



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

B2023/538

s.242 - Application for the FWC's approval of a supported bargaining authorisation

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

Sydney

10.00 AM, WEDNESDAY, 14 JUNE 2023

PN1

THE ASSOCIATE: The Fair Work Commission is now in session. This is matter B538/2023, for directions before Hatcher J.

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JUSTICE HATCHER: I'll take the appearances. Mr Redford, you appear for the United Workers Union, which I'll call the first applicant.

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MR B REDFORD: Yes, your Honour, I'm here.

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JUSTICE HATCHER: Thank you. Mr McIver, you appear for the Australian Education Union (Victorian Branch) which I'll call the second applicant.

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MR M MCIVER: Yes, your Honour, I appear for the AEU.

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JUSTICE HATCHER: Dr Wright, you appear for the Independent Education Union of Australia, which is the third applicant?

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DR M WRIGHT: Yes, I do, your Honour.

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JUSTICE HATCHER: All right, for the respondents, using the grouping identified in the UWU's note, Mr Ward you appear for the Australian Childcare Alliance and the Group 1 respondent employers, is that right?

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MR N WARD: Yes, it is, your Honour. Yes.

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JUSTICE HATCHER: Ms Stevens, you appear for the Community Early Learning Australia and Community Childcare Association, which are bargaining representatives of the group 2 and group 3 respondents, respectively?

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MS L STEVENS: That's correct, your Honour.

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JUSTICE HATCHER: Ms Pearson and Ms Wood, you appear for G8, which is in the fourth category of respondents, correct?

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MS T PEARSON: That's correct, your Honour.

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JUSTICE HATCHER: All right, and Peak Council's, Ms Tinsley, you appear for the Australian Chamber of Commerce and Industry?

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MS J TINSLEY: That's correct, your Honour.

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JUSTICE HATCHER: And Ms Peldova-McClelland, you appear for the ACTU?

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MS S PELDOVA-MCCLELLAND: Yes, your Honour.

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JUSTICE HATCHER: Is that all the appearances?

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All right, I might start with you, Mr Redford.

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MR REDFORD: Thank you, your Honour.

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I thought to make some brief introductory comments about the application and its contest, some things about its scope and the parties, and then some brief comments about our thoughts, in relation to the evidence and then we have provided your Chambers, last night, with some draft directions which I could then address.

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JUSTICE HATCHER: Yes.

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MR REDFORD: Your Honour, by way of introduction, for the United Workers Union members, this application is significant and historic because our members who work in early education and care hope that this process is the one by which the significant undervaluation of the work that they perform in this sector can be dealt with.

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The authorisation that we're seeking from the Commission would allow us and the Australian Education Union and the Independent Education Union of Australia to collectively bargain with a group of 62 employers who operate in the early education and care sector, or ECEC sector, covering about 500 services which operate across Australia that employ roughly around 1200 workers.

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The bargaining process that we hope can occur would, we envisage, also involve the Commonwealth government, which is the primary funder of the sector. It funds the sector through the Australian Childcare Subsidy.

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The collective bargaining agreement that we hope to make would be one which, with the involvement and the support of the Commonwealth government would involve a significant improvement to the wages and conditions paid to early childhood educators. We also hope to then use the new supported bargaining

machinery to flow those improved wages and conditions to apply across the sector.

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The application is the first of its kind. It's the first test of the Fair Work Act's new supported bargaining mechanism and we understand that the Commission will need to step its way through these new provisions carefully and meticulously, but we also hope that the process can be conducted efficiently and expeditiously.

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This is, in part, because for early educators the need to address the undervaluation of the work they perform is now compelling and critical. ECEC workers are responsible for the education and care of Australian children under five years of age. They're responsible for the education and care of the future of the Australian community and yet it is widely acknowledged that these workers wages and conditions do not reflect the value of this work.

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The most common qualification in the sector, your Honour, is a Diploma in Early Childhood Education and Care, for which the award classification begins at \$27.88 per hour. Medium full-time earnings for early educators are significantly less than the national average.

