IN THE FAIR WORK COMMISSION

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

Matter No: (B2023/538)

Reply – United Workers Union

Submissions by peak Councils.

1. Submissions in relation to the construction and operation of ss 243 and 244 have been filed by peak Councils: Australian Industry Group (**AI Group**)[1], Australian Chamber of Commerce and Industry (**ACCI**)[2], and the Australian Council of Trade Unions (**ACTU**)[3]. In some areas, there is a divergence between the construction and operation of these provisions contended for by UWU and by the other applicants (and indeed several of the parties representing the Respondents to the application), and some of the peak Councils.

2. Even if some of the divergent points of construction contended for by some of the peak Councils, in some areas, were adopted, none are fatal to the application. While some of these points are contested by UWU (and we understand others), none should move the Commission to refuse the application sought.

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[1] Australian Industry Group, Application for a Supported Bargaining Authorisation – Early Education and Care Industry Submission 7 August 2023 (**AI Group submission**). Note AI Group do not file submissions in relation to the operation of s 244.

[2] Submissions by the Australian Chamber of Commerce and Industry, 7 August 2023 (**ACCI submission**)

[3] Outline of Submissions of the ACTU 7 August 2023 (**ACTU submission**)

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3. Indeed, now that the position of the peak Councils are known, it appears no participant in this proceeding opposes the authorisation sought.

Hypothetical scenarios.

4. Some of the submissions on points of operation or construction invite the Commission to consider hypothetical scenarios well beyond the scope of the application before it. While this is the first application of its kind, and the manner in which it is dealt with will be informative and instructive for future applications, UWU urges that caution be exercised in relation to the extent to which the Commission engages in speculative submissions about how the supported bargaining scheme might work in hypothetical scenarios significantly different than that which is before it.

The scope of findings made by the Commission

5. The AI Group Submissions at [60] suggest that the authorisation sought would apply only to certain employers and employees *in the long day care sector*[4]. More accurately, some of the employers who are respondent to the application operate exclusively in the long day care part of the ECEC sector, and some operate in that part of the sector and in other parts of the sector. The *employees* specified in the application are only those employees of the employers who are engaged in a long day care setting.

6. The Statement of Agreed Facts that has been filed with the Commission is signed by all of the representatives of the parties to the application, and contains facts known to be true by the parties (many based on publicly available sources). The Statement includes facts relating to the ECEC sector at large (beyond the long day care setting) because, as all participants in the proceeding have observed, s 243(1)(b)(i) requires the Commission to have regard to the pay and conditions prevailing in the *relevant industry or sector* (which is defined at [10] of the Statement of Agreed Facts).

7. The evidence collected in the Statement of Agreed Facts provides the Commission with a sound basis upon which to make findings supportive of the granting of the application. The parties to the proceeding are not a "discrete cohort" of employer and employee representatives – they are the parties to the proceeding. They have adopted a common means by which to expediate a proceeding by filing a Statement of Agreed Facts known by them to be true. Indeed, they are not just a "cohort" of employer and

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[4] AI Group Submission [60]

employee representatives but all of the Unions from the sector, several of the sector's major peak advocacy groups and one of the largest employers in the sector.

The objects of the Act.

8. While s 3(f) makes it an object of the Act to achieve productivity and fairness through an emphasis on enterprise-level collective bargaining, s 241 makes it an object of the division to address constraints on the ability of employees and their employers to bargain at the enterprise level through a scheme which facilitates multi-employer bargaining instead. The supported bargaining scheme was introduced as part of a group of amendments which increased the circumstances in which parties might make multi-employer agreements and, with respect to supported bargaining in particular, the stated intention was to significantly expand the circumstances in which that might occur, compared with the operation of the previous scheme.

9. There is no tension in these provisions. A system which places *emphasis* (not *preference*) on enterprise-level collective bargaining sits comfortably with a scheme which attempts to address constraints on access to bargaining at that level by providing for bargaining to occur at the multi-employer level. A continued emphasis on enterprise-level bargaining need not operate as limiting or narrowing of the circumstances in which supported multi-employer bargaining might be appropriate.

The appropriateness consideration – broad based but not speculative.

10. The supported bargaining scheme is designed to facilitate multi-employer bargaining in a significantly broader set of circumstances than the scheme it replaced. The Commission should not take an approach to the question as to whether it is appropriate for a group of employers and employees to bargain together that is confined or narrow – it should take a broad approach to this question[5].

