[2023] FWCFB 176

The attached document replaces the document previously issued with the above code on 27 September 2023.

'Authorisation' replaces 'application' in the first sentence of paragraph [1].

Edrea Venal
Associate to Justice Hatcher, President.

29 April 2024

DECISION

Fair Work Act 2009
s.242—Supported bargaining authorisation

Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia
(B2023/538)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT HAMPTON

SYDNEY, 27 SEPTEMBER 2023

Application for a supported bargaining authorisation – early childhood education and care sector.

Introduction

[1] The United Workers' Union (UWU), the Australian Education Union (AEU) and the Independent Education Union of Australia (IEU) have jointly applied for a supported bargaining authorisation pursuant to s 242(1) of the *Fair Work Act 2009* (Cth) (FW Act). The application, as amended, specifies a total of 64 employers operating in the early childhood education and care (ECEC) sector who will be covered by the proposed multi-enterprise agreement to which the authorisation sought relates. These employers are set out in Annexure A to this decision. The application also specifies that the employees who will be covered by the proposed multi-enterprise agreement are those employed by the specified employers who perform the following types of work in the ECEC sector:

(1) Work covered by the *Children's Services Award 2010* (CS Award) or the *Educational Services (Teachers) Award 2020* (EST Award) occurring in a long day care setting, but *not* work performed in the following settings: adjunct care, a stand-alone preschool or a kindergarten, occasional care, out of school hours care, vacation care, mobile centres, or early childhood intervention programs, and *not* work covered by an enterprise agreement that has not reached its nominal expiry date, including:

- *Bermagui Pre-School Co-Operative Society Ltd Teachers' Agreement 2020*;
- *Gowrie Victoria Early Childhood Teachers Enterprise Agreement 2022*;
- *Victorian Early Childhood Teachers and Educators Agreement 2020*;
- *Victorian Early Childhood Agreement 2021*.

(2) Work performed in the ECEC sector in a long day care setting not otherwise covered by the CS Award or the EST Award, including that of a qualified chef or cook.

[2] There is no dispute that the employers specified in the application are all 'national system employers' within the meaning of s 14 of the FW Act. The employers fall into three categories. Employers numbered 1-41 in Annexure A (ACA employers) are represented by the Australian Childcare Alliance (ACA), and these employers have each nominated Mr Nigel Ward (Director of Australian Business Lawyers and Advisors) and Mr Paul Mondo (President of the ACA) as their bargaining representatives for the proposed agreement. Employers numbered 42-63 have appointed either Community Early Learning Australia Limited (CELA) or the Community Child Care Association (CCCA) to act as their bargaining representative, and are jointly represented by Ms Laura Stevens, the Director, Policy and Strategy of CELA, in this proceeding. Finally, G8 Education Limited (G8) represents itself in this proceeding and as bargaining representative. All of the specified employers support the making of the authorisation sought by the applicants. No employee of these employers has appeared in the proceeding to oppose the making of the authorisation.

[3] Because this is the first application for a supported bargaining authorisation, we have permitted the Australian Chamber of Commerce and Industry (ACCI), the Australian Industry Group (Ai Group) and the Australian Council of Trade Unions (ACTU) to make submissions in the matter concerning the proper construction and application of the relevant provisions of the FW Act. None of these parties sought to make a submission that the authorisation sought by the applicants should not, or could not, be made.

Statutory framework

[4] The FW Act has, since its enactment, contained a regime for the making, and approval by the Commission, of enterprise agreements. At all times during the operation of the FW Act, subsection (f) of s 3 has provided that one of the identified means of achieving the FW Act's object 'to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians' is by 'achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action'. The entire scheme for enterprise agreements is contained in Part 2-4. The object of the Part in s 171 is:

> **171 Objects of this Part**
>
> The objects of this Part are:
>
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and
> (ii) dealing with disputes where the bargaining representatives request assistance; and
> (iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

[5] Prior to 6 June 2023, Division 9 of Part 4-2 provided for a 'low-paid bargaining' stream for the making of multi-enterprise agreements. Section 169, which sets out a 'guide' to Part 4-2, provided in relation to the 'low-paid bargaining' stream:

> Division 9 provides for the making of low-paid authorisations in relation to proposed multi-enterprise agreements. The effect of such an authorisation is that specified employers are subject to certain rules that would not otherwise apply (for example, bargaining orders that would not usually be available for multi-enterprise agreements will be available). It also permits the FWC to assist the bargaining representatives for such agreements.

[6] Former s 241 then set out the objects of the then Division 9 as follows:

> **241 Objects of this Division**
>
> The objects of this Division are:
>
> (a) to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs; and
>
> (b) to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises; and
>
> (c) to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and
>
> (d) to enable the FWC to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements. …

[7] Section 242 provided for the making of applications for 'low-paid authorisations', and s 243 set out when the Commission was required to make a low-paid authorisation as follows:

> **243 When the FWC must make a low-paid authorisation**
>
> *Low-paid authorisation*
>
> (1) The FWC must make a low-paid authorisation in relation to a proposed multi-enterprise agreement if:
>
> (a) an application for the authorisation has been made; and
> (b) the FWC is satisfied that it is in the public interest to make the authorisation, taking into account the matters specified in subsections (2) and (3).
>
> *FWC must take into account historical and current matters relating to collective bargaining*
>
> (2) In deciding whether or not to make the authorisation, the FWC must take into account the following:

(a) whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;
(b) the history of bargaining in the industry in which the employees who will be covered by the agreement work;
(c) the relative bargaining strength of the employers and employees who will be covered by the agreement;
(d) the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;
(e) the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.

FWC must take into account matters relating to the likely success of collective bargaining

(3) In deciding whether or not to make the authorisation, the FWC must also take into account the following:

(a) whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;
(b) the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process;
(c) the views of the employers and employees who will be covered by the agreement;
(d) the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement;
(e) the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that:
(i) would cover that employer; and
(ii) would not cover the other employers specified in the application.

. . .

[8] Section 244 made provision for the variation of low-paid authorisations to remove or add the names of employers, and s 245 provided that the Commission was taken to have varied a low-paid bargaining authorisation to remove an employer’s name when an enterprise agreement or a workplace determination that covers the employer comes into operation. Section 246 empowered the Commission, on its own initiative, to provide assistance to the bargaining representatives for a proposed multi-enterprise agreement where a low-paid authorisation was in operation. Such assistance was that which the Commission considered appropriate to facilitate bargaining for the agreement and which it could provide if it were dealing with a dispute (s 246(2)), but the Commission was not authorised to arbitrate. In addition to the Commission’s general procedural powers under Subdivision B of Division 3 of Part 5-1 of the FW Act, s 246(3) authorised the Commission to direct a person other than an employer specified in the authorisation to attend a conference at a specified time and place if the FWC was satisfied that the person exercised such a degree of control over the terms and conditions of the employees who would be covered by the agreement that the participation of the person in bargaining was necessary for the agreement to be made.

