

**CITATION:** *Oz Family Day Care Pty Ltd v Department of Education and Training* [2017] QCAT 220

**PARTIES:** Oz Family Day Care Pty Ltd  
(Applicant)  
v  
Department of Education and Training  
(Respondent)

**APPLICATION NUMBER:** GAR031-17

**MATTER TYPE:** General administrative review matters

**HEARING DATE:** 4-5 April 2017

**HEARD AT:** Brisbane

**DECISION OF:** **Member Bridgman**

**DELIVERED ON:** 6 July 2017

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. The decision to cancel the service approval under the *Education and Care Services National Law (Queensland)* for Oz Family Day Care Pty Ltd is confirmed.**
- 2. The stay granted by the Tribunal on 15 February 2017 is ended.**
- 3. This order takes effect from 27 July 2017.**

**CATCHWORDS:** EDUCATION – Child Care – Service Approval under the *Education and Care Services National Law (Queensland) Act 2011 (Qld)* – external review – where applicant’s service approval to operate a family day care service cancelled – where service provider argued improvements since cancellation notice – where evidence did not support sufficient improvements

*Education and Care Services National Law (Queensland)*, s 3, s 4, s 5, s 7, s 70, s 77, s 78, s 79, s 179, s 192, s 193  
*Education and Care Services National Law (Queensland) Act 2011 (Qld)*, s 4, s 42, s 43, s 44  
*Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, s 20

*Briginshaw v Briginshaw* (1938) 60 CLR 336  
*Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60  
*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46  
*Long Life Family Daycare v Director General Education Directorate (Administrative Review)* [2016] ACAT 69  
*M v M* (1988) 166 CLR 69; [1988] HCA 68  
*Queensland Building and Construction Commission v Mudri* [2015] QCATA 78

## REPRESENTATIVES

**APPLICANT:** represented by Kimani Boden, solicitor

**RESPONDENT:** represented by Scott McLeod of counsel, instructed by Clayton Utz

## REASONS FOR DECISION

- [1] Oz Family Day Care Pty Ltd (**Oz FDC**) applied for external review of a decision to cancel the service approval authorising its family day care service in Queensland.
- [2] The decision was made on 2 February 2017 under s 79 of the *Education and Care Services National Law (Queensland)* (**National Law**) with effect from 17 February 2017. That decision was stayed on 15 February 2017 pending determination of this application.
- [3] Written and oral evidence was provided to the Tribunal by Mr Ahmed Farrah, Oz FDC's sole director,<sup>1</sup> Ms Lee King, Oz FDC's manager since 17 January 2017,<sup>2</sup> and an educator, Ms Noela Bashinga.<sup>3</sup>
- [4] The Respondent tendered its decision (**cancellation decision**) and supporting documentation.<sup>4</sup>

## Family day care

- [5] Family day care is a nationally regulated system for provision of care and education of children, from birth to 12 years, in providers' residences or at approved family day care venues. Individual providers are family day care

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<sup>1</sup> Statement of Mr Farrah dated 10 March 2017; Affidavit of Mr Farrah dated 15 February 2017 (filed in support of the stay application), exhibiting the response to the show cause notice as exhibit AF6 (4 January 2017).

<sup>2</sup> Statement of Ms King dated 10 March 2017.

<sup>3</sup> Statement of Ms Bashinga (undated), Exhibit 12.

<sup>4</sup> Document 1 in its bundle of documents comprised 49 pages. The entire bundle was Exhibit 2 and comprised some 1800 pages plus a large amount of material provided electronically.

**educators**, who, whether contractors or employees, provide the services under the monitoring and support of family day care **co-ordinators** employed or engaged by the service provider.<sup>5</sup>

- [6] The regulatory system operates by adoption of the National Law in each jurisdiction.<sup>6</sup> The **National Regulation** is also adopted as Queensland law.<sup>7</sup> These two bodies of law, including a **national quality standard**<sup>8</sup> and the prescribed rating system are the **national education and care services quality framework (the National Framework)**.<sup>9</sup>
- [7] A **regulatory authority** administers the laws in each jurisdiction, which, in Queensland, is the Director-General, Department of Education and Training as chief executive of the department administering the National Law.<sup>10</sup>
- [8] The regulatory authority acts through **authorised officers** with powers, among other things, to monitor compliance with the regulatory system and to rate and assess services against the national quality standard that governs a range of matters, including: educational programs and practice; children’s health and safety; the physical environment; staffing arrangements; and leadership and management of services.
- [9] By s 4, entities with functions under the National Law (including the regulatory authority, and by extension this Tribunal in an external review) must having regard to the objectives and guiding principles of the national education and care services quality framework set out in s 3.
- [10] One objective in s 3(2) is:
- “(a) to ensure the safety, health and wellbeing of children attending education and care services”.
- [11] The guiding principles in s 3(3) include:
- “(a) that the rights and best interests of the child are paramount”; and
- “(c) that the principles of equity, inclusion and diversity underlie this Law”.<sup>11</sup>

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<sup>5</sup> National Law, s 5.

