IN THE FAIR WORK COMMISSION

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

Matter No: (B2023/538)

SUBMISSION OF THE FIRST TO FORTY FIRST RESPONDENTS IN THESE SUBMISSIONS REFERRED TO AS THE AUSTRALIAN CHILDCARE ALLIANCE EMPLOYERS (ACA Employers)

Introduction

1. On 6 June 2023, the United Workers Union, Australian Education Union – Victorian Branch and the Independent Education Union of Australia (collectively, **the Applicants**) made an application pursuant to sections 242 of the Fair Work Act (**the Act**), for a supported bargaining authorisation. An amended application to include two additional respondent employers was filed on 26 July 2023 (the **Application**).

2. The Application has been made in relation to employees of employers in the early education and care (**ECEC**) sector who:

   a) are covered by the *Child Services Award* 2010 and perform work in a long day care setting, but not including work in adjust care; work performed in a stand-alone preschool or kindergarten; work in occasional care, work performed in out of school care, work in vacation care, mobile centres, early childhood intervention programs and work covered by an enterprise agreement that has not yet reached its nominal expiry date;

   b) are covered by the *Education Services (Teachers) Award* 2020 in a long day care setting, but not including work in adjust care; work performed in a stand-alone preschool or kindergarten; work in occasional care, work performed in out of school care, work in vacation care, mobile centres, early childhood intervention programs and work covered by an enterprise agreement that has not yet reached its nominal expiry date; and

c) perform work in the ECEC sector in a long day care setting including that of a qualified chef or cook.[1]

3. The Applicants seek one authorisation, which, if granted would permit the Applicants to bargain for a supported bargaining agreement covering 64 employers named in the Application.

4. On 14 June 2023, the President of the Fair Work Commission (**Commission**) issued directions for the filing of written submissions, evidence and any agreed statement of facts by the Applicants and the ACA Employers, Community Early Learning Australia, Community Child Care Association and G8 Education Australia (collectively, **the Respondents**).

5. These submissions are made on behalf of the ACA Employers, who are members (and Directors) of ACA State bodies that are affiliated with the national Australian Childcare Alliance.

6. These submissions are divided as follows:

[1] Application for a supported bargaining authorisation, United Workers Union, Australian Education Union – Victorian Branch and the Independent Education Union of Australia, dated 6 June 2023; Amended Application for a supported bargaining authorisation, United Workers Union, Australian Education Union – Victorian Branch and the Independent Education Union of Australia, dated 26 July 2023.

Common interest

Common interest v Common interests

Clearly identifiable

Do the employers subject to the application have common interests?

B.5 Manageable number of bargaining representatives

B.6 Other matters

The Need for Funding

Quality Childcare

ACA Employer Support

B.7 Employee representation

C. Conclusion

A. BACKGROUND

A.1 ECEC Sector

7. The early childhood education and care (ECEC) sector is comprised of services that provide play-based education to young children. The sector is broken down into a number of different types of services including long-day care, preschool/kindergarten, outside school hours care and family day care.

8. As set out above, the Application is limited to the employment of employees providing long-day care services, which is an all-day or part-time centre based early childhood education program offered to children aged from birth to 6 years who attend on a regular basis.[2]

9. As of 1 April 2023, there were a total of 8,761 long day care centres in the ECEC sector approved under the National Quality Framework (**NQF**) operating in Australia.[3] With approximately 835,000 children attending long-day care centres.[4]

10. Centres vary in size, but the typical centre is a small private provider.[5]

11. The use of long day care centre services has seen the strongest growth of any part of the ECEC sector in the past decade due to increases in both workforce participation and population growth.

12. More than half of all services in the ECEC sector are now long day care.[6]

13. These services deliver preschool as well as educational activities and care for children.

14. The Australian government supports parents to meet the cost of childcare through the Child Care Subsidy with further State based funding in some States for children preparing to transition to school.

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[2] Australian Government Department of Education and Training, *Child Care Provider Handbook* (May 2023), 648.
[3] NQF Snapshot, State of the sector, Australian Children's Education & Care Quality Authority, 1 April 2023.
[4] Department of Education, Child Care Subsidy data report, December quarter 2022.
[5] NQF Snapshot, State of the sector, Australian Children's Education & Care Quality Authority, 1 April 2023.
[6] Ibid.

15. The sector is regulated by national law and regulations, implemented at a State level. The Australian Children's Education and Care Quality Authority (ACECQA) is responsible for quality standards for the sector, including ratios of childcare workers per child etc.[7]

16. Those employed in long day care centres are predominantly female (94 per cent) however the age distribution of the workforce varies significantly.

A.2 Historical Development of Supported Bargaining

17. Supported bargaining has evolved from the previous low-paid bargaining regime and consideration of this is a useful starting point to understand the current supported bargaining stream.[8]

18. The previous low-paid bargaining provisions were introduced with the Act in 2009 and were designed to facilitate collective bargaining for groups of employees who historically had been unable to achieve collectively bargained agreements.[9]

19. The types of employees that were intended to benefit from these provisions included, for example, those in community services, cleaning, childcare, security and aged care.[10]

20. The low-paid bargaining stream diverged from the general 'enterprise' bargaining regime in a number of important respects.

21. In order to access the low-paid bargaining stream, employees (or their representatives) had to apply for a 'Low-Paid Authorisation.' To grant an authorisation, the Commission needed to be satisfied that it was in the public interest to make the authorisation taking into consideration a number of factors including; that the employees to be covered by any proposed agreement were 'low-paid,' the history of bargaining and bargaining power of the employees, the likely success of collective bargaining, and the extent to which the terms and conditions of the employees were controlled by external parties or forces.[11]

22. After a decade and a half of operation, only five substantive applications had been made to utilise the low-paid bargaining provisions. These resulted in only one authorisation being

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[7] Agreed Statement of Facts, Dated 28 July 2023 at 24 to 33.
[8] *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619,59; *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042, 26–37; *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* (2012) 219 IR 139,16–19.
[9] Explanatory Memorandum Fair Work Bill *2009* (Cth), r 178; Fiona Macdonald, Sara Charlesworth and Cathy Brigden, 'Access to Collective Bargaining for Low-Paid Workers' in Shae McCrystal, Breen Creighton and Anthony Forsyth (ed), *Collective Bargaining Under the Fair Work Act* (2018) 206, 213.
[10] Explanatory Memorandum, Fair Work Bill 2008 (Cth), r.202.
[11] *Fair Work Act 2009* (Cth), s243(1), (2), (3).