[9] The FW Act was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBP Act), effective from 6 June 2023, to introduce (among other things) a new 'supported bargaining stream' for multi-enterprise agreements in place of the previous 'low paid bargaining stream'. That part of the object of the FW Act in s 3(f) was not altered, nor were the objects of Part 2-4 in s 171, but the 'guide' to Part 2-4 in s 169 was, in relation to Division 9 of the Part, amended to provide:

> Division 9 provides for the making of supported bargaining authorisations in relation to proposed multi-enterprise agreements. The effect of such an authorisation is that specified employers are subject to certain rules that would not otherwise apply (for example, bargaining orders that would not usually be available for multi-enterprise agreements will be available). It also permits the FWC to assist the bargaining representatives for such agreements.

[10] Division 9 of Part-2-4 is now entitled 'Supported bargaining'. The objects of Division 9 are set out in s 241 as follows:

> **241 Objects of this Division**
>
> The objects of this Division are:
>
> (a) to assist and encourage employees and their employers who require support to bargain, and to make an enterprise agreement that meets their needs; and
> (c) to address constraints on the ability of those employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and
> (d) to enable the FWC to provide assistance to those employees and their employers to facilitate bargaining for enterprise agreements.[1]

[11] Section 242 concerns the making of applications for supported bargaining authorisations, including requirements as to standing and content. The section provides:

> **242 Supported bargaining authorisations**
>
> (1) The following persons may apply to the FWC for an authorisation (a ***supported bargaining authorisation***) under section 243 in relation to a proposed multi-enterprise agreement:
> (a) a bargaining representative for the agreement;
> (b) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement.
>
> Note: The effect of a supported bargaining authorisation is that the employers specified in it are subject to certain rules in relation to the agreement that would not otherwise apply (such as in relation to the availability of bargaining orders, see subsection 229(2)).
>
> (2) The application must specify:
> (a) the employers that will be covered by the agreement; and
> (b) the employees who will be covered by the agreement.
>
> (3) An application under this section must not be made in relation to a proposed greenfields agreement.

[12] Section 243 sets out the circumstances in which the Commission is required to make a supported bargaining authorisation:

243 When the FWC must make a supported bargaining authorisation

Supported bargaining authorisation—main case

(1) The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:
- (a) an application for the authorisation has been made; and
- (b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together, having regard to:
  - (i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and
  - (ii) whether the employers have clearly identifiable common interests; and
  - (iii) whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and
  - (iv) any other matters the FWC considers appropriate; and
- (c) the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation.

Note: This subsection is subject to section 243A (restrictions on making supported bargaining authorisations).

Common interests

(2) For the purposes of subparagraph (1)(b)(ii), examples of common interests that employers may have include the following:
- (a) a geographical location;
- (b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;
- (c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

Supported bargaining authorisation—declared industry etc.

(2A) The FWC must also make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:
- (a) an application for the authorisation has been made; and
- (b) the employees specified in the application are employees in an industry, occupation or sector declared by the Minister under subsection (2B).

Note: This subsection is subject to section 243A (restrictions on making supported bargaining authorisations).

(2B) The Minister may, by legislative instrument, declare an industry, occupation or sector, if the Minister is satisfied that doing so is consistent with the objects of this Division set out in section 241.

What authorisation must specify etc.

(3) The authorisation must specify:
  (a) the employers that will be covered by the agreement; and
  (b) the employees who will be covered by the agreement; and
  (c) any other matter prescribed by the procedural rules.

Operation of authorisation

(4) The authorisation comes into operation on the day on which it is made.

[13] Section 243 operates subject to s 243A, which specifies certain restrictions on the making of supported bargaining authorisations. Section 243A(1) provides that the Commission must not make such an authorisation specifying an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date. However, this restriction operates subject to s 243A(3), which provides that it does not apply if the Commission is satisfied that an employer's main intention in making the single-enterprise agreement with the employees covered by it was to avoid being specified in a supported bargaining authorisation. Section 243(4) provides that the Commission must not make a supported bargaining authorisation in relation to a proposed enterprise agreement if the agreement would cover employees in relation to 'general building and construction work' (as this expression is defined in s 23B(1)).

[14] Section 244 specifies certain circumstances in which the Commission must, upon application, vary a supported bargaining authorisation. Subsections (1)-(3) are, in substance, the same as they were prior to the operation of the SJBP Act, while subsection (4) has been modified and subsections (4A) and (5) added to restrict the circumstances in which an authorisation must be varied to add an employer consistently with s 243A.

[15] Section 245 provides that the Commission is taken to have varied a supported bargaining authorisation to remove an employer's name when the employer and all of their employees who are specified in the authorisation are covered by an enterprise agreement or a workplace determination that is in operation. Section 246 is in the same terms as the provisions was prior to the operation of the SJBP Act, save that 'for the low-paid' is now omitted from the title of the section and subsection (1) has been amended to refer to a supported bargaining authorisation rather than a low-paid authorisation.

[16] An important consequence of the making of a supported bargaining authorisation is specified in s 172(7) as follows:

Requirement for employer specified in supported bargaining authorisation

(7) Despite any other provision of this Part, if an employer is specified in a supported bargaining authorisation that is in operation:
  (a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a supported bargaining agreement; and
  (b) the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement.

[17] Section 172(7) had no equivalent in the previous low-paid bargaining scheme.

[18] After the making of a supported bargaining authorisation, a 'supported bargaining agreement' (defined in s 12 to mean a multi-enterprise agreement in relation to which a supported bargaining authorisation was in operation immediately before the agreement was made) is *made* when, pursuant to s 182(2), the employees of each of the employers that will be covered by the agreement have been asked to approve the agreement under s 181(1), those employees have voted on whether or not to approve the agreement and a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement. Section 184 provides that if a multi-enterprise agreement has been made, but has not been approved by the employees of all the employers that made a voting request under s 181(1), a bargaining representative must, prior to applying for its approval, vary the agreement so that it is expressed to cover only each employer whose employees approved the agreement and its employees. Subsections (3)-(5) of s 184 set out the process by which this is to be done.

[19] Subject to s 184, a supported bargaining agreement once made must be the subject of an application to the Commission for approval pursuant to s 185(1). Under s 186(1), the Commission must approve the agreement if the applicable requirements of ss 186 and 187 are met, and may alternatively approve the agreement pursuant to ss 189, 190 or 191A.

General principles

[20] Before we turn directly to the application before us, it is convenient to set out some general propositions concerning the proper construction and application of the current provisions of Division 9 of Part 4-2. The principal contextual consideration in this respect is, we consider, that the scheme for supported bargaining effected by the SJBP Act represents a modification of the previous low-paid bargaining scheme, rather than a complete innovation, with the objective of rendering the scheme more accessible and therefore more widely-used. The historical context is that the low-paid bargaining scheme essentially failed to achieve its legislative purpose as set out in s 241: only five applications for low-paid authorisations were ever made in the almost 14 years that scheme was in place, only one of these was successful (the *Aged Care decision*[2]) and the successful application did not lead to the making of a multi-enterprise agreement. Decisions concerning applications which were not successful illustrate the way in which the matters required to be taken into account under s 243, as it then was, operated to constrain access to the low-paid bargaining scheme. In *Australian Nursing Federation v IPN Medical Centres Pty Ltd & Ors*[3] (*Practice Nurses decision*), the Commission considered an application for a low-paid authorisation with respect to nurses employed by some 682 employers operating general practice clinics and medical centres. In determining, in undertaking the required discretionary evaluation, that it was not satisfied that it would be in the public interest to make the low-paid authorisation sought, the Commission placed weight on its findings that:

