IN THE FAIR WORK COMMISSION

Application by the United Workers' Union, Australian Education Union and Independent Education Union of Australia

Matter No: (B2023/538)

OUTLINE OF SUBMISSIONS OF THE

AUSTRALIAN EDUCATION UNION IN REPLY

A. INTRODUCTION

1. These are submissions on behalf of the Australian Education Union (**AEU**) in reply to the submissions filed on behalf of the Australian Council of Trade Unions (**ACTU**), the Australian Chamber of Commerce and Industry (**ACCI**) and the Australian Industry Group (**AIG**). Appropriately, those submissions primarily address the proper interpretation and application of s 243 of the *Fair Work Act* 2009 (**FW Act**) rather than the application in the present proceedings. It is necessary to respond to some of the assertions made in the submissions.

B. ENTERPRISE-LEVEL BARGAINING

2. A number of the submissions assert that the FW Act continues to place an emphasis on, or contain a statutory preference for, enterprise-level bargaining as compared to multi-enterprise bargaining: AIG [15]; ACCI [3.8]-[3.12]. The inference sought to be drawn from the alleged emphasis on enterprise-level bargaining is that supported bargaining is only intended to be available in "narrow circumstances", that the Commission should not lightly find that it is appropriate to make a supported bargaining authorisation or that such an authorisation should only be made if there is some particular impairment in the ability of the parties to bargain at an enterprise level: AIG [17] and [23]; ACCI [3.18].
3. Those submissions seek to erect barriers to the making of a supported bargaining authorisation which are not supported by the text of the relevant provisions, particularly s 243, and are inconsistent with the intention of the new provisions to improve access to the supported bargaining stream and to ensure that the provisions are easier to access than the

previous low-paid bargaining stream.[1] The Commission should not commence consideration of an application for a supported bargaining authorisation with a predisposition that the application should not be lightly granted or that it is only in narrow circumstances that a supported bargaining authorisation should be made.

4. Although s 3(f) continues to refer to an object of "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining" and s 171(a) sets out an object of Part 2-4 as being to enable good faith collective bargaining "particularly at the enterprise level", the amendments contained in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**) recognise the limitations of enterprise-level bargaining. They are plainly intended to liberalise access to multiple-enterprise bargaining and reduce barriers to bargaining across enterprises. Section 241(b), for example, records that an object of Division 9 of Part 2-4 is to "to address constraints on the ability of those employees and their employers to bargain at the enterprise level." The ACTU correctly submits that these provisions do not suggest a hierarchy of bargaining approaches and the extent of the emphasis on enterprise level bargaining, and the extent to which collective bargaining more generally is enabled by the SJBP Act, has clearly shifted: ACTU [17]. The different bargaining streams are intended to be complementary not competing.
5. In his second reading speech, the Minister for Employment and Workplace Relations observed that existing multi-employer bargaining provisions were not working and that the intention was to make them work and to get wages moving. The Minister continued:[2]

> *Bargaining at the enterprise level delivers strong productivity benefits and is intended to remain the primary and preferred type of agreement making*. ***For employees and employers that have not been able to access the benefits of enterprise level bargaining, these reforms will provide flexible options for reaching agreements at the multi-employer level. This is intended to deliver more equitable and inclusive wage outcomes which benefit more Australians.***

6. Although supported bargaining is an alternative to enterprise-level bargaining, access to supported bargaining should not be regarded as narrow or as presenting a high threshold to be reached. The object of providing flexible options for reaching agreements at a multi-employer level, and of closing the gender pay gap and improving wages and conditions in sectors which have not been able to successfully bargain at the enterprise level, would be defeated by the Commission adopting an approach of only making a supported bargaining

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1 Commonwealth, *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, p 160 [922] and p 168 [982].

2 Commonwealth, *Hansard (House of Representatives)* (27 October 2022) p 2181.

only in exceptional circumstances. The purpose of the new provision is to remove the barriers which existed to access to the previous low-paid bargaining stream.