<sup>6</sup> *Education and Care Services National Law Act 2010* (Vic), Sch., applying as a law of Queensland under s 4 of the *Education and Care Services National Law (Queensland) Act 2011* (Qld) (“**Queensland Act**”) and s 7 of the National Law.

<sup>7</sup> National Law, s 302 and Education and Care Services National Regulations (NSW).

<sup>8</sup> National Quality Standard for Early Childhood Education and Care and School Age Care Sch. 1 to the National Regulation.

<sup>9</sup> National Law, s 5.

<sup>10</sup> Queensland Act, ss 6(2)(a) and 14; *Acts Interpretation Act 1954*, s 33; *Administrative Arrangements Order (No. 3) 2016*, in force at the time of the cancellation decision.

<sup>11</sup> Other objectives and guiding principles provided by the National Law do not directly affect this external review. The Applicant relied in part on s 3(3)(c); the Department on ss 3(2)(a) and 3(3)(a).

[12] The paramountcy of the rights and best interests of the child are concepts found in other statutes affecting children and young people and the law will be informed from those sources too.<sup>12</sup>

### **Oz FDC**

[13] Oz FDC provides family day care services in Queensland and Victoria.

[14] Mr Farrah set up the business in Melbourne in 2012 and extended operations to Queensland, first under the Victorian service approval, and from March 2015 under the Queensland service approval. Mr Farrah now resides in Queensland and is involved full time in the Queensland service. The Melbourne service is managed by an employed manager.

[15] Oz FDC's Queensland operations at the time of hearing had three co-ordinators, Mr Farah, Ms King and Ms Polai. There were 15 contracted educators, each providing services at their residences for some 60 children in total. Oz FDC had engaged as many as 29 educators when the investigations leading to the cancellation took place, and at that time operated with just Ms Polai as co-ordinator.<sup>13</sup>

### **Notices and responses**

[16] Authorised officers of the regulatory authority undertook various site visits in September and October 2016 to Oz FDC's offices and educator residences, identifying matters of concern about the residences and the practices of Oz FDC, summarised as follows:

- a) On 10 October 2016, an authorised officer emailed Oz FDC requiring remediation of certain matters considered to be a risk to children at one educator's residence.
- b) Mr Farah responded the next day advising that the educator was no longer engaged by Oz FDC, and otherwise explaining the matters, and steps taken to remedy the issues.
- c) On 13 October 2016, an authorised officer issued an emergency action notice under s 179 of the National Law requiring Oz FDC to "remove or reduce" specified risks to children at two further residences by 15

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<sup>12</sup> e.g., *Adoption Act 2003* (Qld), s 229; *Child Protection Act 1999* (Qld), s 5A; *Domestic and Family Violence Protection Act 2012* (Qld), s 57(3); *Family Law Act 1975* (Cth), ss 60A, 65AA, 67L, 67V; *Public Guardian Act 2014* (Qld), s 7(1); *Working with Children (Risk Management and Screening) Act 2000* (Qld), ss 6(a), 360. In terms of the National Law, the only other decided substantive case is *Long Life Family Daycare v Director General Education Directorate (Administrative Review)* [2016] ACAT 69 (handed up by the Respondent) in which it was said: "[12] ... it is evidence that the providers of child care services are responsible for the health and welfare of the children in their care. This too, must require a high degree of probity, trustworthiness and compliance with the National Law."

<sup>13</sup> It was unclear when Mr Farrah relocated to Queensland and commenced as a co-ordinator. His evidence places him in Brisbane during the early investigations: see [16]d) of these reasons above.

October 2016. An emergency action notice may be issued where there is an immediate risk to the safety, health or wellbeing of children. Oz FDC took issue with whether the concerns constituted an “emergency”.

- d) On 13 October, 14 October and 17 October 2016, Mr Farrah responded by email and provided photographs as evidence of remediation.
- e) At a further inspection of one of the residences on 19 October 2016, the authorised officers observed (in their opinion) that certain risks had not been adequately removed or reduced.
- f) On 29 November 2016, the Department gave notice to Oz FDC under s 78(2) of the National Law calling on it to show cause why its service approval should not be cancelled.
- g) Oz FDC replied through its solicitor on 4 January 2017.<sup>14</sup>

[17] The Department, by notice dated 2 February 2017, cancelled Oz FDC’s service approval effective from midnight 17 February 2017. The stay application was granted by consent on 15 February 2017 pending final determination or other order and giving both parties leave to be legally represented.

### **QCAT’s Jurisdiction**

[18] External review of the cancellation decision is provided for by ss 192-193 of the National Law and ss 42-44 of the *Education and Care Services National Law (Queensland) Act 2011* (“**Queensland Act**”). This Tribunal has jurisdiction conferred on it by the Queensland Act, with power under s 193 of the National Law to: (a) confirm or (b) amend the regulatory authority’s decision; or (c) substitute another decision.