- most of the nurses affected were not low-paid, so that the assistance that the grant of the authorisation would provide to low-paid employees was marginal;

- the applicant union had not accessed all the rights available under the FW Act to advance the interests of its members by way of enterprise-based negotiations;

- multi-employer bargaining was less likely to identify improvements in productivity and service delivery than enterprise bargaining;

- multi-employer bargaining was also likely to be cumbersome and of doubtful manageability given the number of employers involved; and

- multi-employer bargaining, while supported by a large proportion of employees, was strongly opposed by most employers and some employees.[4]

[21] These conclusions invoked the considerations in subsections (2)(a) and (b) and (3)(a), (b) and (c) of former s 243 respectively. In respect of the conclusion that most of the nurses affected were not 'low-paid', the Commission relied in part upon the analysis of that expression in the *Aged Care decision*, in which the Full Bench said that '[w]e have no doubt that in the context of the provisions of Division 9 the phrase is intended to be a reference to employees who are paid at or around the award rate of pay and who are paid at the lower award classification levels'.[5] The Commission also referred[6] to the 2009-10[7] and 2012-13 Annual Wage Review decisions,[8] in which the low-paid were identified as those earning less than a benchmark of two-thirds of median adult ordinary-time earnings, and then continued:

> [92] Counsel for IPN submits that the case before me provides an opportunity to provide clarity on the meaning of the term by aligning the approaches adopted in the [*Aged Care decision*] and Annual Wage Review decisions. IPN submits that this would result in considering low-paid employees as those on rates between the C14 and C10 classifications in the Manufacturing Award.
>
> [93] The ANF submits that the term is one that should be applied in the relevant industry under consideration, that industry is the vocation of nursing and that as practice nurses are paid less than public sector hospital nurses, practice nurses are low-paid. It submits in the alternative that practice nurses are low[-]paid because they are often paid at or around the award rate of pay.
>
> [94] There are a number of problems with the ANF approach, not least of which is the comparison made with different industries in the health sector. I consider that the term low-paid used in the legislation is intended to have a consistent meaning, albeit one that cannot be defined by reference to a strict cut[-]off point. The *Aged Care decision* and the approach in Annual Wage reviews involve a consistent approach. In my view that is the correct approach to adopt in this case. However the notion that the concept is a matter of degree involves an element of imprecision which in my view must be borne in mind. I propose to adopt a broad view to the term in the context of the evidence of pay of the employees concerned.

[22] In *United Voice*,[9] the Commission dismissed an application for a low-paid authorisation in relation to five security industry employers in the ACT and their employees covered by the *Security Services Industry Award 2010*. The Commission followed the *Aged Care decision* and the *Practice Nurses decision* in respect of the meaning of 'low[-]paid' and was satisfied that some of the employees that would be covered by the authorisation were low-paid.[10] However, the Commission made findings that led to the conclusion that most of the required considerations in subsections 243(2) and (3) did not weigh in favour of, or weighed against, the grant of the authorisation sought, including that:

- there was no evidence of previous attempts to bargain at the enterprise level with some of the employers proposed to be covered by the authorisation (subsection (2)(a));[11]

- there had been a lack of effort by the applicant to bargain with the employers at the enterprise level (subsection (2)(b));[12]

- the terms and conditions of the affected employees were in most respects no less beneficial than the minimum terms and conditions applying elsewhere and community standards (subsection (2)(d));[13]

- the degree of commonality between the enterprises the subject of the application were counterbalanced by the need to have appropriate regard to the fact that the enterprises competed for contracts and work (subsection (2)(e);[14]

- there was no basis upon which it could be said that granting the authorisation would assist in identifying improvements to productivity and service delivery (subsection (3)(a));[15]

- while a not-insignificant number of employees supported the application, the strength and level of support was not known, and the relevant employers were opposed to becoming involved in multi-enterprise bargaining (subsection (3)(c));[16] and

- there was insufficient evidence that the government, as the dominant player in the market, used its procurement processes to control, direct or influence the terms and conditions of employment (subsection (3)(d)).[17]

[23] Ultimately the Commission concluded:

> [130] Having taken into account each of the matters set out in ss 243(2) and (3) I am not satisfied that it is in the public interest to make the authorisation sought by United Voice. Neither party advanced any other ground on which it might be said that the public interest is enlivened so as to compel the making of a low-paid authorisation. Although I have concluded that some of the employees the subject of this application are low-paid a case has not been made out that the employees have either not had access to collective bargaining or that they face substantial difficulty bargaining at the enterprise level. For the reasons given earlier, the preponderance of the matters of which account must be taken weigh against making the authorisation sought by United Voice. Some of the considerations are neutral and those few that weigh in favour are not so significant as to result in an authorisation being warranted, much less mandated, in the public interest.

[24] The Revised Explanatory Memorandum (REM) for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (SJBP Bill) identifies in a number of instances that an objective of the SJBP Bill is to improve access to and the use of what was then the low-paid bargaining stream. The Outline of the SJBP Bill in the REM identifies a purpose of the Bill as being to '[r]emove unnecessary limitations on access to the low-paid bargaining stream (and rename it the supported bargaining stream) and the single-interest employer authorisation stream; and provide enhanced access to FWC support for employees and their employers who require assistance to bargain'. The REM's Statement of Compatibility with Human Rights states the following in relation to supported bargaining:

> 37. Part 20 would reform the low-paid bargaining provisions in Division 9 of Part 2-4 of the FW Act and create the supported bargaining stream. The supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low-paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively. The supported bargaining stream will also assist employees and employers who may face barriers to bargaining, such as employees with a disability and First Nations employees.
>
> 38. The provisions would amend the existing low-paid bargaining process. When an application for a supported bargaining authorisation is made, the FWC must consider whether it is appropriate for the parties to bargain together. The FWC would consider the prevailing pay and conditions in the relevant industry, whether employers have clearly identifiable common interests, and whether the number of bargaining representatives would be consistent with a manageable collective bargaining process. The proposed supported bargaining stream is intended to be easier to access than the existing low-paid bargaining stream.
>
> . . .
>
> (underlining added)

[25] The REM's Statement of Compatibility with Human Rights further states:

> 109. The Bill would promote the right to work and rights in work by amending the existing low-paid bargaining stream to assist people who face barriers to bargaining to negotiate their terms and conditions of employment. By increasing access to the renamed supported bargaining stream, the Bill intends to assist workers who require support to bargain. This might include those in low paid occupations, government-funded industries, and female-dominated sectors, as well as employees with a disability, employees who are culturally and linguistically diverse and First Nations employees who may be employed in such sectors and face additional hurdles.
>
> 110. Increasing the accessibility of collective bargaining promotes the right to enjoyment of just and favourable conditions of work by enabling employees to leverage the collective power of multi-employer bargaining to secure safe, healthy and fair working conditions.
>
> (underlining added)

[26] Most significantly, the notes on those clauses of the SJBP Bill directly relating to supported bargaining relevantly state:

> 921. Part 20 would reform the low-paid bargaining provisions in Division 9 of Part 2-4 of the FW Act and create the supported bargaining stream. The proposed supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively. The supported bargaining stream will also assist employees and employers who may face barriers to bargaining, such as employees with a disability and First Nations employees.
>
> 922. The supported bargaining process would operate similarly to the existing low-paid bargaining process. When an application for a supported bargaining authorisation is made, the FWC must consider whether it is appropriate for the parties to bargain together. The FWC would consider the prevailing pay and conditions in the relevant industry,