made (dealing with two of the applications) covering employees in the aged care industry, with one other application by the Australian Workers Union being adjourned indefinitely. No multi-enterprise agreements had resulted.[12]

23. The first and only successful application to result in an authorisation was a joint application by the United Voice and the Queensland branch of the AWU, the ***Aged Care case***.[13]

24. However, whilst this application sought to cover in excess of 60,000 aged care employees employed by over 300 aged care employers, Fair Work Australia only granted a low-paid bargaining authorisation for 175 employers and their employees, with the remainder excluded in part because they were covered by an enterprise agreement.[14]

25. Subsequent negotiation conferences were held between the unions and employers covered by the authorisation, as well as the federal government as the third party responsible for funding, but this did not result in an agreement.[15]

26. The second decision regarding a low-paid bargaining application was in response to an application by the Australian Nursing Federation, the ***Practice Nurses case***.[16] The application was made on behalf of nurses working in the operations of almost 700 general practitioners and medical centres.[17]

27. The application was dismissed by the Commission on the grounds that most practice nurses were not low-paid and that, while practically difficult, the options available to the union for single enterprise level bargaining under the Act were not exhausted.[18]

28. Lastly, Deputy President Gostencnik also dismissed an application by the United Voice that sought an authorisation covering five private security businesses and their employees

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[12] Fiona Macdonald, Sara Charlesworth and Cathy Brigden, 'Access to Collective Bargaining for Low-Paid Workers' in Shae McCrystal, Breen Creighton and Anthony Forsyth (ed), *Collective Bargaining Under the Fair Work Act* (2018) 206, 214.
[13] *United Voice and the Australian Workers Union of Employees, Queensland* (2011) 207 IR 251 (Aged Care Case). This authorisation comprised on two applications, one by United Voice (B2010/2957) and one by the AWU Queensland Branch (B2010/3116) heard jointly.
[14] Fiona Macdonald, Sara Charlesworth and Cathy Brigden, 'Access to Collective Bargaining for Low-Paid Workers' in Shae McCrystal, Breen Creighton and Anthony Forsyth (ed), *Collective Bargaining Under the Fair Work Act* (2018) 206, 215; [2011] FWAFB 2633.
[15] Cooper R, Low-paid Care Work, Bargaining and Employee Voices in Australia in Alan Bogg & Tonia Novitz (ed), *Voice at Work* (2014) (Oxford University Press, Oxford), 64.
[16] *ANF v IPN Medical Centres Pty Ltd* [2013] FWC 511.
[17] Fiona Macdonald, Sara Charlesworth and Cathy Brigden, 'Access to Collective Bargaining for Low-Paid Workers' in Shae McCrystal, Breen Creighton and Anthony Forsyth (ed), *Collective Bargaining Under the Fair Work Act* (2018) 206, 215; Ibid.
[18] *ANF v IPN Medical Centres Pty Ltd* [2013] FWC 511, 160.

in the ACT in *the **Security Guard case***.[19] Whilst in this case the Commission did find some of the employees subject to the application were low paid, the other considerations such as difficulty in bargaining weighed against the public interest threshold being met. As Deputy President Gostencnik observed:

> *It is apparent from this review that the legislative scheme establishing special provisions for low-paid bargaining seeks to strike a balance between the emphasis of the enterprise bargaining provisions generally on collective bargaining particularly or primarily at an enterprise level for agreements that deliver productivity benefits on the one hand, and a recognition of the need and perhaps desirability of providing some additional assistance to certain classes of employees who are low-paid who have historically not had access to collective bargaining or who face substantial difficulty in collectively bargaining at the enterprise level on the other.* [20]

29. In December 2022, the low-paid bargaining provisions in the Act were amended, as a result of the pass of the *Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022* (**Secure Jobs, Better Pay changes**).

30. The Secure Jobs, Better Pay changes sought to reform and broaden the low-paid bargaining provision in Division 9 of Part 2-4 of the Act with the creation of the new Supported Bargaining stream.

31. The new Supported Bargaining stream commenced operation on 6 June 2023.

32. The low-paid bargaining regime has in effect been replaced by the Support Bargaining stream because the Parliament considered the low-paid bargaining regime as failing, necessitating it to "remove unnecessary limitation on access to the low-paid bargaining stream". [21]

A.3 Statutory Framework in Summary

33. Chapter 2, Part 2-4, Division 9, ss 241 to 246 of the Act permits an application to be made seeking a supported bargaining authorisation (**SBA**) to allow two or more unrelated employers to bargain for a multi-enterprise enterprise agreement under the Act.

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[19] [2014] FWC 6441,
[20] Ibid, 13.
[21] Explanatory Memorandum, Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) 942; Commonwealth, *Parliamentary Debates*, House of Representatives, Second Reading Speech, 27 October 2022, 2181 (Tony Burke, Minister for Employment and Workplace Relations).

34. These proceedings currently concern the making of a SBA which is predicated on:

a) (s 242(1)) An application being made for the SBA by a bargaining representative or an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the proposed multi-enterprise agreement.

b) (s 242(2)) The application for the SBA must specify the employers and employees who will be covered by the proposed multi-enterprise agreement.

c) (s 243(1)(a) and (b)) Once an application has been made in accordance with s 241, the Commission is obliged to make the SBA if it is satisfied that it is appropriate for the employers and employees that will be covered by the proposed multi-enterprise agreement to bargaining together.

d) (s 243(1)(b)) The Commission may arrive at the requisite satisfaction for all or some of the employers or employees specified in the application.

e) (s 243(1)(b)(i) to (iii)) In arriving at the requisite satisfaction the Commission must have regard to certain matters.

f) (s 243(1)(b)(iv)) In arriving at the requisite satisfaction the Commission is not limited to having regard to those matters specified and may have regard to any other matters it considers appropriate.

g) (s 243(1)(c)) The Commission must be further satisfied that at least some of the employees who will be covered by the proposed multi-enterprise agreement are represented by an employee organisation.

h) (s 243 (2)) Examples of what might constitute common interests (one of the matters the Commission is to have regard to in arriving at the requisite satisfaction of appropriateness) are set out.

i) (s 243(2A) and (2B)) While not relevant in this matter, separately the Commission must make the SBA if the Minister has issued the relevant declaration having themselves been satisfied of certain matters.

