

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

Email: [REDACTED]

Dear Ms [REDACTED]

Decision to Impose Condition on Service Approval

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) resulting in a Compliance Notice being issued.
2. I am satisfied that the Provider has not complied 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 27 August 2020, the Authority issued the Provider a Decision to issue a Compliance Notice as a result of findings of an investigation. Refer Decision and Compliance Notice at Attachment A. Other attachments to the Decision have not been included due to volume but can be provided on request.
5. On 17 September 2020, the Provider responded to the Compliance Notice (Response). Refer Response at Attachment B. Attachments to the Response have not been included due to volume but can be provided on request.
6. Working directly with children (WDWC) records provided within the Response included ratio checks, which were reviewed by the Authority and assessed as indicating inadequate supervision within rooms on multiple occasions on multiple days in multiple rooms. Refer records highlighting concern at Attachment C (pink highlighted = under ratio).
7. On 30 October 2020, due to the response being assessed by the Authority as insufficient with regards to evidence that the service was adequately staffed so as to ensure adequate supervision, the Authority determined to extend to the Provider an opportunity to submit further evidence (Authority’s Letter). Refer Authority’s Letter at Attachment D.
8. On 23 November 2020, the Provider submitted a supplementary response, and additional supportive evidence. Refer Supplementary Response at Attachment E. Attachments to the

Supplementary Response have not been included due to volume but can be provided on request.

Assessment of response to Compliance Notice

9. In assessing the Supplementary Response, Authority noted that the Provider has included further information about factors considered in determining adequate supervision but has not addressed the fact that records produced in the Response indicated inadequate supervision within rooms.
10. When quoting from the Authority's Letter, paragraphs (c) and (d) dealing with those matters, were omitted (see page 3 of the Supplementary Response) and it was stated:

Additionally, there is no mention of a plan for instances when cover is not available, either from within existing resources or agency resources and the Provider is unable to meet prescribed minimum staffing levels

The Approved Provider notes that the above given scenario describes a situation that we would not expect to occur often, if at all. However, if cover was not available by sourcing staff either internally; which would include us drawing upon ANY non-contact staff, as set out in section 4, step a eg Area Managers, suitably qualified admin staff, chefs etc or via agencies, we would have no option than to contact families to collect their children. We would not ever operate out of ratio.

11. The Authority notes that documentation produced via the Supplementary Response does not support a final step of reducing numbers in the event of inadequate staffing. Furthermore, the Provider did not address the specific point in the Authority's Letter about being under ratio within rooms, sometimes substantially, which can impact on supervision particularly in younger rooms.

Law and Regulations

Legislative Provisions Relevant to matter

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.

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 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 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.

12. A Provider’s obligation to ensure adequate staffing and supervision at all times when children are being educated and cared for is a strict one, rather than a matter of taking all reasonable steps.
13. Compliance with sections 165(1) and 169(1) of the *Law* is mandatory (“provider must ensure”). If a provider is unable to secure sufficient qualified educators for the number of children being educated and cared for, then the number of children must be reduced to a level where minimum prescribed ratios are met.
14. Having considered the Response and the Supplementary Response, I am satisfied that the Provider is not complying with sections 165(1), and 169(1) of the *Law*.
15. Furthermore, I am satisfied that the Response and Supplementary Response do not satisfy the requirements of the Compliance Notice, in contravention of section 177(3) of the *Law*.

Obligations upon Regulatory Authority

16. 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”.

17. 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.

18. 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*.
19. 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.
20. 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.

Decision

21. Considering the evidence obtained in the investigation, the Response and Supplementary Response and the objectives and guiding principles of the *Law*, I have determined that imposing a condition on the Service Approval would be appropriate and in the best interests of children.
22. The Authority is empowered to amend a service approval under section 55 of the *Law*

Section 55 of the *Law* – Amendment of service approval by Regulatory Authority

- (1) The Regulatory Authority may amend a service approval at any time without an application from the approved provider.
- (2) Without limiting subsection (1), an amendment may vary a condition of the service approval or impose a new condition on the service approval.
- (3) The Regulatory Authority must give written notice of the amendment to the approved provider.
- (4) An amendment under this section has effect:
 - (a) 14 days after the Regulatory Authority gives notice of the amendment under subsection (3); or

- (b) If another period is specified by the Regulatory Authority, at the end of that period.
- (5) The Regulatory Authority must amend a service approval to the extent that it relates to an associated children's service in accordance with any direction by the children's services regulator if that direction is given in accordance with the children's services law of this jurisdiction.

23. The Service Approval is hereby amended by imposing the following condition:

Condition 1: "For each day on which the Service is educating and caring for children, the Provider must roster two additional educators, who are in excess of the educators required to meet the minimum number prescribed by Regulation 123 including provision of cover for all breaks or other times an educator is not working directly with children as defined by Regulation 13."

Condition 2: "For each day on which the Service is educating and caring for children, the Provider must have, at minimum, two educators working directly with children in each room at all times to ensure adequate supervision."

Condition 3: "The Provider must give the Nominated Supervisor of the Service authority to approve engagement of replacement staff, to cover staff absences."

- 24. These conditions are to minimise the risk that unexpected absences do not continue to result in staffing levels and/or supervision being inadequate at the Service. The condition comes into effect fourteen (14) days from the date of receipt of this Decision.
- 25. An Amended Service Approval is Attachment F to this Decision.
- 26. The Authority will also be increasing its auditing of the Service to ensure compliance is appropriately monitored, to ensure the health, safety and wellbeing of children being educated and cared for.

Rights of Review

- 27. A decision to impose a condition on a service approval 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 these decisions or either of them. 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).
- 28. 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

- 29. 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>.

30. 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>

31. Should you have any questions about this Decision please contact me at email

clare.brookes@act.gov.au.

Yours Sincerely



Clare Brookes
Senior Director
Children's Education and Care Assurance
Early Childhood Policy and Regulation
ACT Education Directorate

15 December 2020