11. The consideration should not be framed as one simply about whether a group of employers and their employers need support to bargain, and if they do not, or if they do not to some degree, that the conclusion must be they are ineligible to access the

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[5]ACTU Submission [28]; ACCI Submission [3.3]; Outline of Submissions – United Workers Union (**UWU Submission**) [16]; Outline of Submissions of the Australian Education Union (**AEU Submission**) [9] – [12]; Submission of the First to Forty First Respondents In These Submissions Referred to as the Australian Childcare Alliance Employers (**ACA Submission**) [56]; Outline of Submissions of Community Early Learning Australian and Community Child Care Association (**CELA / CCC Submission**) [28]

scheme[6]. Nor should the Commission be dissuaded from being satisfied it is appropriate for a group of employers to bargain together if the parties are "capable" of bargaining for a single enterprise agreement, or a multi-enterprise agreement of another kind[7]. Constructions such as these are inconsistent with the notion that the appropriateness consideration is a broad one, as well as the Parliament's deliberate decision to remove considerations relevant to the previous low paid bargaining stream from the supported bargaining stream – such as access to and the history of bargaining in the relevant industry.[8]

12. The scheme is aimed at addressing constraints experienced by employers and employees accessing the benefits of collective bargaining where their only option was to try to bargain at the single enterprise level. But this underlying aim should not be misconstrued as an eligibility requirement.

13. The task in relation to the appropriateness consideration is to consider a range of matters, some specified, some general, some relating to the employers and employees themselves and some the industry or sector they are part of in an effort to reach a state of satisfaction as to whether it is appropriate for that group of employers and their employees to bargain together.

14. The statute provides for three distinct and express disqualifiers. *One* is where the proposed agreement is a greenfields agreement[9]. *Two* is where an employee is covered by a single-enterprise agreement that has not passed its nominal expiry date[10]. *Three* is where the proposed enterprise agreement would cover employees in relation to general building and construction work[11]. There are no other disqualifiers "hidden" within the legislative intent.

15. For example, while employees who are covered by a single enterprise agreement that has not passed its nominal expiry date *are* excluded from the scheme, employees who are covered by a single enterprise agreement that has passed its nominal expiry date

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[6] AI Group Submission [19]

[7] ACCI Submission [3.12], [3.7]; AI Group Submission [20]

[8] ACTU submission [78-79], [81]82].

[9] *Fair Work Act 2009,* s 242(3)

[10] *Fair Work Act 2009*, s 243A(1)

[11] *Fair Work Act 2009* s 243A(4)

are *not* excluded from the scheme. It is misconceived to suggest the Commission should be reluctant to name such employees (or their employers) in a supported bargaining authorisation (whether they wish to be covered or not), by reading into the statute an additional disqualifier[12]. It is a broad consideration, not an exclusionary one.

16. A broad consideration is not the same as a speculative one. Employers and their employees may have some of the characteristics sufficient for the Commission to be satisfied that it is appropriate for them to bargain together and, if that is so (provided the other requirements of the scheme are met), an authorisation must be granted. Thus, matters such as the hypothetical impact of the granting of a supported bargaining authorisation on other forms of multi-employer bargaining or the preferability of other streams of multi-employer bargaining are unlikely to be relevant[13]. Nor is it relevant, in relation to the making of a supported bargaining authorisation itself, to speculate as to how a supported bargaining agreement, if one is made, might then be varied to include other employers[14]. At the point of the application for a supported bargaining authorisation, FWC cannot predict, and should not engage in a predictive exercise as to what would happen if the agreement were made - what its scope is, what future employers may be included, its effect on those employers (whoever they may be), any "potential harm to competition or productivity" and the ultimate impact economic consequences of that process[15].

17. Thus, what are described as "microeconomic and macroeconomic consequences which may flow from multi-employer bargaining", or the potential impact of bargaining between the relevant parties on the economy, specific sectors and / or members of the community that rely upon the services of the employers that will be covered by a proposed supported bargaining agreement[16] or the potential implications for the customers, clients or other users of the employers' products or services, other employees / employers in a supply chain or labour market implications[17], even if they could be ascertained with any degree of probative value, are unlikely to be relevant.

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[12] Ai Group Submission [57]

[13] AI Group Submission [20]; ACCI Submission [3.7]

[14] AI Group Submission [22], [28(b)]

[15] AI Group Submission [28], [22], [23]; ACCI Submission [3.49.2]

[16] AI Group Submission [23]

[17] AI Group Submission 58(b)-(d)

The appropriateness consideration requires an examination as to whether it is appropriate for a group of employers and their employees to bargain together, not scrutiny as to the nature of the agreement which may be made *if* they bargain together.

Submissions of the peak Councils on objects and appropriateness

18. The attempt to resolve a perceived tension in the provisions outlining the objects of the Act and of the relevant division (a tension which does not exist) appears to have inspired assertions by some of the peak Councils which should not be adopted. In particular:

    a. When read together, the provisions relating to the objects of the Act do not "make clear" or even evince a meaning that suggests supported bargaining is intended to operate in a narrow set of circumstances[18].

    b. The appropriateness consideration is not a "bar" to be overcome but a broad based consideration involving multiple factors[19].

    c. The supported bargaining scheme does not require the Commission to consider or reach a state of satisfaction that the cohort of employers and employees to whom a supported bargaining authorisation would apply are in fact of a nature for whom this new legislative scheme is intended, *before* determining that it is appropriate to make a supported bargaining authorisation[20]. The appropriateness consideration is the primary consideration and is not preceded by a condition precedent.

    d. The provisions do not manifest a clear statutory *preference* for bargaining at the enterprise level[21]. The objects of the Act place an *emphasis* on enterprise-level collective bargaining but do not create a hierarchy of bargaining approaches[22].