[19] Proceedings in the Tribunal are otherwise under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (“**QCAT Act**”), which charges the Tribunal in its review jurisdiction with producing the correct and preferable decision by way of a fresh hearing on the merits.<sup>15</sup> The parties agreed this was the Tribunal’s task in this review, and that the decision should be made on the material before the Tribunal at hearing, not the material before the decision maker at the time of cancellation.<sup>16</sup>

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<sup>14</sup> Exhibit AF6 to the Affidavit of Mr Farrah dated 4 January 2017, being letter of Starnet Legal signed by Mr Boden (the date on the document corrected at hearing by Mr Boden).

<sup>15</sup> S 20, and more generally the review jurisdiction exercised under division 3 part 1 chapter 2.

<sup>16</sup> See Explanatory Notes, *Queensland Civil and Administrative Tribunal Bill 2009* (Qld) 30-31, concerning what is now s 20; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68, (Bowen CJ and Deane J).

## Parties' positions summarised

[20] The Applicant acknowledges there were deficiencies in the past and does not take issue with the regulatory authority's processes in producing the show cause and cancellation notices.<sup>17</sup> Its case is that:

- a) cancellation is disproportionate to the shortcomings identified;
- b) the regulatory authority, instead of cancelling the approval, "*should have worked with the applicant to get [the service] up to scratch*";<sup>18</sup>
- c) since the show cause notice was issued, and specifically since 2 January 2017, it has changed fundamentally its practices and engagement of co-ordinators and educators, undertaken a "fresh start" of its business, installed and upgraded computerised management systems and moved to issue written copies of policies rather than relying on emailed versions. It submitted that it is compliant and unlikely to be in breach in the future.

[21] Oz FDC submitted that the correct and preferable decision is that the "service approval should be confirmed", subject possibly to conditions about enhanced supervision for a period (suggested to be 12 months) to assure the regulatory authority of the service provider's conformance and capacity.

[22] The Respondent's position is that the provider was in serious breach of its obligations such that it had systemic deficits. The Applicant's evidence did not show to the requisite standard that the deficits were sufficiently remediated. Therefore, it was said, the correct and preferable decision is to confirm the cancellation decision. The Respondent submitted that the Applicant bore the onus of showing to the Tribunal that its policies, practices and procedures had developed to the requisite standard to satisfy the Tribunal that future compliance was sufficiently certain. It asserts the Applicant has not met that onus.

## Regulatory authority's investigations and directions

[23] The cancellation notice sets out the background including attendance on Oz FDC's offices and the residences of a number of educators on dates commencing 29 September 2016 until 19 October 2016.<sup>19</sup> The notice then sets out certain particular matters arising from three inspections.

[24] While those particulars informed the show cause notice, it was uncontested that the three educators in question no longer provide services to Oz FDC. Accordingly, the details of these incidents are not directly relevant to the assessment here of whether the continued operation of the service constitutes an unacceptable risk to the safety, health and wellbeing of

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<sup>17</sup> Transcript 2-23.

<sup>18</sup> Final written submissions, [11].

<sup>19</sup> Exh 2, doc 1, [5]-[17].

children (the threshold in s 77(a)). However Oz FDC's responses<sup>20</sup> to those incidents and the changes made to its practices and systems are relevant to that question, a matter agreed by both Mr Boden<sup>21</sup> and Mr McLeod.<sup>22</sup>

### Findings by the department

[25] The show cause notice<sup>23</sup> stated a large number of proposed findings. Some arose from the inspections mentioned above. Others arose from inspections and observations of Oz FDC's office and procedures. Oz FDC responded to the show cause notice. The cancellation notice comments on the responses. Ultimately the cancellation notice made a large number of findings, confirming most, but not all, of the preliminary findings.<sup>24</sup> The cancellation notice states the following conclusions in support of cancellation, which are said to meet the threshold for cancellation in s 77(a) and (d) because of Oz FDC's failures to comply with the National Framework:<sup>25</sup>

#### unacceptable risk – s 77(a)

1. educators inadequately supervising children in their care;
2. improperly maintained educator registers;
3. inadequate health and hygiene practices;
4. premises not safe, clean and in good repair;
5. inadequate fencing;
6. inadequate toilet and hygiene facilities;
7. inadequate light and ventilation;
8. assistant educators not registered;
9. educators maintaining incomplete records of visitors;
10. failure to provide copies of policies and procedures;
11. failure to provide copies of prescribed enrolment and other documents;
12. educators being allowed to care for children when not having access to a working telephone;<sup>26</sup>