> whether employers have clearly identifiable common interests, and whether the number of bargaining representatives would be consistent with a manageable collective bargaining process. The supported bargaining stream is intended to be easier to access than the existing low-paid bargaining stream. The revised criteria for making a supported bargaining authorisation is intended to address the limited take-up of the low-paid bargaining process.
>
> (underlining added)

[27] There has been no substantive change to the provisions in s 242 as to who may make an application for an authorisation and the content of such an application. The legislative purpose of improving accessibility and take-up is primarily achieved by the amendments to s 243 in respect of the circumstances in which the Commission is required to make an authorisation. The key changes may be identified as follows:

(1) The former requirement in subsection (1)(b) that the Commission be satisfied that it is 'in the public interest to make the authorisation' has been replaced by one that the Commission be satisfied that 'it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together'. This plainly reflects a substantially lower statutory threshold for the required exercise of power. The concept of the 'public interest' is one which 'directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation' and 'is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest'.[18] A standard which requires positive satisfaction as to the public interest is plainly more stringent than one which involves the exercise of a more general discretion.[19] An appropriateness standard connotes that which is 'fair and just'[20] or 'suitable' or 'fitting'[21] and involves, we consider, an evaluative assessment of a broader and less prescriptive nature.

(2) None of the matters required to be taken into account under subsections (2) and (3) of s 243 in its previous form, except for that in former subsection (3)(b), has been retained. This removes most matters the consideration of which resulted in the applications in the *Practice Nurses decision* and *United Voice* being refused.

(3) The consideration of 'the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms of employment in those enterprises' under former subsection (2)(e) has been replaced by 'whether the employers have clearly identifiable common interests' (subsection (1)(b)(ii)), with examples of such common interests given in subsection (2). One of the examples, in subsection (2)(b), is substantially reflective of former subsection (3)(e), but the other two examples refer to circumstances which do not necessarily relate to commonality in the nature of the enterprises and their terms and conditions of employment. This indicates that a broader range of circumstances may be taken into account in assessing commonality of interests.

(4) An authorisation must also be made, on application, under subsection (2A), if the employees specified in the application are employed in an industry, occupation or sector declared by the Minister under subsection (2B).

[28] It must also be observed that s 243 now operates subject to the restrictions specified in s 243A.

[29] We now turn to the main issues of the construction of s 243 which have arisen in this matter. *First*, it is readily apparent that s 243(1) imposes an obligation on the Commission to make a supported bargaining authorisation if an application for the authorisation has been made, the Commission reaches the requisite state of satisfaction under paragraph (b), and at least some of the relevant employees are represented by an employee organisation (being an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth)). The requirement for an application in paragraph (a) connotes an application that has validly been made in accordance with the requirements of s 242. This means that the application must have been made by a person with standing to do so under s 242(1), must specify the matters prescribed in s 242(2), and must not be made in relation to a proposed greenfields agreement in accordance with s 242(3). The consideration required under paragraph (b) of s 243(1) requires a broad evaluative judgment to be made having regard to the matters specified in subparagraphs (i)-(iv). A requirement to have regard to a matter means that, insofar as it is relevant, it must be treated as a matter of significance in the decision-making process.[22] However, no single matter in s 243(1)(b) is to be regarded as being determinative as to whether the requisite state of satisfaction is reached.

[30] *Second*, the consideration identified in s 243(1)(b)(i) requires us to have regard to the 'prevailing pay and conditions within the relevant industry or sector'. The reference to 'the relevant industry or sector' plainly indicates that the assessment required will extend beyond the pay and conditions of the employees to whom the authorisation sought will apply (unless the authorisation sought would encompass the entirety of the relevant industry or sector). That will mean that, in the normal course, an applicant for an authorisation might be expected to adduce evidence concerning prevailing pay and conditions within the relevant sector. 'Prevailing' is to be given its ordinary meaning; that is, 'predominant' or 'generally current'.[23]

[31] The words in parentheses in s 243(1)(b)(i) require consideration to be given as to whether 'low rates of pay' prevail in the industry or sector. It is to be noted that the legislature has chosen to use the expression 'low rates of pay' rather than refer to the 'the low paid' — the expression used in the former low-paid bargaining scheme, and also currently used in ss 134(1)(a) and s 284(1)(c). This indicates that some distinction in meaning is intended. 'Low paid' connotes the earnings of employees generally, but 'low rates of pay' has a more confined meaning that refers only to the amount an employee is paid for each defined period of working time (for example, an hour, day or week) or, in the case of pieceworkers, for each completed task or unit of work. The use of this different expression indicates that the approach adopted in the *Practice Nurses decision* and *United Voice* whereby 'low paid' was given the same meaning in s 243 as it had been in Annual Wage Review decisions made by reference to ss 134(1)(a) and 284(1)(c), with the benchmark being two-thirds of median adult ordinary-time earnings, should no longer be followed.

[32] We consider that, *prima facie*, 'low rates of pay' will prevail in an industry or sector if employees are predominantly paid at or close to the award rates of pay for their classification, since this is the lowest rate legally available to pay. This is implicit from the objects of the supported bargaining scheme in s 241, including to assist and encourage employers and

employees to bargain and make agreements to meet their needs and to address constraints on their ability to do so. The needs of employees who are paid at award rates include improving their terms and conditions of employment in circumstances where there have been constraints on their ability to bargain. It is also implicit that supported bargaining is a means to assist employers and employees who have been constrained from bargaining to access productivity benefits, consistent with the overarching objects in s 171. Further, this approach finds some support in paragraph [984] of the REM which, in relation to s 243(1)(b)(i), states:

> … the prevailing pay and conditions in the relevant industry – this is intended to include whether low rates of pay prevail in the industry, whether employees in the industry are paid at or close to relevant award rates, etc;…
>
> (underlining added)

[33] However, in a particular case, it may be that a prevailing rate of pay which is at or close to the relevant award rate cannot be characterised as a 'low rate of pay' because the award rate itself is relatively high. For the reasons set out later in this decision, it is not necessary for us to consider this possibility in this matter, and it is best left for fuller consideration in an appropriate case.

[34] *Third*, the expression 'common interests' used in s 243(1)(b)(ii) in connection with the employers the subject of an authorisation application is one of wide import, and on its ordinary meaning extends to any joint, shared, related or like characteristics, qualities, undertakings or concerns as between the relevant employers. The diversity of the non-exhaustive list of 'examples' of common interests in s 243(2) gives contextual support to the breadth of meaning which we assign to the expression. The common interests must be 'clearly identifiable', that is, plainly discernible or recognisable, but need not be self-evident.

[35] The ACA and the ACCI submitted that the use of the plural expression 'common interests' in s 243(1)(b)(ii) and (2) was deliberate and indicated a contrary intention to the expression being able to be read in the singular pursuant to s 23(b) of the *Acts Interpretation Act 1901* (Cth). We consider that this submission has force but, as will be apparent later, it is not necessary for us to determine this issue to finality in this matter.