j) (s 243 (3)) In making the SBA the Commission must specify certain matters.

k) (s 243 (4)) The Commission is required to make the SBA operative from the day it is made.

l) (s 243A (1) to (3)) The Commission is prevented from specifying an employee in the SBA who is covered by a single-enterprise agreement that has not passed its nominal expiry date unless the Commission is satisfied that the employer's main intention in making the single-enterprise agreement was to avoid being specified in a SBA.

m) (s 243A (4)) The Commission is prevented from making the SBA if the proposed multi-enterprise agreement would cover employees in relation to general building and construction work.

n) (s 244) Once made, the SBA can be varied to add or remove the name of an employer covered by it.

o) (s 245) In effect bringing bargaining to an end, the Commission is taken to have varied the SBA to remove an employer's name when the employer and all of their employees who are specified in the SBA are covered by an enterprise agreement, or a workplace determination, which is in operation.

p) (s 246) The Commission can provide assistance in the bargaining process on its own initiative or on application and can direct a person who is not an employer specified in the SBA to attend a conference who exercises such a degree of control over the terms and conditions of the proposed multi-enterprise agreement that participation of the person in bargaining is necessary for the proposed multi-enterprise agreement to be made.

B. THE APPLICATION

B.1 Statutory Framework – Objects and Purpose

35. Chapter 2, Part 2-4, Division 9 of the Act is to be read alongside three objects:

    (a) the objects to Division 9, s 241;

    (b) the objects to Part 2-4, s 171; and

    (c) the objects to the Act, s 3.

36. The objects of the Act are set out in section 3 and state as follows:

> **3 Object of this Act**
>
> *The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*
>
> *(a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and*
>
> *(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and*
>
> *(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and*
>
> *(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and*
>
> *(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and*

(f) 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; and

(g) acknowledging the special circumstances of small and medium-sized businesses.

37. The objects of Part 2-4 are found in section 171 of the Act which provides:

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.

38. Section 171(a) refers to the provision of a flexible and fair framework for collective bargaining for 'enterprise agreements that deliver productivity benefits'. While there is no specific reference to SBA's, section 241 in Division 9 sets out the objects of the division as follows:

241 Objects of this Division

The objects of this Divisions 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.

39. These objects in section 241 are not to be read in isolation but in the context of the entirety of the enterprise agreement provisions of Part 2–4. As the Full Bench of Fair Work Australia observed in the *Aged Care Case*:

> "*The terms of s241 are to be read in the context of the enterprise agreement provision in the rest of Part 2-4.* [22]

40. The objects to Division 9 (s 241) are similar in many respects to the low-paid bargaining regime but have been amended in two regards:

a) the emphasis is now on a class of employers and employees who require "support" in bargaining rather than the class that is characterised as low-paid who have not historically had the benefit of collective bargaining; and

b) there is no longer a focus in the objects on improvements to productivity and service delivery and taking into account the needs of individual enterprises.

41. Ultimately, the focus of Division 9 of the Act as amended has shifted to the notion of "support" with the Commission being empowered to intervene on its own initiative to facilitate bargaining in relation to the proposed multi-enterprise agreement.[23] This includes convening conferences with a third party who has control over the terms and conditions that can be offered under an agreement.[24]

42. This suggests some level of tension between section 3(f) and section 241, in that the former promotes an emphasis on enterprise level bargaining and productivity and not the latter.

43. Such a tension should not be construed to suggest a hierarchy of bargaining approaches, but rather reinforcing that when the Commission is considering approaches other than enterprise level bargaining it must be diligent in applying the gateway criteria applicable.

B.2 Satisfied and Appropriate

44. In accordance with section 243(1)(b) of the Act, the Commission is obliged to ("must") make a SBA if "…*it is satisfied, that is it is appropriate for the employers and*

[22] [2011] FWAFB 2633 at [11].
[23] *Fair Work Act 2009* (Cth) s 246(2).
[24] *Fair Work Act 2009* (Cth) s 246(3).

employees…that will be covered by the agreement to bargain together" having regard to the matters specified in section 243(1)(b) subsections (i) to (iv) and the satisfaction of section 243(1)(c).

45. This in effect is an obligation to be exercised predicated on a conditioned discretion. The Commission must have regard to certain matters in arriving at a conclusion on whether it is satisfied that it is appropriate, but once so satisfied it must make the SBA.

46. In arriving at a conclusion that it is satisfied that it is appropriate, the Commission must have regard to certain matters.

47. This needs to be considered in the context of the scope of the Application and the employers who will be bargaining together.

Satisfied

48. The state of satisfaction that the Commission must reach concerns whether it is appropriate that the named employers be allowed to bargain together for a multi-enterprise agreement.

49. The ordinary meaning of satisfy as defined in the Macquarie Dictionary is:

> *satisfy /sætɪsfaɪ/ v., -tied., -fying. -v.,. 1. to fulfil the desires, expectations, needs, or demands of, or content (a person, the mind, etc.); supply fully the needs of (a person, etc.). 2. to fulfil (a desire, expectation, want, etc.). 3. to give assurance to; convince: to satisfy oneself by investigation. 4. to answer sufficiently (an objection, etc.); solve (a doubt, etc.). 5. to discharge fully (a debt, etc.). 6. to make reparation to (a person, etc.) or for (a wrong, etc.). 7. to pay (a creditor). 8. to fulfil the requirements or conditions of: to satisfy an algebraic equation. - v.i. 9. to give satisfaction. [ME, from OF, from L: do enough] - satisfier, n. - satisfyingly, adv.*[25]

50. 'Satisfaction' by its very nature is a considered evaluative judgment which involves a degree of latitude where rationale minds might arrive at different answers.[26]

51. As the High Court plurality explained in *Coal and Allied Operations v Australian Industrial Relations Commission,*[27] the Commission can only genuinely be 'satisfied' if its decision to that effect is based upon relevant considerations and the evidence:

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[25] Macquarie Concise Dictionary (3rd ed, 2000) 'satisfy', 1032.
[26] Francis Bennion, '*Distinguishing Judgment and Discretion'* [2000] Public Law 368;
[27] [2000] HCA 47 (31 August 2000).

