IN THE FAIR WORK COMMISSION

B2023/703

INDEPENDENT EDUCATION UNION OF AUSTRALIA WA BRANCH – APPLICATION FOR SINGLE INTEREST EMPLOYER AUTHORISATION

SUBMISSIONS BY THE AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

1. INTRODUCTION

1.1. On 12 July 2023, the Independent Education Union of Australia WA Branch have applied for a single interest employer authorisation under section 248 of the *Fair Work Act 2009* (Cth) (**FW Act**). This application is the first of its kind following the commencement of amendments to the enterprise bargaining framework on 6 June 2023.[1]

1.2. On 8 August 2023, the Australian Chamber of Commerce and Industry (**ACCI**) wrote to the Fair Work Commission (**Commission**) requesting leave to intervene in the proceedings.[2] **Part 2** of this submission will, pursuant to the pursuant to paragraph [3] of the Commission's directions,[3] further elaborate on the basis for ACCI's intervention.

1.3. In that correspondence, ACCI indicated an intention to file submissions in relation to the operation of sections 249 and 250. However, following examination of the materials provided by the parties, it has now become apparent that only limited submissions in these proceedings are warranted. The reasons for this will be explored in **Part 3** of this submission.

1.4. In summary, ACCI submits that the Commission should, in its decision, refrain from making wider observations about the operation of aspects of section 249 which are impertinent to the present application.

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[1] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) s 2(1) cols 18-23A.
[2] Correspondence on behalf of the Australian Chamber of Commerce and Industry addressed to Deputy President Hampton of the Fair Work Commission (8 August 2023).
[3] Amended Directions, *Independent Education Union of Australia v Catholic Education Western Australia Limited & Ors* (B2023/703) (9 August 2023) [4].

2. BASIS FOR INTERVENTION

2.1. ACCI requests leave to intervene in these proceedings to address the operation of section 249. We do not intend to provide specific submissions on the facts of the case, which are better addressed by the parties specified in the application and their representatives; however, we will refer to material filed by the other parties where necessary to illustrate which aspects of the statutory regime apply in the present proceedings.

2.2. ACCI submits that it both has a relevant interest affected by the proceedings and is in a position to provide assistance to the Commission, given that it is a peak employer body representing a large number of employer organisations and individual business members. The limited nature of our proposed involvement should also provide the Commission with comfort that allowing our intervention will not prejudice the timetabling of the proceedings.

2.3. The recent expansion of the single interest employer stream of enterprise bargaining was significant for Australian businesses and the broader industrial relations system. The changes will expose many employers across the country to the risk of being compelled to bargain for a multi-enterprise agreement,[4] which may have drastic consequences for their business operations and competitiveness. As the largest and most representative business organisation in Australia, ACCI therefore has a clear interest in the operation of the new provisions.

3. NATURE OF THE APPLICATION

3.1. Once an application for an authorisation has been made,[5] the Commission must be satisfied of six particular matters.[6] Some of these matters give rise to additional requirements.[7] If the Commission is satisfied of the six matters, it is obliged to make the authorisation.[8]

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[4] See *Fair Work Act 2009* (Cth) s 249(1B)(d).
[5] *Fair Work Act 2009* (Cth) s 249(1)(a).
[6] Ibid s 249(1)(b)(i)-(vi).
[7] See, eg, ibid s 249(1)(b)(iii).
[8] Ibid s 249(1).

Representation by employee organisation

3.2. The first requirement is that at least some of the employees that will be covered by the agreement are represented by an employee organisation.[9] This requirement is unambiguous.

Opportunity to express views

3.3. The second requirement is 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.[10] This requirement is simply an instantiation of the hearing rule of natural justice.

3.4. It may be argued that, because section 249(1)(b)(ii) only refers to a need for the relevant parties to "have had the opportunity to express … their views", the Commission is not bound to consider them. This, it may be argued, is in contradistinction to other provisions in the FW Act, such as sections 145A, 193A, 223, 226, 235, which explicitly require *consideration* of the views of specified parties,[11] rather than the mere facilitation of their expression.

3.5. On the contrary, the failure to deal with a matter raised by a party in relation to the proposed authorisation will constitute a denial of procedural fairness,[12] irrespective of differences in the wording between section 249(1)(b)(ii) and other provisions in the FW Act. The Commission must meaningfully consider the views expressed by the parties when satisfying itself of the statutory requirements.[13]

Applications by employers

3.6. The third requirement is that, if the application was made by two or more employers, two further requirements in subsection (1A) are met.[14] In these proceedings, the application was not made by two or more employers. The Commission should, therefore, refrain from deciding how these

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[9] *Fair Work Act 2009* (Cth) s 249(1)(b)(i).
[10] Ibid s 249(1)(b)(ii).
[11] Ibid ss 145A(2)(c), 193A(4), 223(d), 226(3), 235(2)(c).
[12] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 356 [90] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[13] See also *Dranichnikov v Minister for Immigration and Multicultural & Indigenous Affairs* (2003) 77 ALJR 1088, 1092 [24] (Gummow and Callinan JJ, Hayne J agreeing at 1102 [95]).
[14] *Fair Work Act 2009* (Cth) s 249(1)(b)(iii).

requirements should be construed.

Applications by employee bargaining representatives

3.7. The fourth requirement is that, if the application is made by a bargaining representative of an employee, either each employer must have consented to the application, or they must each be covered by subsection (1B).[15] If any employer does not consent to the application, every employer specified in the application must be covered by subsection (1B).

