ACT Government
Education

Mr [redacted]
Person with Management and Control
Woden Early Childhood Centre Inc
RE: Woden Early Childhood Centre

Email: [redacted]@health.gov.au
[redacted]

Dear Mr [redacted]

Decision to Issue Administrative Action

1. As you are aware, Authorised Officers from the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance, recently assessed a Notification of Incident (NOT-40713057) relating to the operation of Woden Early Childhood Centre, SE-00009858 (the Service), operated by Woden Early Childhood Centre Inc, PR-00005884 (the Provider).

2. The Notification related to an incident occurring on 18 May 2022 advising of a circumstance where an enrolled child, [redacted] (aged 3 years), was on excursion and tumbled on the edge of a riverbank, ending up in the water.

3. The Authority is satisfied that the Provider has not complied with provisions of the *Education and Care Services National Law Act (ACT)* (the *Law*) in this instance. Web addresses for the *Law* and the *Regulations* are provided for your convenience at the end of this decision.

Facts

4. On 15 June 2022, the Authority sent the Provider a Show Cause Notice (the Notice) advising the Provider that the Authority had determined that there was sufficient evidence to support a case to answer for the Provider regarding suspected offences under the *Law*. However, the Authority's final determinations would not be made until the Provider had an opportunity to respond to the allegations and evidence obtained by the Authority.

5. The Notice outlined the grounds for issue, relevant evidence supporting suspected contraventions of the *Law*, and potential compliance actions if allegations were substantiated. Refer copy of Notice (minus attachments due to size, noting on request can be produced again) issued at Attachment A.

6. The Notice advised that evidence obtained during the assessment supported the following offences under the *Law*:

Allegation One – Sections 165(1) of the Law

It is alleged that on 18 May 2022, the Provider failed to ensure that all children being educated and cared for at the Service, were adequately supervised at all times, resulting in [redacted] being able to access and fall into water whilst on an excursion to a local playground, contravening s165(1) of the Law.

Allegation Two – Section 167(1) of the Law

It is alleged that on 18 May 2022, that due to inadequate supervision, and not ensuring additional staffing resources were allocated to supervise and care for children in a higher risk environment, being the local playground, the Provider failed to take reasonable steps to ensure children were protected from harm and hazard likely to cause injury or illness, in contravention of section 167(1) of the Law.

7. On 29 June 2022, the Provider submitted to the Authority a response to the Notice. Refer a copy of the response at Attachment B.

Law

8. Provisions of the *Law* outlined in the Notice engaged the following:

Section 165(1) of *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.

Obligations upon Regulatory Authority, Providers and Services

9. 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".*

10. 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.

11. 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.

12. 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*.

13. 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.

14. 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

15. The Authority has considered all the information supplied by the Provider, inclusive of the response to the Notice, and is satisfied that, on balance of probabilities, allegations One and Two are substantiated, being in contravention of sections 165(1) and 167(1) of the *Law*.

16. In relation to section 165 of the *Law*, the Authority is satisfied, on the balance of probabilities, that the Provider has not ensured adequate supervision at all times, which resulted in [redacted] being able to access the open waterway unchallenged. The very nature of the incident, admissions within the Provider's incident report and management of matter supports the contravention being determined.

17. Furthermore, the Authority is satisfied that the Provider, by not ensuring adequate supervision of children, in what is viewed by the Authority as a high-risk environment, has not ensured all reasonable precautions have been taken to protect children, specifically [redacted] in this instance, from harm and hazard likely to cause injury, engaging the substantiated offence under section 167(1) of the *Law*.

18. Additionally, the substantiated offences are supported due to risk assessments not acknowledging above minimum required ratio to support adequate supervision in a higher risk environment with elements of environment unable to be controlled i.e. open and

accessible waterways. An additional educator engaged to supervise and support children could have on balance of probabilities, prevented the incident and is viewed by the Authority to be a reasonable precaution that should have been undertaken to protect children from harm and hazard.

19. In information submitted by the Provider, it is noted that the following actions were undertaken to mitigate risk of a similar incident included:
    a) WECC has introduced a number of policy changes, particularly in relation to the management of incidental excursions, to further improve the safety of these excursions.
    b) No longer stopping at that particular section of the park.
    c) Updated risk assessments and supervision policy; and Creating Risks Assessment Folders and Procedure Folder for all rooms.
    d) Debrief and reflection both with individual staff involved and the Centre as a whole.
    e) All room leaders shown how to complete a Serious Incident Report on the CECA portal NQAIT.
    f) Arranged training with [redacted] from Thinkers Inq and Inspired EC to improve communication and accountability for all educators and staff and Supervision Training.

20. Considering the evidence, the objectives and guiding principles of the *Law*, the compliance history of the Service, and the steps taken by the Provider to mitigate risk of a similar incident, the Authority has decided to issue this administrative action rather than statutory compliance actions.

21. This Decision is issued to remind the Provider, that always, staffing and supervision levels need to meet the emotional, developmental, and physiological needs of children at all times. These staffing and supervision levels may need to be adapted to be above minimum regulated ratio levels to protect children from harm and hazard likely to cause injury – both physically and psychologically, and with consideration of the type of environment that children are being educated and cared in.

22. In relation to substantiated offences engaged by the Provider under sections 165 and 167 of the *Law*, the Authority is satisfied that this administrative action addresses the non-compliance, with no further response required from the Provider.

23. This Decision will be recorded on the Service's file and may be considered in any future applications for approvals, amendments or waivers. It may also be considered in determining the action to be taken, should further breaches of the *Law* or associated *Regulations* be found.

<u>Legislation</u>

24. 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.

25. 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

26. If you have any questions in relation to this Decision, please contact me by 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
ACT Education Directorate

13 July 2022