#### non-compliance with conditions: s 77(d)

13. failure to ensure the service is operated in a way to ensure safety, health and wellbeing of children as required by s 51(1)(a);
14. failure to comply with a condition that services be provided in Ipswich and Brisbane City Council areas – no less than 7 educators provided services outside those areas;<sup>27</sup>
15. failure to ensure educators keep prescribed documents available for inspection;

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<sup>20</sup> e.g., Exh 2, doc 12, pp. 86-87; photographic evidence Exh 2, document 35.a.i.x, p. 343-344; photographic evidence Exh 2, document 35.a.viii, p. 350, 351; Exh 2 Doc 56, pp.756-771; Exh 2 Docs 59, 60 and 61 pp. 787-868; email dated 17 October 2016, Exh 2, Doc 62, pp. 869-872; file note 20 October 2016.Exh 2, Doc64, p. 902; Exh 2, Doc 63, pp. 873-901; file note dated 19 October 2016, Exh 1, Doc 86, pp. 1032-1037.

<sup>21</sup> e.g., Transcript p. 2-19.

<sup>22</sup> e.g., Transcript 2-31 and following.

<sup>23</sup> Exh 2 Doc 3, pp. 58-85 with attachments pp. 86-1178.

<sup>24</sup> Notice of cancellation, Exh 2, Doc 1, [5]-[115], pp.2-45.

<sup>25</sup> Ibid, at [116].

<sup>26</sup> No further action proposed on this item: cancellation notice [78]-[80] and p. 46.

<sup>27</sup> The Department found this to be a technical breach only and did not intend to take action on this ground: cancellation notice, Exh p. 47.

16. failure to ensure adequate health and hygiene practices;
17. failure to ensure premises, furniture and equipment were safe, clean and in good repair;
18. failure to ensure adequacy of fencing;
19. failure to ensure adequacy of ventilation and light;
20. failure to ensure educators used only authorised educator assistants;
21. failure to ensure educators keep accurate records of visitors;
22. failure to ensure copies of policies and procedures were readily available;
23. failure to ensure educators keep prescribed enrolment and other documents;
24. failure to ensure educators could provide evidence of prescribed insurance;
25. failure to ensure educators had access to a working telephone.

[26] Items 14 to 23 were said to demonstrate a lack of supervision and support to educators by co-ordinators.

[27] In reaching the decision to cancel, the delegate stated:

I am of the view that the fact that a serious incident has not occurred in respect of a child in the care of the Service has been more a case of good fortune than good planning.

[28] Cancellation was justified by the delegate because of a high likelihood of ongoing poor governance; the historical breaches indicating a high likelihood of future breaches of consequence; a lack of appreciation by Oz FDC of its obligations; the failings being systemic and not limited to particular individuals; and a lack of insight and understanding sufficient to minimise the risks.

### **Grounds for cancellation etc**

[29] The National Law sets out grounds for cancellation of a service approval in s 77. The power to cancel is discretionary. The stated grounds for cancellation relevant to this matter are those in s 77(a) and (d):<sup>28</sup>

A Regulatory authority may cancel a service approval if—

- (a) the Regulatory authority reasonably believes that the continued operation of the education and care service would constitute an unacceptable risk to the safety, health or wellbeing of any child or class of children being educated and cared for by the education and care service;

...

- (d) a condition of the service approval has not been complied with.

[30] By way of contrast, prescribed grounds for suspension of a service approval in s 70 (an alternative decision open to the decision maker) relevantly include the following:

A Regulatory authority may suspend a service approval if—

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<sup>28</sup>

Cancellation notice, Exh 2, Doc 1, p46.

(a) the Regulatory authority reasonably believes that it would not be in the best interests of children being educated and cared for by the service for the service to continue; or

...

(c) the service is not being managed in accordance with this Law; or

...

(e) the approved provider has contravened this Law as applying in any participating jurisdiction; or

(f) the approved provider has failed to comply with a direction, compliance notice or emergency order under this Law as applying in any participating jurisdiction in relation to the service

...

[31] To complete the picture, the regulatory authority may suspend a service approval without notice if it is satisfied there is an immediate risk to the safety, health and wellbeing of children.<sup>29</sup> This action was not taken in regard to Oz FDC, from which it can be inferred that the regulatory authority, despite the emergency notice, was not satisfied such an immediate risk existed.

### Are grounds for cancellation made out?

[32] Cancellation will only be a correct (lawful) decision if one or more of the grounds in s 77 are established. The only grounds relied on by the delegate were those in ss 77(a) and (d), concerning risk to children and non-compliance with conditions respectively.

### s 77(a): Risk

[33] There are four elements to s 77(a):

- a) a reasonable belief formed by the decision maker (speaking to the evidence relied on and the standard of proof, the civil standard, taking into account the seriousness and consequences of the decision);<sup>30</sup>
- b) that the continued operation of the service (being the focus on present and future operations);
- c) presents an unacceptable risk (measured in accordance with standards stated in cases such as *M v M*<sup>31</sup> and *Fardon*,<sup>32</sup> contextualised appropriately for the National Law and its purposes);<sup>33</sup>

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<sup>29</sup> s 73.

