Australian Industry Group

Application for a Supported Bargaining Authorisation – Early Education and Care Industry

Reply Submission

(B2023/538)

14 August 2023

B2023/538 APPLICATION FOR A SUPPORTED BARGAINING AUTHORISATION – EARLY EDUCATION AND CARE INDUSTRY

1. INTRODUCTION

1. Ai Group seeks the Commission's leave to file and rely upon this submission in response to the Australian Council of Trade Union's (**ACTU's**) submission of 7 August 2023, with a view to facilitating the efficient conduct of the proceedings listed before the Full Bench on 16 – 17 August 2023.

2. These submissions should be read in conjunction with our earlier submission dated 7 August 2023 (**First Submission**). Where our First Submission deals with matters that also arise in the ACTU's Submission, we have not sought to repeat them in response. Further, we use the same abbreviations as those adopted in the First Submission.

2. THE ACTU CONTENTIONS

3. In this submission, we respond to the following contentions advanced by the ACTU.

4. *First*, the Commission should *'form a broad view about whether it is "appropriate" for the employers and employees to bargain together'*.[1]

5. *Second*, if *'several'* of the matters identified at s.243(1)(b)(i) – (iii) of the Act are present in the context of a particular matter, *'this should weigh very strongly in favour'* of the relevant SBA being made, *'regardless of any other matters the Commission considers appropriate pursuant to s.243(1)(b)(iv)'*.[2]

6. *Third,* for the purposes of s.243(1)(b)(ii) of the Act, *'it will be enough for some employers to share some interests, rather than all employers needing to share all interests. Different employers may share different interests – where some interests are shared amongst at least some employers, that will be sufficient'*.[3]

[1] ACTU submission at paragraph 28. See also paragraph 31.

[2] ACTU submission at paragraph 33.

[3] ACTU submission at paragraph 57.

7. *Fourth,* the Commission is *'not required to consider the ways in which the interests of employers may differ. Nor is it required to balance 'common interests' with divergent interests'*.[4]

8. *Fifth,* the Commission should be *'cognisant'* of certain matters that were *'deliberately not retained from the low paid bargaining provisions, to ensure that the purpose of the new legislative scheme can be properly realised'*.[5]

3. THE FIRST CONTENTION

9. The ACTU submits as follows: (emphasis added)

> 28. Consistent with the object of the new provisions being to ensure that the supported bargaining provisions are easier to access than the previous low paid bargaining stream, section 243(1)(b) requires the Commission to form a broad view about whether it is "appropriate" for the employers and employees to bargain together. …
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> …
>
> 31. The discretion the Commission has in determining appropriateness must be exercised in accordance with the purpose and intent of the supported bargaining provisions and the legislative scheme, including the Objects of the Division.[6]

10. On its face, the supported bargaining scheme may apply in a broader range of circumstances than the previous low paid bargaining stream. Various aspects of the earlier legislative scheme, which purportedly limited the extent to which it was able to be accessed or utilised, have been removed as a consequence of the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022*. Thus, the objects of the new provisions, as described by the ACTU, would be achieved even if the Commission adopted a more moderate approach than what is advocated by the ACTU, such as the approach we have advanced.

[4] ACTU submission at paragraph 61.

[5] ACTU submission at paragraph 79.

[6] ACTU submission at paragraphs 28 and 31.

4. THE SECOND CONTENTION

11. The ACTU submits as follows: (emphasis added)

> 33. … if several of [the matters in s.243(1)(b)(i) – (iii) of the Act] are present, this should weigh very strongly in favour of a supported bargaining authorisation being granted, regardless of any other matters the Commission considers appropriate pursuant to s.243(1)(b)(iv).[7]

12. There is no sound basis for limiting the significance of s.243(1)(b)(iv), or any relevant matters identified pursuant to it. The text of the provisions does not suggest that the matters identified at ss.243(1)(b)(i) – (iii) are to be given primacy or that they are of greater importance to the Commission's assessment of whether it is appropriate for the relevant employers and employees to bargain together. Further, the ACTU has not relied on any extrinsic material or other aspects of the legislative scheme that might support its submissions.

13. Ultimately, the weight that should be attributed to matters arising from ss.243(1)(b)(i) – (iv) will turn on the facts and circumstances of each matter.