[36] *Fourth*, s 243(1)(b)(iii) is concerned with whether the likely number of bargaining representatives is consistent with a 'manageable' — that is, workable or tractable — collective bargaining process. This requires an assessment to be made which is to some extent speculative or predictive, since the choice of bargaining representative by the relevant employers and employees may not be known at the time an application for an authorisation is considered, and weight has to be given to the scope of their capacity to choose, and change, their bargaining representatives under s 176 of the FW Act. However, the consideration required is what is 'likely' — that is, probable to happen — not what may possibly happen. Any past history of bargaining, representation at the hearing of the authorisation application, and any sameness or diversity of views amongst employees and employers concerning the prospect of multi-employer bargaining may all inform the assessment to be made. However, we do not consider that the prospect of an agreement being reached if an authorisation is made to be a significantly relevant consideration since s 243(1)(b)(iii) is concerned with the collective bargaining *process*, not the *outcome*.

[37] *Fifth*, s 243(1)(b)(iv) gives the Commission a broad discretionary scope as to the relevance and weight of other matters to be taken into account. The applicable objects of the FW Act in ss 3, 171 and 241 will guide the Commission in identifying those matters which may appropriately be taken into account, as will the circumstances of the particular case.

[38] With two exceptions, we do not propose beyond the above analysis to engage with all the various propositions advanced by the parties and the ACTU, Ai Group and the ACCI concerning the proper construction and application of s 243. Many of the propositions advanced did not relate to the present application and were highly hypothetical in nature. Their consideration may await future applications in which they are of relevance.

[39] The first exception is the following submission advanced by the Ai Group:

> Given the seriousness of the microeconomic and macroeconomic consequences that can ultimately flow from the making of a SBA, the Commission should not lightly find that it is appropriate to do so. Once understood in its context, the test of appropriateness must be seen as a bar that is overcome only where the circumstances indicate a genuine need to provide the relevant employers and employees with access to the supported bargaining scheme.[24]

[40] This submission, we consider, attempts to place a gloss on the statutory language of s 243 insofar it suggests that the Commission would not 'lightly' reach the requisite state of satisfaction in s 243(1)(b) and characterises the prescribed appropriateness standard as a 'bar'. The characterisation of the statutory task in this fashion would be likely to defeat or at least hinder the achievement of the apparent statutory intention to liberalise access to the scheme of bargaining in Division 9 of Part 4-2.

[41] Secondly, the ACCI's submission that the asserted statutory preference for enterprise-level bargaining should operate to defeat an application for a supported bargaining authorisation where a capacity for bargaining for a single-enterprise agreement is demonstrated[25] must be treated with caution and cannot be accepted without qualification. We agree that the relevant parts of the objects of the FW Act in ss 3(f), 171(a) and 241(c) indicate that enterprise-level bargaining is intended to be the primary and preferred mode of agreement-making under the FW Act. We also agree that, where it is demonstrated that the employers and employees covered by a proposed supported bargaining authorisation have the capacity to bargain effectively at the enterprise level, this is a matter which may be taken into account under s 243(1)(b)(iv) as weighing against satisfaction that it is appropriate for the employers and employees to bargain together. However, this consideration should not be taken so far as to transform the appropriateness standard in s 243(1)(b) into a comparative 'more appropriate' standard whereby the Commission must be satisfied that supported bargaining under Division 9 of Part 4-2 is *more* appropriate than any other mode of bargaining available under that Part. This would constitute an impermissible and erroneous alteration to the statutory test.

Material supporting the application

[42] The primary material supporting the application is an Agreed Statement of Facts (ASF) signed by the UWU, the IEU, the AEU, Mr Ward and Mr Mondo on behalf of the ACA employers, CELA, CCCA and G8. In broad terms, the ASF sets out factual propositions concerning the characteristics of the employers and employees covered by the proposed authorisation and the ECEC sector generally, including in relation to employee pay rates and

qualification levels, the regulatory framework and funding arrangements. The ASF identifies the source for the factual propositions stated and also annexes a number of the source documents. No party submitted that we should not rely on the ASF. We accept the ASF as constituting a reliable evidentiary basis upon which to found our consideration of the application.

[43] The ACA employers tendered a witness statement made by Mr Mondo, which describes the role of the ACA and the general characteristics of the ECEC sector, and also describes the long day care centre which he operates. The ACA employers also tendered witness statements made by the operators of 16 long day care centres who, in largely common terms, described the employment, charging and funding arrangements in the centres they operated and confirmed that their centre fitted within the class of employers described in the application and that they had appointed Mr Ward and Mr Mondo as their bargaining representatives. The CELA/CCCA employers tendered a witness statement made by Ms Stevens, which describes the role and membership of CELA and CCCA, the need for members of these organisation for support in order to engage in enterprise bargaining, and the commonality of the CELA/CCCA employers in respect of being long day care providers, having common regulatory requirements and standards, the way they remunerate their employees, and funding arrangements. G8 tendered a witness statement made by Ms Tabitha Pearson, its Chief People Transformation Officer, which describes G8's business including the regulatory framework in which it operates, its workforce and employment arrangements and its funding arrangements. None of these witnesses was required for cross-examination. We see no reason not to accept their evidence.

Consideration

[44] There is no dispute that, for the purpose of s 243(1)(a) of the FW Act, the application has validly been made under s 242. The UWU, the AEU and the IEU are registered employee organisations which are entitled to represent the industrial interests of childcare workers, educators and early childhood teachers employed in long day care centres covered by the proposed multi-enterprise agreement, and they are also default bargaining representatives for the proposed agreement by virtue of their membership amongst such employees. They accordingly have standing to make the application under s 242(1). The application, as amended, specifies the employers and employees who will be covered by the proposed agreement in accordance with s 242(2).

[45] As to s 243(1)(c), we are satisfied (and it is not in contest) that at least some of the employees who will be covered by the proposed agreement are represented by the UWU, the AEU or the IEU. The application is not made in relation to a proposed greenfields agreement and thus complies with s 242(3).

[46] In respect of s 243(1)(b), we consider each of the matters we are required to have regard to below.

The prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector): s 243(1)(b)(i)

[47] We find, on the basis of the evidence before us, that rates of pay that are the same as, or close to, the minimum award rates of pay in the CS Award or the EST Award, are prevalent in

the ECEC sector. Pay rates for 57.8 per cent of employees in the ECEC sector are derived from the applicable award, and pay rates for a further 20.9 per cent are between 0.01 per cent and 10 per cent above the award rate of pay. The evidence is somewhat less clear about conditions of employment other than rates of pay. However, the fact that the pay setting method for 61.8 per cent of the ECEC workforce is 'Award only' suggests that the conditions of employment prescribed by the applicable awards are also prevalent.