<sup>30</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

<sup>31</sup> *M v M* (1988) 166 CLR 69, 78 (parenting in the context of allegations of past sexual abuse).

<sup>32</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 593 (Gleeson CJ) (bail).

<sup>33</sup> Unacceptable risk and related ideas have been applied in a wide range of circumstances other than those in *M v M* and *Fardon*, for example parenting where there was a history of: domestic violence (*George & Nichols* [2016] FamCA 519) or

- d) to the safety, health or wellbeing of any child or class of children being educated and cared for by the education and care service.

[34] The elements are to be considered in the context that the rights and best interests of the child are paramount.<sup>34</sup>

### **s 77(d): Conditions**

[35] Conditions are found both in the service approval itself<sup>35</sup> and in the Act, s 51, including obligations to ensure the safety, health and wellbeing of children, meeting the educational and developmental needs of children, appointment of sufficient people as co-ordinators to monitor and support educators, and to adequately monitor and support them.

[36] The statutory conditions were said by the delegate to be strict obligations.

### **Applicant's evidence and submissions**

[37] As noted above, Oz FDC did not challenge the findings of fact or the process used by the regulatory authority in its investigation and disciplinary procedure. It relied on changes to practices, procedures, policies, and personnel, urging the Tribunal to conclude that its "service approval should be confirmed", by which it is taken to mean that the Tribunal should substitute the cancellation decision with one not to cancel the service approval under s 79(1)(a)(iii). No argument was made by either party for suspension of the service approval in the alternative.

[38] Oz FDC's evidence was that the three educators whose premises and practices were the subject of the show cause notice have ceased to provide services. That they have left Oz FDC was uncontested.

[39] Oz FDC's evidence was:

- a) it now issues hard copy policies to educators where previously a soft copy was sent by email. A copy of the policy (comprised of 267 pages) was in evidence;

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high conflict relationships (*Heston & Norton and Ors* [2017] FamCA 154); land use planning (*HGC Administrative Services Pty Ltd v Darebin CC* [2004] VCAT 1205, re an adult book shop); Insolvency - risk of assets being dissipated (*Australian Securities and Investments Commission, In the Matter of Richstar Enterprises Pty Ltd (ACN 099 071 968) v Carey (No 3)* [2006] FCA 433); creditworthiness (*Arab Bank Australia Ltd v Sayde Developments Pty Ltd* [2016] NSWCA 328); injunctive relief (*Campomar Sociedad Limitada v Nike International Ltd* (1998) 156 ALR 316); species protection (*Northern Inland Council for the Environment Inc v Minister for the Environment* [2013] FCA 1419); keeping dogs, dangerous or otherwise (*Isbester v Knox City Council* [2015] HCA 20; *Thomas v Ipswich City Council* [2015] QCATA 97; *North Burleigh Place* [2016] QBCCMCmr 152); teacher registration (*Education (Queensland College of Teachers) Act 2005* s 49); assisted reproduction (*Patient Review Panel v ABY & ABZ* [2012] VSCA 264) among many others.

<sup>34</sup> National Law ss 3(3)(a) and 4, and [9] to [11] above.

<sup>35</sup> The service approval was not in evidence.

- b) there are now three co-ordinators in Brisbane including the manager, Ms King, who holds nursing and early childhood education qualifications and has experience as a teacher's aide, nurse, and manager of a family day care service;
- c) the three co-ordinators had all attended "professional development training on Governance and Performance management";<sup>36</sup>
- d) the co-ordinator who previously managed the Brisbane service was relieved of duties by Mr Farrah and trained before being re-engaged;
- e) training is provided to educators on their obligations by Mr Farrah and Ms King (and, it seems, at least once by the Melbourne service manager);
- f) the number of educators has been significantly reduced;
- g) Ms King engages educators on educational and care opportunities;
- h) it undertakes inspections of educator residences and maintains regular contact by telephone.

[40] Evidence adduced at hearing included numerous photographs, for example:

- a) photographs said to be of various key documents, including (by way of example only):
  - i) a 'certificate of approval' bearing a person's name and address, and a logo and the words Oz Family Day Care prominently displayed;
  - ii) a certificate, in part, from "Auswide Training Solutions" (an entity not mentioned in oral evidence) bearing a slogan and a Registered Training Organisation (RTO) number and the same name as that on the certificate of approval, but no more;
  - iii) what appears to be educational materials;
  - iv) the cover of a bound volume bearing Oz FDC's name and logo and Melbourne address, entitled "Observation Book";
- b) photographs said to be of the Oz FDC office and computers;
- c) a photograph said to be of training taking place with a person standing in front of a white board in a room with adults seated in rows;
- d) a photograph of some chairs, and another of about 15 adults sitting in rows, as evidence of training facilities' existence;
- e) photographs of various facilities such as a change table, toys, hygiene poster, a child safety gate, bathrooms.