> *There is well established authority to the effect that a tribunal's or public officer's 'satisfaction' in such a context must not be capricious. The Commission may only be satisfied if its decision to that effect is based upon relevant considerations and the evidence.*[28]

52. Being satisfied will therefore involve evaluative judgement to meet the necessary state of being convinced of the appropriateness in the context of the matter and the evidence before the Commission.

Appropriate

53. The word "appropriate" should be construed according to the ordinary and grammatical sense of the word.[29]

54. The ordinary meaning of 'Appropriate' as defined in the Macquarie dictionary is:

> *appropriate /əprəʊpriət/ adj., /ə'proʊprieɪt/ v., -ated, -ating. - adj. 1. suitable or fitting for a particular purpose, person, occasion, etc.: an appropriate example. 2. belonging or peculiar to one: each played their appropriate part. - v. t. 3. to set apart for some specific purpose or use: parliament appropriated funds for the university. 4. to take to or for oneself; take possession of. 5. to filch; annex; steal. [L: made one's own] - appropriation /əprəʊprieɪʃən/, n. - appropriately, adv. - appropriateness, n. - appropriative, adj - appropriator, n.*[30]

55. Effectively, (subject to what the Commission must have regard to) the Commission is being asked to make an evaluative judgement based on the evidence of whether it is satisfied (convinced or assured) that it is fitting or suitable for the named employers to bargain together for a multi-enterprise agreement within the scope of that proposed; long day care.

56. Vice President Lawler in considering the meaning of 'appropriate' in the context of section 226 of the Act in *Tahmoor Coal Pty Ltd re Tahmoor Colliery Enterprise Agreement 2006; Tahmoor Washery Workplace Agreement 2006 (*Tahmoor*)* observed*:*

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[28] Ibid, 48; citing *Coal & Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union Print P8382* (AIRCFB, Giudice J, Munro J, Larkin C, 29 January 1998) [(1998) 80 IR 14] 17.
[29] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 47(footnotes omitted).
[30] Macquarie Dictionary (3rd ed, 2000) 'appropriate', 47.

> *"'Appropriateness' is a broad discretionary standard. Reasonable minds may differ, indeed, differ sharply, on what is appropriate in any given set of circumstances"*[31]

57. This is not to suggest however that section 243 is simply a rubber stamp process. The discretion it confers on the Commission is not unfettered. In addition to it being conditioned by the factors the Commission must have regard to in section 243(1)(b), it must also be exercise in accordance with the nature and purpose of the Commission's powers and the intent of the Act.[32]

58. In exercising this discretion, the Commission is required to consider various matters.

'Having regard to'

59. The discretion vested in the Commission, in determining whether it is satisfied of the requisite level of 'appropriateness' is conditioned by the obligation placed on it to 'have regards to' the matters specified subsections s 243 (1) (b) (i) to (iv).

60. As Gibbs CJ observed in *The Queen v Toohey: Ex Parte Meneling Station Pty Ltd* when legislation directs a decision maker to "have regard to" something:

> *it requires him to take those matters into account and to give weight to them as a fundamental element in making his recommendation…*[33]

61. As the section directs the Commission to take the matters in subsections (i) to (iv) into account "*it requires [it] to remark upon those matter and to express [its] views upon them*".[34]

62. The Commission will fail to 'have regard to' the nominated matters if the regard is not "sufficient".[35] The Commission will not have complied with its statutory obligation if it merely has "token" regard or "nominal" regard to those matters.[36]

63. We now turn to a consideration of each of the matters specified in section 243(1)(b).

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[31] [2010] FWA 6468, 32.
[32] Ibid, 39.
[33] [1982] 158 CLR 327, 333.
[34] Ibid.
[35] *R v Hunt* [1979] 180 CLR 322, 29.
[36] *Department of Defence v Fox, Jodette Margaret* [1997] FCA 3,363.

B.3 Prevailing pay and conditions

64. The first matter which the Commission must have regard to under subsection 243(1)(b)(i) is the "*prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector).*"

65. It is important to consider that the notion of prevailing pay and conditions is not concerned with the actual employers and employees who are subject to the Application themselves, but rather the industry or sector that is relevant to the Application; in the current case the "sector" is the long day care sector (subject to the exceptions set out in the Application). [37]

66. As was previously held in the *Practice Nurses case* in making such an assessment "*a relevant industry or relevant industry standard is one derived from a comparison of the industry of the employer, not the vocation of the employees*".[38]

Meaning of "Prevailing pay and conditions"

67. The phrase "*prevailing pay and conditions*" is not defined, nor given any further guidance in Division 9 of the Act.

68. The definition of "prevail" is:

> *prevail /prɪ'veɪl/ v.i. 1. to be widespread or current; to exist everywhere or generally: dead silence. prevailed. 2. to appear or occur as the more important or frequent feature or element; predominate: green tints prevail in the picture. 3. to be or prove superior in strength, power, or influence. 4. to operate effectually. to be efficacious. - phr. 5. prevail on (or upon) (or with), to use persuasion or inducement successfully on. [ME, from L: be more able] - prevailing, adj.*[39]

69. It should be uncontroversial that what is being explored are the actual "pay" and "conditions" currently operating in the industry or sector concerned and whether they constitute low rates of pay.[40]

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[37] Application for a supported bargaining authorisation, United Workers Union, Australian Education Union – Victorian Branch and the Independent Education Union of Australia, dated 6 June 2023.
[38] [2013] FWC 511, 127.
[39] Macquarie Dictionary (3rd ed, 2000) 'prevail', 913.
[40] Explanatory Memorandum, Fair Work Amendment (Secure Jobs, Better Pay) Bill 2014, paragraph 115.

70. The phrase "prevailing pay and conditions" also appears in s 187(6) of the Act and while in a very different context, its use supports the view that what is being explored are the actual pay and conditions in operation.[41]

71. The Explanatory Memorandum to the *Fair Work Amendment (Secure Jobs, Better Pay) Bill* 2022 (**Secure Jobs, Better Pay Bill**) provides some further insight into the intention behind this consideration:

> "*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*"[42]

72. Pay and conditions are of course two different things.

Prevailing pay and conditions in the ECEC sector

73. Reliable data is available on this issue for the ECEC sector as a whole. As long day care is the major part of the ECEC sector, the Commission should be satisfied that the ECEC data is appropriate to examine in this matter.

74. The pay and conditions of employees in the ECEC sector subject to the application, are covered by the:

a) *Children's Service Award* 2010; and
b) *Education Services (Teachers) Award 2020*.