[48] We also find that low rates of pay prevail in the ECEC sector. Most employees in the ECEC sector have an ECEC sector-related qualification, with 72 per cent holding a Certificate III, Certificate IV, Diploma or Advanced Diploma in Early Childhood Education and Care (or equivalent). The CS Award covers persons with these qualifications in the ECEC sector, and the applicable classifications and current minimum pay rates are:

Classification		Weekly	Hourly
Level 3.1 (Certificate III)	On commencement	995.00	26.18
Level 3.2	After 1 year	1029.30	27.09
Level 3.3	After 2 years	1061.70	27.94
Level 3.4 (Diploma)		1120.40	29.48
Level 4.1 (Diploma + appointed as person in charge or Authorised Supervisor)	On commencement	1172.00	30.84
Level 4.2	After 1 year	1190.00	31.32
Level 4.3	After 2 years	1207.70	31.78

[49] The minimum rates of pay for employees without qualifications are lower than the above. In particular, support workers (who perform functions such as assisting a qualified cook/basic food preparation/kitchen hand, laundry work, gardening work, cleaning, driving, non-trades maintenance or administrative duties) without qualifications are classified in the CS Award as follows:

Classification		Weekly	Hourly
Level 1.1	On commencement	878.00	23.11
Level 2.1	On commencement	909.90	23.94
Level 2.2	After 1 year	939.80	24.73

[50] Having regard to the proportion of the ECEC workforce which is paid at or close to the award rate (as earlier discussed), this is sufficient to found the conclusion that low rates of pay prevail in the ECEC sector. It is therefore unnecessary for us to consider whether bachelor's degree-qualified teachers employed in the ECEC sector (who constitute about 12 per cent of qualified employees) may also be characterised as having low rates of pay if they are paid at or close to the minimum rates prescribed by the EST Award. Our conclusion in this respect weighs in favour of making the authorisation sought.

Whether the employers have clearly identifiable common interests: s 243(1)(b)(ii)

[51] The employers specified in the application who would be covered by the proposed agreement clearly have one overriding common interest, namely, they all operate long day care businesses in the ECEC sector. This of itself means that there is substantial similarity in the businesses which they operate. It also gives rise to a number of concomitant common interests:

(1) They are all covered by the CS Award and the EST Award.

(2) They are all covered by a common regulatory framework, the 'National Quality Framework' (NQF). The NQF consists of the following elements:

(a) a model national law, the *Education and Care Services National Law 2010*, which has been enacted in each State and Territory, and the *Education and Care Services National Regulations* made pursuant to the model law;

(b) The National Quality Standard, which benchmarks services provided by employers in the ECEC sector by reference to seven quality areas, namely:
- educational program and practice;
- children's health and safety;
- physical environment;
- staffing arrangements;
- relationships with children;
- collaborative partnerships with families and communities; and
- governance and leadership;

(c) an assessment and quality rating process;

(d) mandated educator/child ratios;

(e) a requirement for ECEC services to provide an educational program based on one of the two approved learning frameworks (the Early Years Learning Framework or, in Victoria, the Victorian Early Years Learning and Development Framework);

(f) regulatory bodies in each State and Territory which are responsible for the approval, monitoring and quality assessment of ECEC services; and

(g) the Australian Children's Education and Care Quality Authority, which guides the implementation of the NQF, works with the State and Territory regulatory authorities and promotes national consistency.

(3) They are subject to common arrangements for the funding of long day care services by the Commonwealth. The funding mechanism is the Child Care Subsidy (CCS), which is paid directly to providers and passed on to families as a fee reduction. To receive the CCS, ECEC service providers must be approved by the relevant State or Territory regulatory authority and must otherwise be NQF-compliant. The amount of fee reduction is dependent on the family's income and number of pre-school-aged children in an ECEC service, with families earning less than $80,000 receiving a 95 per cent fee reduction. The CCS is the largest

> funding source for long day care providers. Because payment of the CCS is based on an hourly rate cap which indicates the maximum amount which will be subsidised by the Commonwealth, this operates as a practical constraint on the amount which long day care providers can charge families and, in turn, constrains the wages and conditions which providers can negotiate with their employees.

[52] The existence of these clearly identifiable common interests weighs in favour of making the authorisation applied for.

Whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process: s 243(1)(b)(iii)

[53] We are satisfied that the likely number of bargaining representatives for the proposed multi-employer agreement would be consistent with a manageable collective bargaining process. As earlier explained, despite the fact that the proposed agreement would cover 64 employers in total, the 41 ACA employers have each nominated Mr Ward and Mr Mondo as their joint bargaining representatives, another 22 employers have nominated CCCA or CELA as their bargaining representative, and G8 will act as its own bargaining representative. This is clearly a manageable number of representatives on the employers' side. In respect of employees, it is likely that the UWU, the AEU and the IEU will be the major bargaining representatives. It is possible that, if an authorisation is granted, individual employees will nominate additional bargaining representatives, but there is no evidence before us that it is likely that this will occur to such an extent as to render the collective bargaining process other than manageable. This consideration weighs in favour of the grant of the authorisation sought.

Any other matters the Commission considers appropriate: s 243(1)(b)(iv)

[54] We consider it appropriate to have regard to four additional matters. The first is that all the affected employers support the application and none of the employees that would be affected has advised us that they oppose the making of the authorisation sought. This is of significance having regard to the prohibition upon employers engaging in bargaining for any type of agreement other than a supported bargaining agreement once an authorisation is in operation (s 172(7)(b)), and weighs in favour of making the authorisation.

[55] The second matter is that over 90 per cent of the workforce in the ECEC sector is female, and there is no evidentiary basis to conclude that the position is any different in respect of the workforce of the employers who would be covered by the proposed multi-enterprise agreement. Having regard to our earlier finding that low rates of pay prevail in the ECEC sector, granting the authorisation applied for would open the prospect of improving rates of pay of a female-dominated workforce, which would be consistent with that part of the object of the FW Act in s 3(a) concerned with the promotion of gender equality. This weighs in favour of the making of the authorisation.

[56] Third, the evidence indicates that there has been a relatively low uptake of enterprise bargaining in the ECEC sector due to a number of factors, including that a large proportion of long day care operations are small in size and lack the management capacity and other resources to engage in bargaining, and the funding and pricing constraints to which we have earlier referred. Employers in the sector, including (subject to one caveat discussed below) those the

subject of this application, clearly need support in order to engage in effective bargaining. That support may arise on a number of levels and includes the support employers will derive from being able to bargain collectively and the assistance which the Commission will be empowered to provide pursuant to s 246. The grant of the authorisation will for this reason be consistent with the statutory object in s 241, and this weighs in favour of making the authorisation.

[57] Fourth, it appears to us that the inclusion of G8 in the group of employers to which the authorisation will apply is somewhat anomalous. Although there is no doubt that G8 shares the common interests with the other employers which we have earlier identified, its size makes it significantly different in character to all the other employers. It has some 10,000 employees and presumably has the personnel resources to permit it to engage in enterprise bargaining. This consideration weighs, to some degree, against the making of an authorisation which includes G8.

Conclusion

[58] On the basis of our consideration of the matters specified in s 243(1)(b) of the FW Act, we are satisfied that it is appropriate for all of the employers and employees that will be covered by the proposed multi-enterprise agreement to bargain together. In summary:

- low rates of pay at or close to the award minima prevail in the ECEC sector;
- the employers specified in the authorisation have a number of significant common interests;
- the likely number of bargaining representatives is small and consistent with a manageable collective bargaining process;
- the specified employers support the making of the authorisation;
- the grant of the authorisation may promote gender equality in a female-dominated sector; and
- support is required in order to improve the uptake of enterprise bargaining in the sector.

[59] These matters overwhelmingly favour the making of a supported bargaining authorisation. The only matter which we have been able to identify as weighing against the making of the authorisation in the terms applied for is the inclusion of G8, which is an anomalously large employer. However, having regard to the fact that G8 shares the identified common interests with the other specified employers, this matter is not sufficient to render other than appropriate that all of the specified employers, including G8, should be allowed to bargain together.