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<sup>36</sup> Certificates of attendance for Mr Farrah, Ms King and Ms Polai all dated 18 February 2017, and letterhead of "Yassco".

[41] Mr Boden submitted the photographs were evidence, for example, that training had occurred:

“There is photographic evidence of training that has occurred. My friend has made no reference to those folders. There has been some sort of whiteboard which details for that particular training session what the training was to encompass. And evidence has been given about that. There has been no reference made to that issue. On top of that, you’ve heard from both Ms [King] as well as Mr Farah, about what training is being provided.”<sup>37</sup>

[42] Evidence was also given by Ms Bashinga of the induction process used by Oz FDC and photographs of her residence.<sup>38</sup>

### **What was not in evidence**

[43] Oz FDC’s evidence did not canvas certain details, said by the Respondent to be pertinent to the decision, about:

- a) the content of the training said to be provided to educators and co-ordinators by Mr Farrah and others;
- b) details of the training apparently provided by Yassco and Auswide Training Solutions, the credentials of the training providers, and the recipients of the training;
- c) the processes and procedures used by Oz FDC to ensure compliance with the National Standard;
- d) details of actual inspections undertaken by the co-ordinators of educators’ premises and action taken to identify and remedy any defects;
- e) details of how the educational and developmental needs of the children being educated and cared for by Oz FDC are being met.<sup>39</sup>

### **Other evidence issues**

[44] Some of the findings relied on by the delegate in making the cancellation decision turned on evidence about the three former educators who no longer provide services through Oz FDC and whose residences, with all the deficiencies identified by the authorised offices, are no longer used for education and care of children through Oz FDC.

[45] That evidence was clearly relevant to the delegate’s decision. However on the unchallenged evidence of the Applicant it is no longer representative of Oz FDC’s current operations or the continued operation of the service by

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<sup>37</sup> e.g., Transcript 2-43.

<sup>38</sup> Exhibit 13.

<sup>39</sup> s 51(1)(b).

Oz FDC. Particular findings no longer relevant for that purpose include the following:

- a) the presence in an accessible place of a disused refrigerator and a large bed leaning against a wall;
- b) the use of an ill-lit and ill-ventilated garage space for the provision of care and education;
- c) inadequate fencing possibly permitting access to a roadway or other hazards;
- d) inadequate access to toilet or hand wash facilities;
- e) inadequate nappy change facilities.

[46] However, the regulatory authority's evidence, unchallenged as it is by Oz FDC, is relevant to this Tribunal informing itself about historical matters and Oz FDC's current and continuing capacity to respond effectively to such matters. It is also relevant to systemic issues. Therefore the evidence is relevant to whether the continued operations constitute, first, an unacceptable risk for s 77(a), and second, for issues about compliance with conditions of service approval for s 77(d).<sup>40</sup>

[47] In the cancellation notice, the delegate said the following about the response to the show cause notice:

- 26. I note that you have submitted that the evidence you have provided in support of your Submissions is not exhaustive nor does it represent all documents relied upon. You submit that unless stated, you have only attached a sample of documents and more evidence can be provided if requested.
- 27. I do not consider this approach to be satisfactory. You have been called on to show cause. It is not for me to attempt to assess or attempt to predict those matters where there may speculatively be further supporting evidence. The onus is upon you to satisfactorily show cause by providing submissions and evidence to support your submissions. ... I note generally that you have also made a number of submissions unsupported by any evidence ...

[48] Oz FDC's approach to evidence in this external review followed a similar approach. In the face of findings of systemic defects, Mr Farrah, for example, was able only to assert that things had improved. Under cross-examination he asserted several times that there was documentary evidence of relevant matters, but that it was in the office or elsewhere.<sup>41</sup> Probative documents might have been produced, but were not. The Respondent submitted that the Applicant bore the onus of convincing the Tribunal of the changes said by it to have wrought a fresh change or a new

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<sup>40</sup> The evidence is similarly relevant to the suspension criteria in s 70.  
<sup>41</sup> e.g., Transcript 1-53, 1-53, 1-63. See also Ms King, Transcript 2-6.

start: “he had the opportunity to produce the documents and ... hasn’t – they have not been produced.”<sup>42</sup>