75. The ECEC Workforce Census from the Commonwealth Department of Education presents a national overview of the ECEC selected characteristics of childcare services, preschool programmes and information from a staff survey.[43]

76. According to the ECEC National Workforce Census 2021:[44]

a) 57.8% of employees in the ECEC sector receive an award wage;
b) 20.9% of employees are paid up to 10% above the award;
c) 5.4% of employees are paid between 10% and 25% above the award; and
d) 1.9% of employees are paid more than 25% above the award.[45]

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[41] Explanatory Memorandum, *Fair Work Amendment Act* 2015, 114.
[42] Explanatory Memorandum, Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) 944.
[43] Social Research Centre, 2021 Early Childhood Education and Care National Workforce Census, (Report prepared for the Australian Government Department of Education, August 2022).
[44] Ibid.
[45] Ibid, Table 5 page 13. The remaining 14% did not know.

77. The following are the prevailing pay and conditions in the ECEC sector:

a) there is a relatively high degree of Award dependency;[46]

b) a relatively low number of employees covered by enterprise agreements;[47] and

c) median weekly full-time earnings for "child carers" between $1000 and $1059 per week.[48]

Are the prevailing pay and conditions in the ECEC sector 'low rates of pay'?

78. Section 243(1)(b)(i) requires the Commission to consider whether "low rates of pay" prevail.

79. The Act does not contain a definition of "low rates of pay", nor is the phrase elsewhere in the Act.

80. Recently however the phrase "low rates of pay" was used by the Full Bench of Commission in its decision regarding the Aged Care Work Value case to describe the remuneration of those who are "low-paid.[49] Similarly, the Australian Government in its submission to the Fair Work Commission Annual Wage Review 2022, used the phrase interchangeably with the term "low -paid".[50]

81. Having regard to the legislative history[51] of Division 9 of Part 2-4 of the Act, not only was it formally titled "low-paid bargaining", but the amendment to it by the Secure Jobs, Better Pay Bill were directed at "remove unnecessary limitation on access to the <u>low-paid</u> bargaining stream" As the Explanatory Memorandum to the Bill explains:

> *"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 <u>low-paid industries</u> such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively".*[52]

<u>*Low rates of pay*</u>

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[46] Agreed Statement of Facts, Dated 28 July 2023, at [17].
[47] Ibid.
[48] Ibid at [20] and [21].
[49] *Aged Care Work Value Case* [2023] FWCFB 93, 429.
[50] New Australian Government Submission to the Fair Work Commission Annual Wage review 2022, 3 June 2022 at page 2.
[51] *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 59; *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042, 26–37; *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* (2012) 219 IR 139,16–19.
[52] Explanatory memorandum, Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) r.37

82. The concept of low-paid has been commonly referred to in a variety of decisions of the Commission and it predecessors.

83. Firstly, the Commission has considered in consecutive Annual Wage Reviews since the 2012-13 Review,[53] that low-paid is defined as "*persons whose ordinary-time earnings are below two-thirds of median (adult) ordinary-time earnings of all full-time employees"*.[54]

84. There are two different measures of median earning by which this threshold has been calculated:

a) ABS Characteristics of Employment (COE): based on the last COE data published in August 2022, the low paid threshold is $1016.67 ($26.75 per hour).[55]

b) ABS Employee Earnings and Hours (EEH) data: based on the last published EEH data in May 2021, the threshold is $1062.00 ($27.94 per hour).[56]

85. Secondly, in the *Aged Care case* the Full-Bench of the Commission considered the meaning of low-paid employees in the context of a low-paid bargaining authorisation application. In essentially adopting the approach to the identification of low-paid employees from the Annual Wage Reviews, they suggested that the appropriate low-paid reference point was whether the employees or some of them "*are paid at the lower award classification levels*". This position was subsequently endorsed in the *Practice Nurses case*.[57]

86. The more contemporary approach is the 2/3 approach but for completeness in applying both of these notions, the low-paid reference points are as follows:

Reference Point	**Hourly rate ($)**
C13[58]	$23.23
C 10 (Level 3.1)	$26.18

[53] [2013] FWCFB 4000
[54] [2023] FWCFB 3500, 89; [2022] FWCFB 3500, 70; [2020] FWCFB3500, 359.
[55] In the 2022-23 Annual Wage Review Decision, FWC noted that "There are two different measures of median earnings by which this threshold may be calculated: (1) Based on ABS Characteristics of Employment (COE) data published in August 2022, the low paid threshold is $1016.67.82 (2) Based on ABS Employee Earnings and Hours (EEH) data published in May 2021, the threshold is $1062.00.83"; *Annual Wage Review 2022-23* [2023] FWCFB 3500, 89.
[56] Ibid.
[57] [2013] FWCFB 4000, 94.
[58] The Practice Nurses decision used the C14 rate, however as the National Minimum Wage was realigned with the C13 classification wage rate in the Annual Wage Review 2022-2023 this reference point has been used instead.

Two-thirds median AWOTE (COE data)	$26.75
Two-third median AWOTE (EEH data)	$27.94
Low-paid range	**$23.23 – 27.94**

87. The applicable adult full-time rates of pay in the *Children Services Award* 2020 are as follows:

Classification	**Minimum hourly rate ($)**
Support worker	
Level 1.1	$23.11
Level 2.1	$23.94
Level 2.2	$24.73
Level 3.1	$26.18
Children's Service Employee	
Level 1.1	$23.11
Level 2.1	$23.94
Level 2.2	$24.73
Level 3A.1	$25.78
Level 3A.2	$26.18
Level 3.1	$26.18
Level 3.2	$27.09
Level 3.3	$27.94
Level 3.4	$29.48
Level 4A.1	27.94
Level 4A.2	$28.33
Level 4A.3	$28.72
Level 4A.4	$29.12

Level 4A.5	$29.51
Level 4.1	$30.84
Level 4.2	$31.32
Level 4.3	$31.78
Level 5A.1	$32.25
Level 5A.2	$32.72
Level 5A.3	$33.18
Level 5.1	$32.25
Level 5.2	$32.72
Level 5.3	$33.18
Level 5.4	$33.30
Level 6A.1	$37.19
Level 6A.2	$37.66
Level 6A.3	$38.12
Children Services Employee – Director	
Director level 6.1	$37.19
Director level 6.2	$37.66
Director level 6.3	$38.12
Director level 6.4	$39.54
Director level 6.5	$39.90
Director level 6.6	$40.38
Director level 6.7	$40.86
Director level 6.8	$41.33
Director level 6.9	$41.79

88. The applicable adult full-time rates of pay in the *Education Services (Teachers) Award* 2020 are:

Classification	Minimum hourly rate ($)
Teachers – long day care centres	
Level 1	$35.41
Level 2	$38.71
Level 3	$42.13
Level 4	$45.57
Level 5	$49.00

89. The evidence from the ACA Employers shows that employees are paid at award minimum rates or as driven by the market modestly above these rates.