5. THE THIRD CONTENTION

14. The ACTU has advanced the following submission in relation to s.243(1)(b)(ii):

> 57. … it will be enough for some employers to share some interests, rather than all employers needing to share all interests. Different employers may share different interests – where some interests are shared amongst at least some employers, that will be sufficient.[8]

15. The ACTU appears to suggest that, for example:

    (a) In the context of a proposed SBA that would cover three employers:

        (i) If employers A and B share some common interests; and

        (ii) Employers B and C share other common interests; however

        (iii) Employers A and C do not share *any* common interests;

[7] ACTU submission at paragraph 33.

[8] ACTU submission at paragraph 48.

all of the common interests shared between employers A and B and employers B and C will be relevant for the purposes of s.243(1)(b)(ii).

(b) In the context of a proposed SBA that would cover four employers:

(i) If employers A and B share some common interests; and

(ii) Employers C and D share other common interests; however

(iii) Employers A and B do not share any common interests with Employers C or D;

the four employers would nonetheless have clearly identifiable common interests for the purposes of s.243(1)(b)(ii).

16. We disagree. For the purposes of s.243(1)(b)(ii) of the Act, only the *'clearly identifiable common interests'* common to *all* of the employers proposed to be included in the SBA will be relevant. The provision requires a consideration of whether the *'employers'* – that is, the employers proposed to be covered by the SBA – have *'clearly identifiable common interests'*. Common interests that relate to only some but not all of the relevant employers would not be relevant for the purposes of s.243(1)(b)(ii).

6. THE FOUTH CONTENTION

17. The ACTU has also advanced the following submission in relation to s.243(1)(b)(ii):

> 61. The Commission is required to consider whether employers have common interests, and is not required to consider the ways in which the interests of employers may differ. Nor is it required to balance *'common interests'* with divergent interests – only to assess whether common interests exist.[9]

18. Whilst we agree that s.243(1)(b)(ii) does not expressly require a consideration of the way in which employers' interests differ; divergent interests can (and, depending on their relevance to the question of whether it is appropriate for the employers and employees to bargain together, should) be taken into account by

[9] ACTU submission at paragraph 61.

virtue of s.243(1)(b)(iv). Such matters may weigh against the grant of a proposed SBA.

7. THE FIFTH CONTENTION

19. At paragraph 78 of its submissions, the ACTU lists various factors that were identified by the Act as being relevant to the Commission's determination of whether to grant a low paid bargaining authorisation. It goes on to say as follows:

> 79. … The Commission, in interpreting the new supported bargaining provisions, should be cognisant of the matters that were deliberately not retained from the low paid bargaining provisions, to ensure that the purpose of the new legislative scheme can be properly realised.[10]

20. The ACTU does not explain how the Commission's *'cognisance'* of the above proposition should affect the exercise of its statutory functions associated with the making of SBAs. To the extent that the ACTU is, in effect, suggesting that the factors previously enumerated in the Act are not relevant or should not be taken into account by the Commission; we disagree. They are factors that may be relevant in the context of certain matters, which the Commission can take into account by virtue of s.243(1)(b)(iv).

21. An example of the proposed application of the ACTU's above contention can be found at paragraphs 81 – 82 of its submission: (emphasis added)

> 81. The removal of references to access to and history of bargaining <u>is likely due to</u> previous decisions of the Commission in which it was unpersuaded of the need for support where some bargaining has taken place in the past, even where agreements had expired or ultimately failed the better off overall test, …
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> 82. The removal of these criteria signals a clear intention by the Parliament that having some history of, or benefit from bargaining should not weigh against the granting of an authorisation. Rather, the emphasis should be, as submitted above, on a holistic assessment of <u>whether employees in the industry or sector have not been able to achieve substantive gains as a result of bargaining</u>, and any difficulties they may have faced bargaining at the enterprise level – which may include factors like the ineffectiveness of bargaining at the enterprise level for improved wages where the sector is largely reliant on government funding.[11]

[10] ACTU submission at paragraph 79.

[11] ACTU submission at paragraphs 81 – 82.

22. Speculation as to why various aspects of the supported bargaining scheme differ from the previous low paid bargaining scheme should not supplant a plain and ordinary reading of the statute as it now applies. The objects of Division 9 clearly state that supported bargaining is intended for employers and employees who require support to bargain. Where employers and employees have previously engaged in enterprise-level bargaining, this may suggest that they do not need such support. This would weigh against the appropriateness of granting a SBA, particularly where the employer, employees and / or employee bargaining representative(s) intend to engage in enterprise-level bargaining again. The extent to which the earlier enterprise bargaining process resulted in *'substantive gains'* is besides the point.