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The United Workers Union submission to the current Productivity Commission inquiry into the early childhood education and care sector begins with a short statement that was made by a United Workers Union member, who works in early education and this is what she said. She said:

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The personal limitations that come from choosing a career in ECEC are enormous. It is unlikely that I will ever be able to purchase my own home, buy a brand new car or go on an overseas holiday. It is difficult when we live paycheque to paycheque with very little opportunity to build our savings. I regularly worry about the implications my career will have on my life when I retire and can no longer work.

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Somewhere between 30 per cent and 50 per cent of early educators are leaving the sector each year. The average tenure of an ECEC worker is presently about 3.6 years and our members are telling us that as many as three-quarters of them are considering leaving the sector in the next few years because the work they do, which is so significant and important, is undervalued.

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For early educators this application is a means by which they will attempt to exercise direct power over the circumstances they now find themselves in and win value for their work so they can stay in the job that they love.

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The group of employers included in the application and the advocacy peaks who are involved are, we understand it, generally supportive of this ambition and we also hope that the process envisaged by the supportive bargaining scheme will allow us to engage direction with the government funder, in a bargaining context, and we understand that proposition to be one in which the government is supportive of. That's the context in which we make this application your Honour.

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In relation to its scope, as I've said, the application seeks an authorisation that the three unions and 62 employing entities bargain together. The application is confined to what we describe as long day care. So this means an earlier education and care service which has features such as that it provides services across a period of more than eight hours a day. It provides services for 48 weeks in the year, or more. As I've said, it's funded, predominantly, through the Commonwealth Childcare Subsidy and each of these services implement what is called the National Quality Standard, which is a benchmark standard for the provision of early education and care, which is overseen by the Australian Children's Education and Care Quality Authority.

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Long day care may be contrasted with, for example, a standalone kindergarten or preschool service that operates a program that is usually funded by state government. This application only seeks a supportive bargaining authorisation in respect of long day care, early education and care services. The employers that are included in the application are, in the main, only conducting these types of services. But the application makes it clear that we are seeking the authorisation only, in relation to employees working in the long day care setting.

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We've provided your Chambers with a short note which divides the employing entities into four categories. I'll go to those categories in just a moment, your Honour. The first thing to say about this group, though, is that it is our understanding that, in each case, the employers will not object to the application being granted by the Commission.

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So while we understand that the Commission must be satisfied that we've met the requirements of section 243 for a supportive bargaining authorisation to be granted, when we make our submission to you, that we think we have fulfilled those requirements, we are given to understand that this group of employers will agree with that submission.

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In the document we've provided you the employers numbered 1 to 41 are each members of the Australian Childcare Alliance, so this is group 1. The ACA is the prominent advocate for early childhood employers in Australia. ACA is, in this proceeding, represented by Australian Business Lawyers and Advisors, and we understand that ABL's director, Mr Nigel Ward, will be appointed to act as the bargaining representative for this group, together with the president of ACA, Mr Paul Mondo. Each of these employers operate early childhood and care centres across Australia.

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The employers numbered 42 to 49 are each members of the Community Childcare Association. This is group 2. The CCC is the significant peak advocacy group for community ECEC in Victoria.

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The employers numbered 50 to 61 are each members of Community Early Learning Australia. This is another significant Australian ECEC advocacy group that provides advocacy and assistance to operators, particularly in the community sector. This is group 3.

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We understand that in the case of both group 2 and 3, these two bargaining representatives have engaged a common representative, in the form of Ms Laura Stevens, who I understand will represent them both.

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The final group is comprised of a single employer and that's G8 Education. G8 Education is one of the largest ECEC operators in Australia, it runs over 400 ECEC centres across the country and we understand G8 will act as its own bargaining representative in relation to this matter.

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I'll just turn to some brief comments about the evidence, your Honour. In very broad terms it appears there's two key matters that we need to satisfy the Commission about. One is that it is appropriate for the employers and the employees concerned to bargain together, taking into account the prevailing pay and conditions within the ECEC sector, including where the low rates of pay prevail in the sector. Two is that it is appropriate for the employers and the employees concerned to bargain together, taking into account their common interests.