- [49] In keeping with the task of a merits review, the Tribunal took a liberal approach to additional evidence being led. It is appropriate to note in merits reviews there is generally no formal onus of proof. The Applicant did not have to ‘meet the case’ against it.<sup>43</sup> Rather, there is an “evidentiary burden” that lies on the Applicant, to adduce or present evidence to support its application, so that the Tribunal is able to make the correct and preferable decision.<sup>44</sup>
- [50] The Respondent’s submissions raised two questions about the Applicant’s evidence of its practices from 2 January 2017. First, did the Applicant’s evidence demonstrate that its current conduct and likely future conduct would not put it in breach of its obligations? Second, was the evidence sufficiently probative? The Respondent urged that the evidence was not adequate and not probative.
- [51] The regulatory authority also submitted that the inconsistencies in documentary evidence exhibited in the hearing demonstrated on-going systemic failures contrary to the Applicant’s assertion that the new systems guaranteed compliance.
- [52] The department did however submit that family day care service providers operate in the real world, and that there may be breaches at educator’s residences from time to time. I take this submission to mean that the measure of whether the decision to cancel Oz FDC’s service approval is “correct and preferable” turns not on a particular breach but on what the Respondent identified as systemic failure to detect or remedy breaches and the failure to ensure the systems’ integrity in light of the paramountcy of the safety of children.<sup>45</sup>
- [53] The failure of one co-ordinator to act on a breach she detected was said also to be evidence of systemic failure. Mr Farrah and Ms King both gave evidence that Ms Polai had since received additional training and that they are now also discharging co-ordinator duties, whereas at the time Ms Polai was either the sole co-ordinator or supervised only by Mr Farrah.
- [54] The Tribunal has no doubt that Mr Farrah was and remains intent on improving the service his company provides in Queensland. From the evidence, steps that were taken to improve compliance included:

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<sup>42</sup> Transcript 2-41.

<sup>43</sup> *Queensland Building and Construction Commission v Mudri* [2015] QCATA 78, [12].

<sup>44</sup> *Ibid*, [11]-[13]; it is not incumbent on the Applicant to show the delegate’s decision was not the correct and preferable one: *Dunmoor Pty Ltd v Queensland Building and Construction Commission & Anor* [2016] QCATA 39.

<sup>45</sup> Transcript 2-36.

- a) employing Ms King, a more experienced co-ordinator, to manage the Brisbane service;
- b) relieving the previous co-ordinator until she had advanced her skills to Mr Farrah's satisfaction;
- c) increasing training for educators and providing developmental materials and policies to support their compliance;
- d) increasing the supervision and support for educators through daily (or twice daily) telephone calls and educational support from the Manager;
- e) improved social media contact by Oz FDC with its educators and parents, managed by Ms King;
- f) reducing the number of educators and taking a more rigorous approach to educator induction and compliance, including terminating engagement when performance was considered inadequate or the educator failed to respond to contact.

[55] Despite these steps, much of the Applicant's asserted improvement was unsupported, or sparsely supported, by confirmatory documentary evidence. Several times under cross-examination Mr Farrah told the Tribunal that the documentary proof of his claimed improvements were 'in his bags' or 'at the office'. Oz FDC was invited by the Tribunal to adduce further evidence until very late in the hearing. It did not produce the corroborative documents said to exist, but instead relied on photographs and oral evidence.

[56] There was an assertion by both Mr Farrah and Ms King, supported by Ms Bashinga, that educators received regular training. However the content and quality of that training was not addressed by the Applicant and it remains at best an assertion that it is training apt for the intended purpose and of sufficient quality to assure future compliance. In particular there was no evidence provided to show that the training adequately provided for the safety, health and well-being of children and the paramount consideration of children's rights and best interests.

[57] The revised system of monthly inspections of residences was evidenced by what purported to be an inspection report, unfortunately undated. The Respondent's submission was that the Tribunal could not be satisfied that the report even related to the period of a contended improvement: it may, for example, have related to the previous year. Similarly the records of educators and children were difficult to reconcile with the oral evidence and failed to provide sufficient confidence of their accuracy or utility as a compliance tool.

[58] Oz FDC also relied on software implemented in the Brisbane office from 2 January 2017, said by Mr Farrah and Ms King to be very sophisticated.

However there was no particular evidence of the software's operations, its use by Oz FDC, and how it achieved the stated compliance purpose.

### Conclusions on evidence

- [59] The Applicant's evidence must be seen in light of the task of the Tribunal in its review of the cancellation decision, with the possible outcomes prescribed by s 193 of the National Law.
- [60] The task of the Applicant was to convince the Tribunal that the correct and preferable decision should, in effect, be to set aside the cancellation decision and leave the service approval undisturbed. Oz FDC's challenge to the Respondent's decision is that cancellation was disproportionate. The argued-for decision was about additional conditions, inspections and maybe assistance from the regulatory authority. Oz FDC did not suggest what those conditions might be or whether the Tribunal has power to make such conditions.<sup>46</sup>
- [61] Suspension as an alternative outcome was not suggested by either Oz FDC or the regulatory authority, but it is an outcome open to the Tribunal to impose under the National Law.
- [62] The Applicant's position did not challenge the factual findings stated in the cancellation notice *at the time* of the notice, and therefore they are the factual starting point. To achieve the order it seeks,<sup>47</sup> Oz FDC needed to adduce evidence sufficient to displace the conclusions relied on by the regulatory authority in support of cancellation. That was its 'evidentiary burden'. It could have done so in two main ways:
- a) first, by showing that a conclusion was not adequately supported at the time of cancellation; or
  - b) second, by demonstrating that, by the time of hearing, it had implemented sufficient change to satisfy the Tribunal that the conclusions should be displaced.
- [63] Regardless of Oz FDC's acceptance of, or decision not to challenge, the content of the cancellation notice other than the conclusion, I start by asking if the cancellation decision was, on the evidence at the time it was made, consistent with the statutory criteria in s 77.
- [64] I conclude that it was.
- [65] The failings in regard to compliance with the statutory conditions alone were sufficient, and sufficiently grave, to warrant cancellation under s 77(d).