[60] None of the restrictions in s 243A on making supported bargaining authorisations applies here. In relation to s 243A(1), the following enterprise agreements which have not passed their nominal expiry dates apply to the following specified employers:

Enterprise agreement	**Nominal expiry date**	**Relevant employer(s) to whom agreement applies**
Bermagui Pre-School Co-Operative Society Ltd	18 November 2023	Bermagui Pre-School Co-Operative Society Ltd

Enterprise agreement	**Nominal expiry date**	**Relevant employer(s) to whom agreement applies**
Teachers' Agreement 2020 [AE509492]		
Gowrie Victoria Early Childhood Teachers Enterprise Agreement 2022 [AE518527]	1 July 2025	The Lady Gowrie Child Centre (Melbourne) Inc. t/a Gowrie Victoria
Victorian Early Childhood Teachers and Educators Agreement 2020 [AE511947]	30 September 2024	Ashwood Children's Centre Inc Hawthorn Early Years Incorporated
Victorian Early Childhood Agreement 2021 [AE514652]	30 September 2024	Coburg Children's Centre Incorporated

[61] However, as earlier set out, the authorisation sought excludes any work covered by an enterprise agreement that has not passed its nominal expiry date, and consequently making the authorisation will not contravene the prohibition in s 243A(1).

[62] Because the requirements in paragraphs (a), (b) and (c) of s 243(1) of the FW Act are each satisfied, and none of the restrictions in s 243A applies, we are required by s 243(1) to make the supported bargaining authorisation applied for by the UWU, the AEU and the IEU. The authorisation is made by a separate order that is published in conjunction with this decision and, in accordance with s 243(4), will operate from the date of this decision.

PRESIDENT

Appearances:

B Redford for the United Workers' Union.

M Gibian SC for the Australian Education Union.

M Aird for the Independent Education Union of Australia.

N Ward for the Australian Childcare Alliance and the ACA employers.

L Stevens for the Community Child Care Association and Community Early Learning Australia Limited.

T Pearson for G8 Education Limited.

S Peldova-McClelland for the Australian Council of Trade Unions.

R Bhatt for the Australian Industry Group.

L Izzo for the Australian Chamber of Commerce and Industry.

Hearing details:

2023.

Melbourne:
16, 17 August.

ANNEXURE A

No	Legal name of business	Trading name(s) of business	ABN/ACN	Bargaining representative
1	DMP Child Care Association Inc	DMP Early Learning	41 540 918 533	Nigel Ward and Paul Mondo
2	3 Bears Cottage Pty Ltd	3 Bears Cottage Early Education Service	068 154 423	Nigel Ward and Paul Mondo
3	CBF Childcare Pty Ltd	Daws Road Early Learning Centre	145 892 342	Nigel Ward and Paul Mondo
4	Windybanks Pty Ltd	Unley Early Learning Centre	071 982 100	Nigel Ward and Paul Mondo
5	Starfish Childcare Pty Ltd	Starfish Early Learning Centre	129 694 382	Nigel Ward and Paul Mondo
6	Starfish Childcare Nunawading Pty Ltd ATF Starfish Nunawading Trust	Starfish Early Learning Centre (Nunawading)	164 993 695	Nigel Ward and Paul Mondo
7	Starfish Childcare Springvale Pty Ltd	Starfish Early Learning Centre (Springvale)	601 126 149	Nigel Ward and Paul Mondo
8	Starfish Childcare Clayton Pty Ltd ATF Starfish Clayton South Trust	Starfish Early Learning Centre (Clayton South)	616 756 604	Nigel Ward and Paul Mondo
9	Starfish Childcare Reservoir Pty Ltd ATF Starfish Reservoir Trust	Starfish Early Learning Centre (Reservoir)	621 199 308	Nigel Ward and Paul Mondo
10	Starfish Essendon Pty Ltd ATF Starfish Essendon Trust	Starfish Early Learning Centre (Essendon)	665 079 998	Nigel Ward and Paul Mondo

No	Legal name of business	Trading name(s) of business	ABN/ACN	Bargaining representative
11	Thomanders Pty Ltd	Essence Early Learning	622 895 676	Nigel Ward and Paul Mondo
12	Midi Property Investment Pty Ltd	Coolamon School of Early Learning and Warriapendi Early Learning	124 484 368	Nigel Ward and Paul Mondo
13	S and A Chemello Pty Ltd	Malvern Springs Early Learning and Ellenbrook School of Early Learning	154 695 664	Nigel Ward and Paul Mondo
14	P and A Chemello Nominees Pty Ltd	Kingsway Afterschool Care	661 848 225	Nigel Ward and Paul Mondo
15	Peacock Street Long Day Care Pty Ltd	Peacock Street Long Day Care; Bindook Cottage; Peek-A-Boo Cottage	36 073 717 665	Nigel Ward and Paul Mondo
16	Mondo Corporation Pty Ltd ATF The Mondo Family Trust	Bimbi Early Learning and Kindergarten	62 339 690 171	Nigel Ward and Paul Mondo
17	Village Kids Childrens Centre – Domain Pty Ltd	Educating Kids Early Learning Centre – Domain	98 604 704 949	Nigel Ward and Paul Mondo
18	Village Kids Childrens Centre – Townsville Pty Ltd	Educating Kids Early Learning Centre – Townsville	38 602 117 411	Nigel Ward and Paul Mondo
19	Educating Kids Childrens Centre Pty Ltd	Educating Kids Early Learning Centre – Kirwan	85 168 791 268	Nigel Ward and Paul Mondo
20	Wispfinn Pty Ltd	Childcare First trading as BelaBabes Early Learning Centre	061 285 596	Nigel Ward and Paul Mondo

No	Legal name of business	Trading name(s) of business	ABN/ACN	Bargaining representative
21	Child Care Services Australia Pty Ltd	Highway Child Care & Early Learning Centre; Lockleys Child Care & Early Learning Centre	008 209 578	Nigel Ward and Paul Mondo
22	Child Care Services SA Pty Ltd	Angaston Child Care & Early Learning Centre; Kapunda Child Care & Early Learning Centre	121 352 412	Nigel Ward and Paul Mondo
23	Bear Childcare Pty Ltd	Barfa Bear Child Care	631 015 079	Nigel Ward and Paul Mondo
24	Little Scholars School of Early Learning (Nerang) Pty Ltd	Little Scholars School of Early Learning (Nerang)	78 618 708 982	Nigel Ward and Paul Mondo
25	Little Scholars School of Early Learning (Ashmore) Pty Ltd	Little Scholars School of Early Learning (Ashmore)	72 608 520 252	Nigel Ward and Paul Mondo
26	Little Scholars School of Early Learning (Yatala) Pty Ltd	Little Scholars School of Early Learning (Yatala)	17 600 168 910	Nigel Ward and Paul Mondo
27	Little Scholars School of Early Learning (Stapylton) Pty Ltd	Little Scholars School of Early Learning (Stapylton)	60 604 624 599	Nigel Ward and Paul Mondo
28	Little Scholars School of Early Learning (Deception Bay) Pty Ltd	Little Scholars School of Early Learning (Deception Bay)	74 608 520 261	Nigel Ward and Paul Mondo