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[18] AI Group Submission [17], [25]

[19] AI Group Submission [23], [28(a)]

[20] AI Group Submission [20]

[21] ACCI Submission [3.10]

[22] ACTU Submission [17]; ACA Submission [43]

e. Thus, the Commission is not required to engage in a consideration of any intention or efforts to make a single-enterprise agreement amongst the relevant employers and employees or consider the history of bargaining between those employers and employees[23]. Requirements similar to these which formed part of the low paid bargaining scheme have been removed[24].

f. Other objects of the Act – such as to promote productivity or to be mindful of the special circumstances of small business – are unlikely to bear on an application for a supported bargaining authorisation[25]. The "single interest" bargaining scheme contains a "small business" exemption (s 249(1B)(a)). The supported bargaining scheme does not. Considerations similar to these were also removed from the low paid bargaining scheme[26].

Prevailing pay and conditions (including whether low rates of pay prevail)

19. UWU in its Outline of Submissions said it is not necessary in respect of this application for FWC to determine the extent of the circumstance in which it may be appropriate for a group of employers and their employees to bargain together, having regard to those employees' prevailing pay and conditions[27]. Thus, a submission such as that at [3.18] of the ACCI Submissions need not be adopted:

> "[a]lthough it is no longer strictly necessary that the prevailing pay and conditions within the relevant industry or sector be "low", it is there for clear that they must service as some *impairment* to the ability of the parties to bargain at the enterprise level. This *impairment* is necessary to justify this alternative, *less preferable* form of bargaining …" [our emphasis]

20. Section 241 speaks of "constraints", not impairment. And, as has been submitted, section 3(f) speaks of "emphasis" not preference. While in this matter, the level of award dependency in the sector and some of the known characteristics of the sector do create "impediments" to bargaining (and it is constrained) the Commission need not

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[23] AIG Submission [56(b) and (c)]

[24] See *Fair Work Acy 2009* former s 243(2)b)

[25] ACCI Submission [3.49.2]

[26] ACTU Submission [15]; [78]-[79] See *Fair Work Act 2009* former s 243(3)(a)

[27] UWU Submission [20]

adopt language that does not appear in the statute that might improperly narrow the scope of the scheme in respect of future applications.

21. UWU also takes issue with the suggestion that the absence of low rates of pay would *weigh strongly* against the granting of a supported bargaining application[28]. The consideration in respect to whether low rates of pay prevail in a sector has been reduced by the supported bargaining amendments to a sub-consideration within the broader factor relating to the pay and conditions which prevail in the industry (which itself is one of a number of considerations relating to "appropriateness"). The AI Group submission at [42] places much more weight on the consideration than the statute clearly envisages. Conceivably, a supported bargaining authorisation could be granted in circumstances where low rates of pay do not prevail within an industry or sector[29].

The enquiry into common interests is a search for commonality, not divergence.

22. The employers specified in this application have several common interests that are referred to as examples in the legislation, and several other common interests. These include:

    a. Substantial funding directly from the Commonwealth Government;

    b. A common regulatory arrangement;

    c. Commonality in the nature of their enterprises, arising particularly from their striking structural similarity, because of their need to comply with a detailed regulatory framework, but also because they deliver precisely the same services through the engagement of similarly qualified people who perform similar work, in a similar manner; and

    d. Commonality in an interest to bargain together, and to do so together with their common funder, the Commonwealth Government.

23. The operation of ss 243(1)(b) and 243(2) requires FWC to consider whether employers who may bargain together *have* common interests. If common interests exist, there is weight in favour of the appropriateness of the employers bargaining together. The exercise is not one in which FWC should inquire into characteristics among employers

[28] AI Group Submission [42]

[29] ACTU Submission [39] – [40]

which might not be consistent or common, so as to cancel out or diminish those interests they do have in common[30]. There is no requirement that FWC assess "the significance" of a common interest, its relevance to the setting of employees' terms and conditions, the extent to which it relates to the employers' operational requirements and realities or other "differences"[31]. Similarly, the common interest held by employers who are substantially funded, directly or indirectly, by the Commonwealth, State or a Territory is not diminished if some of those employers also have other income streams. Their common interest remains[32].

Variations to remove or add employers

24. Neither AI Group or the ACTU make submissions on the operation of s 244 and the manner in which the Commission should approach an application to vary a multiple employer agreement made through supported bargaining, given the parties to this application do not rely on this provision.

25. UWU agrees with this approach, and it is suggested the Commission need not consider or comment on these provisions.

Filed on behalf of the
United Workers Union
14 August 2023

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[30] ACTU Submission [61]

[31] AI Group Submission [46] – [51]

[32] AI Group Submission [49]