IN THE FAIR WORK COMMISSION

Registry: Perth

Action No: B2023/703

RE: APPLICATION BY INDEPENDENT EDUCATION UNION (130N)

Application pursuant to section 248 of the *Fair Work Act 2009* for a Single Interest Employer Bargaining Authorisation

REPLY SUBMISSIONS OF THE APPLICANT

1. These submissions are filed pursuant to the Amended Directions issued by the Fair Work Commission on 9 August 2023.

2. The employers identified in the IEU's application have elected to file no submissions in this matter.[1] The ACTU, ACCI and NSW Business Chamber/ABI have filed submissions which raise issues that do not strictly arise for determination to dispose of the present application.

3. ACCI and the NSW Business Chamber/ABI take no position on whether the application should be granted.[2] The ACTU express the view that *"..the parties have provided far in excess of what is strictly necessary to satisfy the FWC that an authorisation should be made"*[3] and support the granting of the application[4].

4. The totality of the material filed since our initial submission presents no impediment to the application being granted in the terms applied for.

5. The Commission has not yet ruled on whether it will accept the material filed by any of the prospective intervenors. The IEU does not oppose the Commission's acceptance of the same. The IEU offer the following response to that material in the

---

[1] See correspondence to the IEU and the Commission from the employers' representative date 3 August 2023.

[2] See paragraph 2.1 of the ACCI submissions and paragraph 6 of the NSW Business Chamber/ABI submissions. This is despite the conditional nature of the invitation for submissions from intervenors, which sought the position of the intervenors as to the application, per paragraph 3 of the Amended Directions.

[3] At paragraph 40.

[4] At paragraphs 1 and 35 - 40.

event the Commission considers it necessary or desirable to express a view about the matters raised therein.

OPPORTUNITY TO EXPRESS VIEWS

6. Paragraphs 3.2 – 3.5 of ACCI's submission discuss the requirement in section 249(1)(b)(ii) for the Commission to be satisfied that "the employers and the bargaining representatives of the employees of those employers have had the opportunity to express to the FWC their views (if any) on the authorisation".

7. Whilst the IEU accepts that the Commission should receive any views so expressed, the IEU is concerned that ACCI's discussion elevates the status that should be accorded to any views so received. In the IEU 's submission, any views proffered pursuant to section 249(1)(b)(ii) must be relevant either to the specific conditions about which the Commission must be satisfied set out in section 249 concerning whether an authorisation "must" be made or to the specific matters set out in sections 249A and 250 as to the content of such an authorisation.

8. There is no requirement (or warrant) to consider views falling outside those bounds in the Commission's decision making. In the context of the provisions, which are cast in mandatory terms, the enumerated indicia are exhaustive and confer no residual discretion. In this context the Commission would fall into error if it had regard to views other than in relation to the enumerated preconditions by taking into account an irrelevant consideration.[5] Section 249(1)(b)(ii) ensures that relevant parties have an opportunity to be heard in relation to the statutory framework under which an application must be assessed, but plainly does not create a discretion to refuse or grant an authorisation based on broad views or mere preferences as to the general desirability of doing so.

APPLICATIONS BY EMPLOYEE BARGAINING REPRESENTATIVES

9. Paragraph 3.7 of ACCI's submission's incorrectly paraphrases section 249(1)(b)(iv). That section provides:

[5] *Minster for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 at [15] per Mason J.

> (iv) if the application was made by a bargaining representative under paragraph 248(1)(b)—each employer either has consented to the application or is covered by subsection (1B); and

ACCI mistakenly assert that the relevant requirement is "…either each employer must have consented to the application, or they must each be covered by subsection (1B)" and "If *any* employer does not consent to the application, *every* employer specified in the application must be covered by subsection (1B)" (emphasis added).

10. The implication of the submission is that the Commission would be required to undertake an assessment of whether the circumstances of *each* employer (including consenting employers) meet the requirements of coverage by subsection (1B).