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So, in relation to the first matter, your Honour, there are a range of publicly available data sources which can provide a picture of the prevailing pay and conditions in the sector that we think demonstrate the widely accepted view that those pay and conditions are low. It's on that basis we've begun to have some preliminary discussions, amongst the parties, about the idea that, in relation to this matter, we provide the Commission with a set of appropriately referenced agreed statements of contention, in relation to these matters, which will be presented to you as not in context. So that's the thinking that we've done so far, in relation to the first key evidentiary matter.

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In relation to the second matter, it seems it's likely to be appropriate for the Commission to hear from each employer as to the nature of their enterprises, and the commonality of those. When I say 'hear' I mean that given that the evidence in this matter will not be contested, we envisage a short statement from each employer would be made. Bearing in mind, your Honour, that the starting point in each case will be a structural commonality between each of the enterprises because they each operate the same national curriculum, they each do so pursuant

to a consistent regulatory arrangement, they each have a common funding arrangement. So, fundamentally, we imagine that the evidence given by each employer, in relation to the nature of their enterprises might also be generic.

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JUSTICE HATCHER: I see a reference to subsection (2) of section 243, noting that these are only examples, that (b) and (c) would be the primarily pertinent ones?

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MR REDFORD: Yes, your Honour. I think (b) and (c), together with, 'In relation to any other matter the Commission might consider to be appropriate', the common regulatory arrangement, including the common curriculum that's required to be administered by each service. But that's right, (b) and (c) and that other matter.

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JUSTICE HATCHER: Yes.

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MR REDFORD: So it's on that basis, your Honour, that we've had discussions about what directions in the matter might look like, and we've provided your Chambers with a draft in that regard. What we've proposed is that parties file and serve materials, in relation to the application, on 28 July, which is around five or six weeks away. That's, we suggest, an appropriate amount of time, particularly to pull together the second broad set of evidence that I've mentioned, across the some 60-odd employers that are involved.

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We then thought there could be a provision for reply material to be filed a week later, with a hearing that we'd envisage might not extend beyond two or three days, to occur at the Commission's convenience, but ideally, for our part, some time in August.

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JUSTICE HATCHER: With direction 4, if, as you say, none of the respondent employers are opposing the application, why is there a need for reply submissions?

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MR REDFORD: Yes, your Honour. We thought, simply out of an abundance of caution, there may be things that are raised that might need to be addressed. You'll notice that we've also envisaged that it may be the case that the Commission feels it might be assisted by hearing from peak councils as well. What we'd envisaged was to suggest that if the Commission was so minded that those submissions, if there were any, made by peak councils should be limited only to the operation of the legislation. But if the Commission was so minded to make that direction and invite such submissions, then that may be another reason why there may be some facility in having a reply date, your Honour.

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JUSTICE HATCHER: All right, thank you.

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MR REDFORD: That's all I have, your Honour.

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JUSTICE HATCHER: All right, thank you. Mr McIver or Dr Wright, do you want to add anything to that?

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MR MCIVER: No, your Honour, I concur with Mr Redford's submissions and our claim. We consent to the draft directions as well.

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JUSTICE HATCHER: Thank you.

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DR WRIGHT: No, your Honour, we support the directions as sought.

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JUSTICE HATCHER: All right. Mr Ward?

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MR WARD: Thank you, your Honour. I might make a brief number of points. Can I firstly indicate that the application is the culmination of discussions between the Australian Childcare Alliance and United Workers Union and the other applicants and the Commonwealth, dating back to last year.

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The employers identified as group 1 are all prominent members of the Australian Childcare Alliance, they're either members of the national board or the various state boards and they are representative of each state in Australia and are also representative of city operations and regional and country operations.

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It was put by Mr Redford that those I act for will not oppose the making of the authorisation. I think that would be better phrased this way. We appear in the proceedings to support the making of the authorisation.