90. The Commission can be satisfied based on the above analysis that:

a) modern awards are the prevailing basis for "conditions" and "pay" in the long day care sector;

b) some of the employees covered by the Children's Services Award 2010 would be low paid but not all of the employees in the long day care sector are low paid; and

c) a predominant classification in the sector the Level 3.1 Children's Service Employee in the *Children Service Award 2010* covering employees who have completed AQF Certificate III in Children's Services or equivalent qualification, falls within the low-paid band.[59]

[59] Social Research Centre, 2021 Early Childhood Education and Care National Workforce Census, (Report prepared for the Australian Government Department of Education, August 2022), 14.

B.4 Clearly identifiable common interests

91. This consideration is expressed in s 243(1)(b)(ii) as "*whether the employers have clearly identifiable common interests*".

92. For the purposes of considering this, s 243(2) of the Act provides the following examples of common interests that employers may have:

a) *"A geographical location;*

b) *The nature of the enterprise to which the agreement will relate, and the terms and condition of employment in those enterprises;*

c) *Being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.*"

Common interests

93. The starting point of any consideration of this factor is to construe the words of section 243(1)(b)(ii) according to their ordinary meaning.

94. According to the Macquarie dictionary,[60] the term 'common' means:

> *common /kɒmən/ adj. .1 . belonging equally to, or shared alike by, two or more or all in question: common property. 2. joint; united: to make common cause against the enemy. 3. relating or belonging to the whole community; public: common council. 4. generally or publicly known; notorious: a common thief. 5. widespread; general; ordinary: common knowledge. 6. of frequent occurrence; familiar; usual: a common event; common salt. 7. hackneyed; trite. 8. of mediocre or inferior quality; mean; low. 9. coarse; vulgar: his language is so common. 10. ordinary; having no rank, etc.: a common soldier; the common people.*

95. It is clear that the use of the term 'common' in the current context, when used in conjunction with 'interests', is focussed on commonality of interests between the employers.

96. The term 'interests' is similarly defined in a number of different ways depending on the context and usage of the term:

[60] Macquarie Concise Dictionary (3rd ed, 2000) 'common', 222.

interest /ˈɪntrəs, -tərəst / n. 1 . the feeling of one whose attention or curiosity is particularly engaged by something: to have great interest in a subject. 2. a particular feeling of this kind: a woman of varied intellectual interests. 3. the power of exciting such feeling; interesting quality: questions of great interest. 4. concernment, importance, or moment: a matter of primary interest. 5. a business, cause, or the like, in which a number of persons are interested. 6. a share in the ownership of property, in a commercial or financial undertaking, or the like. 7. any right of ownership in property, commercial undertakings, etc. 8. a number or group of persons, or a party, having a common interest: the banking interest. 9. something in which one has an interest, as of ownership, advantage, attention, etc. 10. the relation of being affected by something in respect of advantage or detriment: an arbitrator having no interest in the outcome. 11. benefit or advantage: to have one's own interest in mind. 12. regard for one's own advantage or profit; self-interest: rival interests.13. Commerce a. payment, or a sum paid, for the use of money borrowed (the principal), or for the forbearance of a debt. b. the rate per cent per unit of time represented by such payment. - v.t. 14. to engage or excite the attention or curiosity of: a story which interested him greatly. 15. to concern (a person, etc.) in something; involve: every citizen is interested in this law. 16. to cause to take a personal concern or share; induce to participate: to interest a person in an enterprise.[61]

97. This definition suggests two potentially different notions. One being something that a person's attention is engaged with or a more commercial notion of shared property or undertaking.

98. Ultimately, the former approach seems to be more consistent with the work to be done by Division 9. The nature of the enquiry is whether the employers are sufficiently similar that the Commission can be satisfied that it is appropriate for them to bargain together.

99. That sufficient commonality between the employers' interests is seen as important for the Commission to reach the necessary sense of satisfaction should be uncontroversial, as the less in common their interests are, the more likely that bargaining will be disorderly and quite challenging to arrive at an outcome.

[61] Macquarie Concise Dictionary (3rd ed, 2000) 'interest', 589.

100. It should therefore also be self-evident that the more common interests the employers have the more easily satisfied the Commission can be that it is appropriate for them to bargain together.

101. This said, the notion of 'common interests' does not require a consideration of that which is uncommon or even a balancing of what interests are common and uncommon but rather an enquiry of whether the employers have common interests, their nature and extent.

102. The term 'common interests' in the wider context of the Act, is given colour by virtue of the operation of section 243(2) which provides a list of non-exhaustive examples of what 'may' be considered a common interest, including geographical location, the nature of business being conducted, and the terms and conditions of employment in the enterprises and whether the employers are reliant on any government funding.

103. All of these suggest that the approach set out above is the correct one.

104. There are of course notions of "common interests" in other parts of the law.

105. One example would be in the context of 'common interest privilege'. While in an entirely different context it reinforces the notion of commonality of multiple parties attention being engaged in the same things.

106. In this context privilege will survive if the communication is disclosed to a third party who shares a sufficient "common interest" with the privilege holder**.**

107. In the leading High Court authority on the meaning of 'common interest privilege' in *Howe v Lees* Justice Isaacs helpfully observed:

> *A common interest means, in my opinion, some interest, in the sense of an actually existing right, privilege or duty to which two or more persons have in respect of a single subject matter.*[62]

108. As was more recently observed in *Marshall v Prescott*[63] by the NSW Court of Appeal, common interest can be seen as two parties "facing the same way" and this will not be destroyed by the circumstances that there is a potential for future divergence of interests.[64]

"Common interest" v "Common interests"

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[62] [1910] 11 CLR 361, 382.
[63] *Marshall v Prescott* [2013] NSWCA 152.
[64] Ibid, 62.