No	Legal name of business	Trading name(s) of business	ABN/ACN	Bargaining representative
29	Little Scholars School of Early Learning (Redland Bay) Pty Ltd	Little Scholars School of Early Learning (Redland Bay)	48 608 520 592	Nigel Ward and Paul Mondo
30	Little Scholars School of Early Learning (Burleigh) Pty Ltd	Little Scholars School of Early Learning (Burleigh)	32 634 191 861	Nigel Ward and Paul Mondo
31	Little Scholars School of Early Learning (Redland Bay South) Pty Ltd	Little Scholars School of Early Learning (Redland Bay South)	18 628 507 602	Nigel Ward and Paul Mondo
32	Little Scholars School of Early Learning (George St) Pty Ltd	Little Scholars School of Early Learning (George St)	78 609 720 710	Nigel Ward and Paul Mondo
33	Little Scholars School of Early Learning (Pacific Pines) Pty Ltd	Little Scholars School of Early Learning (Pacific Pines)	94 659 321 132	Nigel Ward and Paul Mondo
34	Little Scholars School of Early Learning (Ormeau) Pty Ltd	Little Scholars School of Early Learning (Ormeau)	40 645 111 048	Nigel Ward and Paul Mondo
35	Little Scholars School of Early Learning (Ormeau 2) Pty Ltd	Little Scholars School of Early Learning (Ormeau 2)	64 169 563 482	Nigel Ward and Paul Mondo
36	Little Scholars School of Early Learning (Ormeau Village) Pty Ltd	Little Scholars School of Early Learning (Ormeau Village)	17 653 673 557	Nigel Ward and Paul Mondo
37	Organic Seedlings Education Pty Ltd	Organic Seedlings Education	614 760 691	Nigel Ward and Paul Mondo

No	Legal name of business	Trading name(s) of business	ABN/ACN	Bargaining representative
38	Early Years Learning and Development Pty Ltd	Landsdale School of Early Learning	636 291 284	Nigel Ward and Paul Mondo
39	Radiam Early Learning Pty Ltd	Sagewood Early Learning Dayton; Sagewood Early Learning Joondalup; Sagewood Early Learning Canning Vale; Sagewood Early Learning Success; Sagewood Early Learning Harrisdale	98 634 699 719	Nigel Ward and Paul Mondo
40	North Epping Early Learning Pty Ltd	Cressy Road Early Learning; Mary Street Early Learning	78 614 970 320	Nigel Ward and Paul Mondo
41	Clovel Childcare & Early Learning Centre Granville Pty Ltd	Clovel Childcare, Early Learning & OOSH Services	60 114 879 159	Nigel Ward and Paul Mondo
42	Ashwood Children’s Centre Inc.	Ashwood Children’s Centre	36 248 912 689	Community Child Care Association
43	Coburg Children’s Centre Incorporated	Coburg Childrens Centre Childcare and Kindergarten	56 265 141 966	Community Child Care Association
44	Derby Street Children’s Centre Incorporated	Derby Street Children’s Centre	97 805 251 620	Community Child Care Association
45	The Lady Gowrie Child Centre (Melbourne) Inc	Gowrie Victoria	27 625 198 252	Community Child Care Association

No	Legal name of business	Trading name(s) of business	ABN/ACN	Bargaining representative
46	Hawthorn Early Years Incorporated	Hawthorn Early Years Education and Care	77 121 473 386	Community Child Care Association
47	Hillbank Community Children's Centre Incorporated	Hillbank Community Childcare centre	35 758 645 243	Community Child Care Association
48	Unley Community Child Care Centre Inc.	Unley Community Child Care Centre Inc.	14 488 736 225	Community Child Care Association
49	Yawarra Children's Services	Yawarra Children's Services; Pookara Community Early Education and Care	37 566 556 446	Community Child Care Association
50	Amy Hurd Early Learning Centre Inc	Amy Hurd Early Learning Centre Inc	99 590 633 230	Community Early Learning Australia
51	Balranald Early Learning Centre Inc	Balranald Early Learning Centre Inc	69 955 755 995	Community Early Learning Australia
52	Believe Playschool Pty Ltd	Believe Playschool	55 621 147 260	Community Early Learning Australia
53	Bermagui Preschool Co-operative Society Ltd.	Bermagui Preschool Co-Op Soc Ltd	47 808 600 330	Community Early Learning Australia
54	The Trustee for Ross-Clarke Family Trust	Cheeky Cherubs Preschool	90 148 256 996	Community Early Learning Australia
55	Childcare Australia United Ltd	Bonnet Bay Child Care Centre	56 124 784 194	Community Early Learning Australia

No	Legal name of business	Trading name(s) of business	ABN/ACN	Bargaining representative
56	Kirrawee Child Care Centre Pty Ltd	Kirrawee Child Care Centre	16 097 080 352	Community Early Learning Australia
57	Little Mate Pty Ltd	Cobbers Child Care Centre	86 118 922 348	Community Early Learning Australia
58	Edgeworth Child Care Centre Inc	Edgeworth Child Care Centre Inc	54 358 037 628	Community Early Learning Australia
59	Glendale Early Education Centre Inc.	Glendale Early Education Centre	80 537 615 393	Community Early Learning Australia
60	Koala Long Day Care – Sutherland Hospital Ltd.	Koala Long Day Care – Sutherland Hospital	87 003 550 721	Community Early Learning Australia
61	The Trustee for S&N Clayton Family Trust	Bellingen Burrow Long Day Care Centre; Young Explorers Pre-school and Long Day Care	30 232 711 318	Community Early Learning Australia
62	Gowrie NSW	Gowrie NSW	57 001 894 659	Community Early Learning Australia
63	Big Fat Smile Group Ltd	Big Fat Smile	82 002 796 232	Community Early Learning Australia
64	G8 Education Limited	G8 Education	95 123 828 553	G8 Education Limited

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[1] There is now no subsection (b) in s 241.

[2] *United Voice and The Australian Workers' Union of Employees, Queensland* [2011] FWAFB 2633, 207 IR 251.

[3] [2013] FWC 511.

[4] Ibid at [160]-[161].

[5] [2011] FWAFB 2633, 207 IR 251 at [17].

[6] [2013] FWC 511 at [90]-[91].

[7] [2010] FWAFB 4000.

[8] [2013] FWCFB 4000.

[9] [2014] FWC 6441.

[10] Ibid at [34]-[50].

[11] Ibid at [66].

[12] Ibid at [74].

[13] Ibid at [96]-[97].

[14] Ibid at [101].

[15] Ibid at [107]-[109].

[16] Ibid at [115]-[119].

[17] Ibid at [125]-[126].

[18] *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142, 145 FCR 70 at [9]-[10] (Tamberlin J).

[19] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54, 192 FCR 78 at [33]-[35], [43].

[20] *Nile v Wood* [1988] HCA 30, 167 CLR 133 at 143 per Deane and Toohey JJ.

[21] *Suncoast Scaffold Pty Ltd* [2023] FWCFB 105 at [16].

[22] *Edwards v Giudice* [1999] FCA 1836, 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* [2014] FCAFC 118, 225 FCR 154, 244 IR 461 at [56].

[23] Macquarie Online Dictionary.

[24] Ai Group submission, 7 August 2023 at [23].

[25] ACCI submission, 7 August 2023 at [3.8]-[3.12].