3.8. In these proceedings, the employers have consented to the application.[16] The Commission should, therefore, refrain from deciding how the requirements in subsection (1B) should be construed. This includes the related subsections of (1C) and (1D) which affect the operation of (1B). The Commission should also refrain from expressing observations about the necessary constituent elements of "consent" for the purposes of the provision; there is no present dispute about vitiation of consent.

Franchisees and common interest employers

3.9. The fifth requirement in section 249 is that either subsections (2) or (3) are met.

3.10. Subsection (2) relates to franchisees.[17] The relevant employers in this matter are not franchisees. The Commission should, therefore, refrain from deciding how these requirements should be construed.

3.11. Subsection (3) relates to common interest employers.[18] As the applicants contend that the specified employers are common interest employers, this subsection is relevant to these proceedings.

3.12. The requirement in subsection (3) will be met if the employers have clearly identifiable common interests and it is not contrary to the public interest to make the authorisation.[19] The operation of

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[15] *Fair Work Act 2009* (Cth) s 249(1)(b)(iv).
[16] Transcript of Proceedings, *Independent Education Union of Australia v Catholic Education Western Australia Limited & Ors* (Fair Work Commission, B2023/703, Hampton DP, 20 July 2023) PN19.
[17] *Fair Work Act 2009* (Cth) s 249(2).
[18] Ibid s 249(3).
[19] Ibid s 249(3)(a)-(b).

this sub-provision is of significant interest and may be determinative of many future applications within the single interest employer stream of enterprise bargaining.

3.13. However, where an application is made by a bargaining representative of an employee, a rebuttable presumption may apply in respect of the matters in the sub-provision.[20] It will be presumed that an employer meets the requirements in subsection (3) if they employ 50 or more employees.[21] The calculation of the number of employees for the purposes of this presumption includes the employees of associated entities of the employer.[22]

3.14. In the present application, all but one of the employers specified in the application employ more than 50 employees.[23] The only employer who does not employ 50 or more employees, Loreto Nedlands, is an associated entity of another employer that employs more than 50 employees.[24] Resultingly, for the purposes of the presumption, every employer employs 50 or more employees.[25] The presumption therefore applies to each employer.[26]

3.15. No party has indicated any intention to contest whether the employers have clearly identifiable common interests or whether it is not contrary to the public interest to make the authorisation.[27] There is, therefore, no prospect of the presumption being rebutted by proof of the contrary.

3.16. Accordingly, it is unnecessary, in these proceedings, to file submissions in relation to the operation of the requirements in subsection (3). Equally, the Commission should refrain from making substantial observations regarding their operation.

Reasonable comparability

3.17. The sixth and final requirement is that, if the requirements in subsection (3) are met (i.e. the employers are "common interest employers"), the operations and business activities of each of

[20] *Fair Work Act 2009* (Cth) s 249(3AB).
[21] See ibid.
[22] Ibid s 249(3AC)(d).
[23] IEU and CEWA, Proposed Statement of Agreed Facts, *Independent Education Union of Australia v Catholic Education Western Australia Limited & Ors* (B2023/703), 1 August 2023 [4.1].
[24] Ibid [4.2].
[25] *Fair Work Act 2009* (Cth) s 249(3AC).
[26] Ibid s 249(3AB).
[27] Cf Transcript of Proceedings, *Independent Education Union of Australia v Catholic Education Western Australia Limited & Ors* (Fair Work Commission, B2023/703, Hampton DP, 20 July 2023) PN32-PN35.

those employers are reasonably comparable with those of the other employers that will be covered by the agreement.[28]

3.18. However, as which the requirement for clearly identifiable common interests, a rebuttable presumption applies in these proceedings.[29] Employers who employ 50 or more employees at the time an application is made are presumed to have reasonably comparable operations and business activities, unless the contrary is proved.[30] As explained, for the purposes of section 249, every employer specified in the relevant application employ more than 50 employees.[31] No party has indicated any intention to contest the reasonable comparability of the employers' operations and business activities.[32]

3.19. Accordingly, it is unnecessary to file submissions in relation to the operation of the test of reasonable comparability under the sixth requirement for single interest employer authorisations. This matter is not relevant to the present proceedings. Equally, the Commission should refrain from making substantial observations about these sub-provisions in the abstract which may affect disputes about the operation of the requirement that are yet to arise.

4. CONCLUSION

4.1. In these proceedings, it will not be necessary for the Commission to make broad observations regarding the operation of section 249. Issues of construction that are not in dispute, such as those relating to reasonable comparability and the test of common interests, do not require elaboration.

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[28] *Fair Work Act 2009* (Cth) s 249(1)(b)(vi).
[29] Ibid s 249(1AA).
[30] See ibid.
[31] IEU and CEWA, Proposed Statement of Agreed Facts, *Independent Education Union of Australia v Catholic Education Western Australia Limited & Ors* (B2023/703), 1 August 2023 [4]; ibid s 249(3AC).
[32] Cf Transcript of Proceedings, *Independent Education Union of Australia v Catholic Education Western Australia Limited & Ors* (Fair Work Commission, B2023/703, Hampton DP, 20 July 2023) PN32-PN35.

Filed on behalf of the Australian Chamber of Commerce and Industry

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