109. Section 243(1)(b)(ii) has adopted the plural form of the word 'interest' and this appears to have been intentional.

110. Whilst section 23 of the *Acts Interpretation Act* Cth 1901 states that "*in any Act…(b) words in the singular number include the plural and words in the plural number include the singular*", this must be read in conjunction with the exclusion rule in section 2(2).

111. Section 2(2) makes clear that the interpretation rules do not apply where a provision of an Act is subject to a contrary intention.

112. The grammar used supports only a plural reading as the text says, "*whether the employers have clearly identifiable common interests*" not "*whether the employers have a clearly identifiable common interest*".

113. In the current context, the use of the plural 'interests' should not be read and applied in the singular, as the operative practical consequences of doing so would likely result in what has been described as "absurdity".[65] As the enquiry is to establish 'commonality' its seems almost absurd that this could be satisfied by finding one, as finding one commonality would seem meaningless; its seems inconceivable that you could not find one thing in common.

114. That the Commission is exploring the weight to be given when having regard to this issue it also seems appropriate that the greater the commonality (the more common interests) the greater the weight which again focusses on the plural not the singular use.

Clearly identifiable

115. The notion of 'common interests' is qualified by them having to be 'clearly identifiable'.

116. Something is 'clearly identifiable' if it is capable of being clearly perceived or understood; plain or clear.[66]

117. In this respect weight should therefore only be given to this factor where the common interests identified between the employers has such an appearance to an ordinary observer as to be transparent and conclusive.

118. While the Parliament did not go as far as to use a word such as "obvious" the threshold set is only marginally short of this and would ward against finding common interests that

[65] Singulars, Plurals and section 57 of the Constitution, Federal Law Review, Geoffrey Dawer, 50.
[66] Macquarie Concise Dictionary (3rd ed, 2000) 'clear', 204; Macquarie Concise Dictionary (3rd ed, 2000) 'identify, 560.

involve undue enquiry or work to uncover, or ones that require complex explanation or justification.

Do the employers subject to the application have 'common interests'

119. On the evidence the answer to this question should be clearly, yes.

120. Firstly, each ACA Employer operates a long day care centre/s in the ECEC sector and provides long day care services to families within the Australian community.

121. Secondly, whilst the ACA Employers are geographical dispersed around Australia, all operate under the same specialised regulatory scheme including the National Qualify Framework (NQF).

122. The NQF is implemented by way of a model law, *the Education and Care Services National Law Act* 2010, which was enacted by each State and Territory legislatures and by the *Education and Care services National Regulations.* This statutory regulation overarches the industry by setting out the minimum qualification and educator to child ratio requirements for ECEC services and applies to all the employers subject to the Application.

123. Thirdly, each of the ACA Employers are approved and licenced providers.

124. Fourthly, each of the ACA Employers are primarily funded through the Federal Government Child Care Subsidy.

125. Fifthly, as the evidence shows, all the ACA Employers have an interest in how funding can be improved to support changes to conditions of employment in bargaining.

126. Sixthly, as the evidence shows all of the ACA Employers share a common interest in working to advance the education, care and development of pre-school children and share a deep common interest in the pedagogy underpinning this.

127. Seventhly, they also share a common interest in providing this to the highest standard of quality.

128. Lastly, as is also clear from the evidence, all of the ACA Employers share the same interest in the work performed by employees in long day care which is similar in its character; this extends to the professional development of staff and their career progression.

129. Overall, the magnitude of 'common interests' between the ACA Employers is a factor that weighs in favour of granting the SBA.

B.5 'Manageable' number of bargaining representatives

130. In deciding whether or not it is satisfied that it is appropriate for the employees and employers that will be covered by the multi-enterprise agreement to bargaining together, the Commission must have regard to: "*whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process*".[67]

131. What is being considered here is the "number" or quantity of "bargaining representatives". Being a "bargaining representative" either on a default basis or on appointment has a certain statutory meaning.[68] It for this reason that the word "likely" is used given that the actual number of bargaining representatives may, however unlikely, change or evolve once the SBA is made.

132. The ordinary meaning[69] of 'manage' is:

> *manage /ˈmænɪdʒ/ v., -aged, -aging. - v.t. 1. to bring about; succeed in accomplishing: he managed to see the governor. 2. to take charge or care of: to manage an estate. 3. to dominate or influence (a person) by tact, address, or artifice. 4. to handle, direct, govern, or control in action or use. 5. to wield (a weapon, tool, etc,). – 6. to succeed in accomplishing a task, purpose, etc. 7. to contrive to get along. 8. to conduct affairs. [It.: handle, train (horses), from L: hand] Manageable, adj. – manageably, adv. manageability /mænɪ.dʒə'bɪləti/, n.*[70]

133. In this context, what is being explored is whether this number is "manageable" such that the bargaining process can be orderly, constructive and efficient leading to a successful outcome; a multi-enterprise agreement covering the relevant employers (and their employees) in the long day care sector.

134. For the number to be manageable also invites a consideration of the nature or character of the likely bargaining representatives. A number of experienced and competent bargaining

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[67] *Fair Work Act 2009* (Cth), s 243(1)(b)(iii).
[68] *Fair Work Act 2009* (Cth) s 176.
[69] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (NT) (2009) 239 CLR 27, 47.
[70] Macquarie Concise Dictionary (3rd ed, 2000) 'manage', 692.

representatives is likely to be more manageable than the same number being in experienced or of lesser competence.

135. The requirement on the Commission to consider the manageability of the number of bargaining representative is not a new one. Under the previous low-paid bargaining regime, the Commission was obligated when determining whether it was required to make a low-paid authorisation to consider:

> *"The extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process"*[71]

136. When considering this factor, the Full Bench of then Fair Work Australia observed in the *Aged Care Case* that section 243(3)(b):

> *...involves a prediction. It requires some assessment of the likely behaviour of many employers and employees in a bargaining process spread, potentially, across many enterprises in a number of States and Territories.*[72]

137. Such a prediction should be made on the currently available factual knowledge in the matter balanced against the Commission's experience with bargaining generally.

