you have any questions about this Decision or the Compliance Notice please contact Tanya Masterman on email tanya.masterman@act.gov.au.

Yours Sincerely



Jo Williams
A/g Director
Early Childhood Policy and Regulation
ACT Education Directorate

27 August 2020