7. Other provisions of the FW Act have been included to guard against the potential for enterprise-level bargaining being used to undermine the purposes of supported bargaining. In particular, s 243A(1) and (2) provide that the Commission must not make a supported bargaining authorisation specifying an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date and an authorisation made in those circumstances has no effect. However, s 243A(3) provides that subsections (1) and (2) do not apply if the Commission is satisfied that the employer's main intention in making the agreement with the employees covered by it was to avoid being specified in a supported bargaining authorisation.
8. The capacity for a supported bargaining authorisation to be varied at a later date to add employers[3] or for a supported bargaining agreement to be varied to cover new employers[4] are not relevant to the initial making of an authorisation and certainly do not provide any grounds for caution or restraint: cf. AIG [21]-[22]. The provisions permitting employers to be added to an authorisation or the coverage of a supported bargaining agreement prescribe the circumstances that must be satisfied for those steps to be taken. An employer may be added to the coverage of a supported bargaining agreement only if the Commission is satisfied a majority of the employees want to be covered and it is otherwise appropriate, including having regard to the factors in s 243.[5] Similarly, the Commission must vary an authorisation only if satisfied that it is in the public interest to do so having regard to whether a Ministerial declaration exists or the considerations in s 243(1)(b).[6]

C. SECTION 243(1)(b) CONSIDERATIONS

9. The various submissions appear to accept that the role of the Commission under s 243(1)(b) involves the making of a broad discretionary finding of appropriateness and that, particularly having regard to s 243(1)(b)(iv), the considerations expressly listed do not exhaust the matters which the Commission might properly consider relevant: AIG [29]-[31]; ACCI [3.3]-[3.4]. However, it is necessary to respond to some of the matters raised with respect to the appropriateness question.

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3 FW Act, s 244.
4 FW Act, s 216BA.
5 FW Act, s 216BA(1) and (2).
6 FW Act, s 244(4).

10. First, AIG suggests the Commission must be "properly informed" in relation to the factors expressly referred to in s 243(1)(b), and be able to "robustly assess" those factors, in order to reach the requisite degree of satisfaction required to invoke its power to make a supported bargaining authorisation: AIG [34]-[35]. The Commission must, of course, be satisfied it is appropriate for the relevant employees and employers to bargain together on the material before it after having informed itself in such manner as it considers appropriate.[7] However, it would be wrong to regard the considerations listed in s 243(1)(b) as prerequisites to be proved or to import notions of onus or burden of proof.[8]
11. Second, ACCI suggests that the Commission should consider whether it would be more appropriate for the parties to bargain together for a multi-enterprise agreement in another manner and consider the preferability of other streams of multi-enterprise bargaining: ACCI [3.5]-[3.7]. Whilst the appropriateness assessment in s 243(1)(b) is to be made in the context of the objects found in s 241, ultimately the Commission is considering merely whether it is appropriate for the employers and employees that will be covered by the agreement to bargain together. That provision does not call for a comparative assessment of the relative appropriateness of other forms of multi-enterprise bargaining.
12. Similarly, the making of a supported bargaining authorisation does not, and could not, "circumvent" the single interest bargaining scheme or, indeed, any other method of bargaining: cf. AIG [20]. The supported bargaining and single interest bargaining streams represent independent bases upon which multi-enterprise bargaining can occur under the FW Act as amended with distinct preconditions prescribed for the making of an authorisation under each. One stream should not be, in effect, read down or constrained by reference to the other. The matters to which primary attention must be directed in case of a supported bargaining authorisation are those listed in s 243(1)(b).
13. Third, AIG observe (in itself correctly) that the consent or agreement of the parties does not negate the task of the Commission under s 243(1) and the Commission should not "rubber stamp" an application: AIG [36]. The Commission must, of course, be satisfied that it is appropriate for the employees and employers to bargain together irrespective of the views of the parties. However, support for the application by relevant employers, employees and employee organisations is relevant to that assessment at least as bearing upon the existence of common interests among the employers, the manageability of the bargaining process and

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7 FW Act, s 590(1).

8 See, by analogy from other contexts, *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 356 (Woodward J); *Coal & Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (1997) 73 IR 311 at 317; *Re 4 Yearly Review of Modern Awards – Penalty Rates – Transitional Arrangements* (2017) 272 IR 1 at [49]-[53].

as providing a factor that the Commission might consider appropriate to have regard to for the purposes of s 243(1)(b)(iv).