11. These assertions by ACCI are plainly at odds with the ordinary and natural meaning of the words used in section 249(1)(b)(iv). The construction for which ACCI contends is inimical to the purpose and intent of the amended scheme for single interest employer bargaining as discussed at length in the ACTU's submission. There is simply no warrant for subjecting consenting employers to the more onerous requirements of subsection (1B) and doing so may have the peculiar result of denying a single interest authorisation to a consenting employer with less than 20 employees merely because a different employer did not wish to be covered by the authorisation.

THRESHOLD FOR REBUTTABLE PRESUMPTION

12. The NSW Business Chamber/ABI make reference to the "headcount" threshold established by sections 249(1AA)(b) and 249(3AB)(b), at paragraphs 30(c)(iii), 30(c)(iv), 30(c)(v), 42(a), 42(b), 42(c) and 46. On each occasion, the threshold is described as operating where an employer has "*more than* 50 employees" (emphasis added). This is incorrect. The relevant threshold is reached where the employer has, subject to subsection (3AC), 50 employees *or more* at the relevant time.

OPERATION OF REBUTTABLE PRESUMPTION

13. Paragraphs 43 – 50 of the NSW Business Chamber/ABI submission discuss the operation of the rebuttable presumptions contained in subsections (1AA) and (3AB) of section 249. Paragraph 48 of the submission relevantly states:

> "Each of the presumptions shall *only stand until 'some' evidence to the contrary is given*, at which point it is displaced. Once this occurs, the presumption has no inherent superadded wight. *It is then the role of the Commission to be satisfied of the underlying requirement* that it must be satisfied of, without the presumption having any force or weight" (emphasis added)

14. The IEU respectfully disagrees with this analysis.

15. The IEU submits, consistent with the position put by the ACTU at paragraphs 36 and 39 of its submissions, that the presumptions operate *on* matters that Commission must be *satisfied* of and in effect deem those matters to be proven, "unless the contrary is proved". To illustrate by way of example:

- Pursuant to section 249(1)(b)(v), it is necessary of the Commission to *be satisfied* in the current matter that, *inter alia*, "..the requirements of …subsection (3)… are met";

- Where it applies, the presumption in section 249(3AB) operates to presume that those "requirements" *are* met. That is, to presume it is conclusively established that the requirement *is* met – not merely that the Commission can be satisfied that it is met. In such circumstances, the Commission would err in law if it found it was *not* satisfied that the requirement was met as there is simply no room for it to exercise any evaluative judgement as would ordinarily be associated with forming a state of satisfaction. It is deemed proven.

- The presumption can only be displaced if "the contrary is proved". Whether or not the contrary is *proved* subjects a party seeking to defeat the presumption to an onus to do more that present 'some' evidence to the contrary.

- If the contrary *is proved*, it follows that the requirement on which the presumption operates *is not* met. In such a circumstance the Commission would err in law if it found it was satisfied that the requirement *was met*.

16. The extent of the onus required by the expression "unless the contrary is proved" is, uncontroversially, the civil standard of the balance of probabilities. There are striking similarities between the phrase "..it is presumed that the requirements …are

met unless the contrary is proved" as used in sections 249(1AA) and 249(3AB) and the expression of the presumption in section 361 of the Act of "..it is presumed that the action was, or is being taken, for that reason or with that intent, unless the person proves otherwise."

17. It is clearly established that displacing the latter presumption, which applies in proceedings concerning alleged contraventions of Part 3-1 of the Act, involves an onus of proof which is to be discharged on the balance of probabilities.[6] There is no warrant for any different conclusion in respect of the presumptions contained in sections 249(1AA) and 249(3AB).

MATTERS RAISED BY THE ACTU

18. The IEU supports the submissions of the ACTU.

P Dean
Counsel for the Applicant
21 August 2023.

[6] *Board of Bendigo Regional Institute of Technical and Further Education v. Barclay* [2012] HCA 32 at [62], per French CJ and Crennan J.