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In relation to the evidence, we do intend to file evidence, in relation to each of the employers in group 1 to assist the Commission, in relation to the common interest test. Obviously, given that this is the first time that test has been before the Commission for consideration, we'll be making some detailed submissions on that test and the broader requirements of section 243.

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Other than that, I'd simply indicate that we resolved the draft directions with the United Workers Union yesterday and we support the making of the directions as provided to your Honour's Chambers yesterday.

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JUSTICE HATCHER: Thank you. Ms Stevens?

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MS STEVENS: Thank you, your Honour. I don't have much more to add than what has already been stated, other than to, again, confirm that on behalf of the member services in group 2 and group 3 of the note, represented by Community Childcare Association and Community Early Learning Australia, that we do enthusiastically support this application and the making of the authorisation on the basis that our member services, who have volunteered to participate in this, and who consent to be named in the authorisation, share the urgency mentioned by Mr Redford on addressing the prevailing low pay in the sector.

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They're services who, along with the services named in the group 1, operate in areas across New South Wales, Victoria and South Australia and represent small community providers in both metropolitan and regional areas, as well as small for profit providers, again in metropolitan and regional areas, as well as one medium provider, which operates in metropolitan Melbourne.

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These named employers are very enthusiastic because they see this as an opportunity to extend the benefits of enterprise bargaining to their employees where they have been previously locked out of that system as small providers often lack the time, resources and capability to engage in enterprise bargaining at a service-by-service level.

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We'll be taking a similar approach as outlined by Mr Ward, in terms of the preparation of the evidence in relation to this matter and we consent to the draft directions, as provided to your Chambers.

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Thank you.

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JUSTICE HATCHER: Thank you. Ms Pearson and Ms Wood?

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MS PEARSON: Thank you, your Honour. G8 consent to the application and appear to support the making of the directions.

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JUSTICE HATCHER: All right, thank you. Ms Tinsley?

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MS TINSLEY: Thank you, your Honour. Just confirming that we propose to confine our submissions to such considerations in section 243 and would propose to put on any submissions around the merits of the case.

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JUSTICE HATCHER: Have you seen the directions proposed by the applicant?

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MS TINSLEY: No, I haven't seen that, but in terms of what Mr Redford was saying before, we would appreciate the ability to put forward submissions in reply, for the purpose of - - -

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JUSTICE HATCHER: I don't think that was directed to you, that was directed towards the direct parties to the matter. So what's contemplated is that the applicant, the respondent and any peak councils would all file submissions by 28 July.

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MS TINSLEY: That would work for us, your Honour.

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JUSTICE HATCHER: All right. Ms Peldova-McClellan?

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MS PELDOVA-MCCLELLAND: Thank you, your Honour. Yes, just to say that we support the directions that have been sought, noting that given the nature of this case and it's the first application of its kind, the ACTU may wish to also make submissions and there may be important questions of interpretation that arise, including the matter of a common interest. So we support the directions that have been sought.

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JUSTICE HATCHER: All right. Thank you. Now, I direct this to all the parties. The directions contemplate a hearing sometime between 7 and 28 August, is there any particular dates of concern in that period?

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MR REDFORD: Your Honour, if I could just indicate, I would prefer it to be a Wednesday, Thursday or Friday, if possible. I just have other commitments, at the moment, before the Commission, on the Tuesday.

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JUSTICE HATCHER: Okay. Any other party? All right. I might make some minor modifications to the directions and this will be confirmed in writing later today. I'll confirm that the applicants and respondents will put on their submissions, evidence and any agreed statement of facts by 28 July. What I might to is allow any peak councils which wish to intervene, as well as the Commonwealth, a further seven days after that to make submissions on the operation of provisions. I think those submissions might be more helpful if they were illuminated by the case actually being advanced. Then extend the reply to those submissions to the week after that, which will be 11 August. Then the matter will be referred to a Full Bench for hearing and I can indicate we'll be able to find some dates in the requested time period, but they'll be advised to the parties.

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Is there anything further? No? I thank everyone for their attendance. As I said, we'll issue the directions and a notice of listing later today and we'll now adjourn.

ADJOURNED INDEFINITELY

[10.45 AM]