Prevailing Pay and Conditions

14. The submissions with respect to s 243(1)(b)(i) appear to largely accept that the "prevailing pay and conditions" within the relevant industry or sector must be considered broadly and do not require demonstration that the relevant employees are lowly paid. The reference to "low rates of pay" provides no more than an example of a matter that may be relevant to the appropriateness of the employees and employers bargaining together. Whilst the existence of low rates of pay would support the making of a supported bargaining authorisation, it would be wrong to regard the absence of low rates of pay as "weighing strongly" against the granting of an authorisation: cf. AIG [42]. Other features of the prevailing pay and conditions may favour the making of an authorisation.
15. The ACTU is correct to submit that the reference to "low rates of pay" in s 243(1)(b)(i) is to be distinguished from the concept of employees who are "low paid" in the sense understood in the minimum wage context as referring to persons whose ordinary time earnings are below two thirds of median (adult) ordinary time earnings of all full-time employees: ACTU [41]-[48].[9] The intention of the supported bargaining provisions is to liberalise access to multi-enterprise bargaining and, in that context, a broader meaning should be given to the concept of "low rates of pay" and include consideration of whether employees are paid at or close to award levels or at lower rates than broadly comparable employees. That employees are paid at or close to minimum award levels, or that other conditions largely mirror the applicable award, may indicate that they have not been able to obtain improved remuneration through enterprise-level bargaining: cf. AIG [44].

Clearly Identifiable Common Interests

16. In relation to the common interests factor in s 243(1)(b)(ii), ACCI submits that significance should be attached to the use of the expression "clearly identifiable common interests" and that more than one common interest must be identifiable before that factor would favour a conclusion that it is appropriate for the employees and employers to bargain together: ACCI [3.22]. The submission overreads the section and should not be accepted.

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[9] See *Annual Wage Review 2022-23* [2023] FWCFB 3500 at [89]; *Re Aged Care Award 2021* (2022) 319 IR 127 at [473].

17. As ACCI acknowledges, s 23(b) of the *Acts Interpretations Act* 1901 (Cth) requires that words in the singular number include the plural and words in the plural number include the singular in the absence of contrary intention.[10] There is no contrary intention and the considerations raised by ACCI are unpersuasive. First, the suggestion that recognition of a single common interest would somehow produce anomalous outcomes misunderstands the operation of the subsection: ACCI [3.25]. Whether the employees have common interests is a matter to which the Commission is to have regard in assessing appropriateness and does not dictate the outcome of that consideration. The recognition that employers have common interests does not dictate the outcome.
18. Second, it is unclear why the fact s 243(1)(b)(ii) asks "whether" the employers have common interests suggests that multiple common interests are required for the factor to be considered: ACCI [3.26]-[3.27]. The subsection does not invite a mere quantification exercise of tallying the number of discrete common interests of the employers. It suggests that the Commission will weigh the nature, extent and quality of the common interests of the employers and their relevance to whether it is appropriate that the employers bargain together. There is no reason why a single feature of the employers' operations which produces a common interest may not, in a particular case, favour a conclusion that it is appropriate they bargain together.
19. Third, the submission that the FW Act carefully distinguishes between the single and plural of the expression "common interest" cannot be accepted: ACCI [3.28]. To the contrary, both ss 216DC(3)(a) and 249(3)(a) requires consideration of whether employers have "clearly identifiable common interests". Sections 216DC(3A) and 249(3A) then provide in the same terms as follows:

> *(3A) For the purposes of paragraph (3)(a), matters that may be relevant to determining whether the employers have a common interest include the following:*
>
> *(a) geographical location;*
>
> *(b) regulatory regime;*
>
> *(c) the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.*

20. Those sections, in fact, suggest that the FW Act contemplates that a "common interest" will be relevant to determining whether a number of employers have clearly identifiable common interests and that multiple common interests need not be present.

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[10] *Acts Interpretation Act* 1901 (Cth), s 2(2).

21. The reference, in s 243(1)(b)(ii), to the employers having "clearly identifiable" common interests does not present a high threshold. It may be accepted that the words "clearly identifiable" qualify the expression "common interests": ACCI [3.42]. However, the ordinary meaning of the expression suggests no more than that the common interests of the employers which will be relevant must arise from apparent or ascertainable features of their operations. That interpretation is supported by the non-exhaustive list of examples provided in s 243(2), namely, the geographical location of the employers, the nature of their enterprises and the terms and conditions of employment of their employees or the source of funding relied upon by the employer. Each of those examples refers to a feature of an employer's operations which is objectively apparent or at least ascertainable.