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<sup>46</sup> See s 51(5) - power of the regulatory authority to impose conditions on the grant; s 54(7) – conditions by way of variation on application by the service provider; s 55(2) – conditions varied by the regulatory authority without application.

<sup>47</sup> [37] above.

Proper records were not kept; supervision was inadequate; inspection was insufficient and not adequately followed through to remediate observed deficiencies; there was scant evidence of the suitability of programs for education and development of the children.

[66] The particular matters arising from the inspections of educators' residences were also sufficiently alarming to justify cancellation at that time on the ground in s 77(a), namely, continued operation was an unacceptable risk to the safety, health or wellbeing of the relevant children. There were apparent and preventable dangers in the nature of: unimpeded access to roads; otherwise inadequate fencing; unsecured chemicals, furniture; discarded beds and appliances that might topple or trap a child; and ill-ventilated and lit premises with inadequate access to sanitation.

[67] As to the state of affairs at the time of hearing, the Tribunal makes the following observations:

- a) The evidence before the Tribunal did not show that the enlarged number of co-ordinators and reduced number of educators and children satisfied the statutory condition in s 77(2)(a), namely that there were sufficient persons appointed as co-ordinators to monitor and support the educators. There was no evidence of what might be a suitable number given the number of educators and children, and no evidence that the three particular co-ordinators were 'sufficient', within the meaning of s 77(2)(a).
- b) The evidence that each educator was adequately monitored and supported<sup>48</sup> was limited to the oral evidence and a few documents that, as discussed above, did not do the task of showing the asserted facts. The historical evidence clearly established that there were defects in monitoring and support. The evidence at hearing did not show the new the state of affairs claimed by Oz FDC. Rather, the inference I have drawn from the lack of evidence of the current state of affair is that the systems remain underdeveloped, inadequate and unsuited to the task: otherwise the Applicant would have adduced the documents, certificates or other proof.
- c) There was scant demonstration of the co-ordinators providing the support and monitoring required of them under the Act. The evidence tended to mere assertion or vague photographs said to be of educational materials or training facilities. There was scant evidence of what the co-ordinators actually did, the content of the education and development programs, or how the purported activity met educators' needs. There was no evidence of systematic assessment of how the activities of the co-ordinators and educators met the educational and developmental needs of the children.

[68] The nub of the Applicant's additional evidence took the form of assertions and assurances. In the face of the precise and voluminous evidence

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<sup>48</sup> Statutory condition s 77(2)(b).

supporting the cancellation decision, it was always a hopeful approach rather than a persuasive one.

[69] The evidence did not discharge the burden. Rather it tended to confirm that the continued operation of the service presented an unacceptable risk because of the systemic failings, and that Oz FDC continued to operate in breach of its statutory conditions.

[70] In those circumstances, the conditions in s 77 for cancellation are met, enlivening the discretion to cancel. I would cancel the service approval because of the extent of the condition breaches alone. Further, the systemic failings shown in the cancellation notice findings and confirmed on the evidence (despite the improvements and changes) also warrant cancellation. Suspension as an alternative is not appropriate because of the unacceptable risk and condition breaches.

## Conclusion

[71] Accordingly, the cancellation decision is confirmed.

## Date and effect of cancellation

[72] By s 79, a decision to cancel must set out the date on which cancellation takes effect, being a date 14 days after the decision or at the end of another specified period.

[73] I have decided that in order to facilitate orderly advice to Oz FDC's educators and the parents who use the service, and transition to other providers, the specified period should be 21 days.

[74] The Tribunal notes the following submission about the effect of cancellation, made in oral argument on behalf of the regulatory authority:

If the tribunal was to uphold the department's decision, there's nothing preventing the applicant to immediately ... reapply under the legislative scheme.<sup>49</sup>

## ORDERS

1. The decision to cancel the service approval under the *Education and Care Services National Law (Queensland)* for Oz Family Day Care Pty Ltd is confirmed.
2. The stay granted by the Tribunal on 15 February 2017 is ended.
3. This order takes effect from 27 July 2017.

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<sup>49</sup> Transcript 2-23.