Number of Bargaining Representatives

22. The factor set out in s 243(1)(b)(iii), namely, whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process, has produced limited submissions. As the text of the subsection suggests, the Commission is to consider, not merely the number of bargaining representatives in the abstract, but whether, in light of the circumstances of the employers and employees, the nature and identity of likely bargaining representatives and their histories and the likely course of bargaining, the number of representatives is likely to impact upon the manageability of the bargaining process.
23. The objects of the Act and of Part 2-4 provide limited assistance in the application of s 243(1)(b)(iii): cf. ACCI [3.46]-[3.47]. The object of providing a "simple, flexible and fair framework" for collective bargaining[11] is not particularly relevant to the consideration. The focus of s 243(1)(b)(iii) is the manageability of the collective bargaining process rather than the framework provided by the Act. The object of "ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay"[12] is not relevant. That object relates to the approval process in the Commission and not the process of collective bargaining.

Any Other Matters

24. There is no doubt that the capacity conferred on the Commission to have regard to any other matters it considers appropriate confers a broad discretion on the Commission and is

11 FW Act, s 171(a).
12 FW Act, s 171(b)(iii).

indicative of an extent to which it is intended that the Commission make a broad judgment as to what is appropriate in the circumstances. Some of the matters which it is suggested might be relevant in the assessment of appropriateness require comment.

25. First, AIG suggests that the history of bargaining is likely to be relevant and, more particularly, asserts that the Commission should be reluctant to make a supported bargaining authorisation where any of the employers and employees have previously engaged in enterprise bargaining and the relevant agreements have passed its nominal expiry date: AIG [57]. With respect, the mere fact that enterprise bargaining has occurred in the past involved some or all of the relevant employers and their employees does not indicate that an authorisation should not be made. It will commonly be necessary for the Commission to have regard in more detail to the history of bargaining. For example, past enterprise bargaining which has failed to produce outcomes which depart significantly from award conditions may suggest that constraints exist on the ability of the employees and their employer to bargain effectively at an enterprise level.[13]
26. Second, AIG suggests that the Commission might have regard to potential implications for the customers, clients or other users of the employers' products or services, implications for other employers and employees in the same supply chain or potential distortion of the labour market: AIG [58](b)-(d). ACCI submits that the Commission should consider the potential to harm to competition or productivity: ACCI [3.49.2]. It is difficult to understand how it is that the Commission could meaningfully consider such matters. Whilst the new provisions hope that supported bargaining will assist employees and their employers to make an enterprise agreement that meets their needs[14] and improve conditions of employment, the Commission cannot predict the outcome of a particular bargaining process. It should not be assumed at the time of making an authorisation that bargaining will have any specific impact on competition, productivity, the labour market or the customers and clients of the employers. Assisting the parties to make an enterprise agreement that accords with their needs should assist productivity and economic performance.

D. COMMENTS ON THE CURRENT APPLICATION

27. AIG makes some comments in relation to matters relied upon by the AEU, UWU and IEU in the present application. In particular, it is submitted that similarities in the demographic

13 FW Act, s 241(b).
14 FW Act, s 241(a).

profile of a group of employers' workforces does not necessarily constitute an identifiable common interest that lends support to the making of a supported bargaining authorisation and the fact that the proposed authorisation relates to an industry, sector or occupation that is female dominated is not necessarily relevant for the purposes of s 243(1)(b)(iv): AIG [63](a) and (c). It is further suggested that probative evidence would be needed to support an assertion that there has been gender-based undervaluation of work or that a supported bargaining authorisation would assist in addressing the gender pay gap: AIG ([63](b) and (d).

28. The submission seeks to caricature the approach advanced by the AEU, UWU and IEU. The unions do not rely upon simple fact that the workforce in the ECEC sector is overwhelmingly female. In addition to matters of demographics, the nature of the work and skills involved in the care and education of children are such that the historically gendered nature of those roles is relevant because it is likely to contribute to perceptions of the value of the work performed. To the extent that it is suggested that more "probative evidence" is required, the submission misunderstands the nature of the issues in the present application. The Commission is, at this point, assessing only whether it is appropriate that the employees and employers bargain together. The degree of proof required must be considered in that context.

MARK GIBIAN SC

Counsel for the AEU

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