138. The Full Bench in *Aged Care Case* found that there were sufficient contextual indicators to suggest that the number of bargaining representatives for the low paid bargaining agreement would be manageable:

> *….Viewed from the employee perspective, we have no reason to doubt that one or two unions would take the lead in the negotiations and would devote sufficient resources to the task. There is always the possibility of a multiplicity of bargaining representatives being appointed, as there sometimes are in bargaining for enterprise agreements involving large employers operating in more than one State. Whatever issues of this kind do arise, we are confident that solutions can be found if all representatives are committed to reaching a positive outcome. The tribunal also has the ability to assist. From the employer perspective, the degree of coordination between employers exhibited during these proceedings is encouraging.*[73]

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[71] *Fair Work Act 2009* (Cth), s 243(3)(b), amended by the Fair Work Amendment (Secure Jobs, Better Pay) Bill (Cth) 2022.
[72] [2011] FWAFB 2633 (Giudice J, Watson VP, Gay C, 5 May 2011), 31.
[73] Ibid.

139. Similarly in the *Security Guard case,* Deputy President Gostencnik appeared to suggest that where union and industry association bargaining representatives were to be involved in bargaining, the possible addition of other employee appointed representative not yet part of proceedings would not on its own result in the unmanageability of bargaining.[74]

140. Conversely in the *Practice Nurse* decision, considerations of the manageability of collective bargaining process revolved squarely around concerns about inefficiency due to the number of likely bargaining representatives and the cumbersome nature of holding meetings with a large number of attendees.[75]

141. In the present matter the Commission can be satisfied that:

a) competent and well-resourced unions are representing employees and while possible it is unlikely from practical experience in bargaining that once negotiations start a large number of individual employee bargaining representatives emerge;

b) the ACA Employers have already formally appointed two bargaining representatives to represent them in the negotiation process, one is very experienced in bargaining and the other very experienced in the ECEC sector and collectively they represent over 60% of all employers involved in the matter;[76]

c) it appears likely that G8 will represent itself in the negotiations given their substantial size and internal capability; and

d) the employers who are members of the Community Early Learning Australia and the Community Child Care Association are likely to be represented by a single experienced bargaining representative.

142. Accordingly:

a) given the relatively small number of bargaining representatives currently appointed;

b) that from an employer perspective there is an umbrella of employer association membership coordination involved for the majority of employers; and

c) given the experience and competence of many of the bargaining representatives already appointed,

[74] [2011] FWC 6441,100 – 114.
[75] [2013] FWC 511, 136 – 138.
[76] Bundle A – Instruments of Appointment. Noting at the time of submission we are still formally awaiting to formally receive one instrument of appointment.

the Commission can be satisfied that the "number" is manageable and should allow for an orderly and constructive process of bargaining arriving at the making of a multi-enterprise agreement.

B.6 Other Matters

143. Section 243(b)(iv) provides the Commission with broader scope to consider "*any other matters the Commission considers appropriate*" thus making clear that the Commission is not confined to just those considerations set out in section 243(b)(i) to (iii).

144. A matter is only required to be taken into account under section 243(b)(iv) if the Commission "considers" it to be appropriate – that is, the requirement itself operates upon evaluative judgment as to relevance formed by the Commission in the first place.

145. In a particular case this consideration may range from nothing, to the more obvious such as s 577 and 578 of the Act, through to the competitive nature of an industry or sector or the capacity of a sector to pay.

146. However, in this matter three considerations suggest themselves as being further relevant to the Commission being satisfied that it is appropriate.

The Need for Funding

147. The evidence in this matter suggests that a major reason for the lack of bargaining has been the lack of "support" in the form of funding.

148. Long day care centres are constrained in their capacity to pay higher wages in bargaining unless they are funded. It should be uncontroversial that wages are a central feature of all enterprise agreements and as such the appropriateness of allowing the employers to bargain together should be coloured by the need to bring the Commonwealth to the table which the SBA processes allows.

149. This issue should weigh heavily in favour of the Commission being satisfied of the appropriateness as absent a mechanism to bring the Commonwealth to the table to engage in the discussion to fund any wage or conditions outcome, bargaining would be more or less futile.

Quality childcare

150. Ensuring accessible and high-quality childcare is a community issue which bears particularly upon female workforce participation. This requires a balance of adequate

funding, qualified and competent labour as well as modern and flexible operating conditions for operators.

151. This balance can be promoted in the context of working conditions through the tripartite approach that the SBA bargaining process provides for.

ACA Employer Support

152. The Commission should also have regard to and give weight to the fact that the ACA is the principal employer industrial voice in the ECEC sector and that the ACA and the ACA Employers, who are all members of ACA (and Directors), support the Application as it provides an opportunity to engage in bargaining supported by the Commission and at the appropriate time involving the Commonwealth.

B.7 Employee Representation

153. The final requirement that the Commission must be satisfied of before being able to grant the SBA is "*that at least some of the employees who will be covered by the agreement are represented by an employee organisation*".[77]

154. The term "some" means an unspecified number which could be one, several or all.[78]

155. Practically speaking therefore, this requirement signifies that the Commission is not empowered to grant the SBA unless an Applicant (union) represents at least one of the employees who will be covered by the proposed multi-enterprise agreement presumably as a bargaining representative.[79]

156. It is ACA's understanding that the Applicants will be the default bargaining representatives for at least some of the employees covered by the proposed multi-enterprise agreement.

[77] *Fair Work Act 2009* (Cth) s 243(1)(c).
[78] Macquarie Compact Dictionary (3rd ed, 2005) ''some', 453.
[79] *Fair Work Act 2009* (Cth) s 176(1)(b).

C. CONCLUSION

157. The Application has been made by the Applicants which satisfies the requirements of s 242(1).

158. The Application specifies with clarity the employers and employees who will be covered by the proposed multi-enterprise agreement within the scope of the SBA sought satisfying the requirements of s 242(2).

159. The Application for the SBA has been made in the proper form which satisfies the requirements of s 243(1)(a).

160. Accordingly, the task of the Commission is to determine whether it is satisfied that it is 'appropriate' to make the SBA taking into account all of the matters set out in section 243.

161. Based on the evidence and the above submissions, the Commission can find that:

a) (s 243(1)(b)) On balance, the Commission should be satisfied that it is appropriate to make the SBA to allow the employers and employees to bargain together for a multi-enterprise agreement because:

(i) the prevailing conditions are similar in that they largely rely on modern awards and while teachers and Directors are not low paid, a reasonable number of childcare employees in long day care can be categorised as low paid;

(ii) the ACA Employers (and it is understood the evidence from other Respondents) will show that the employers have a large number of clearly identifiable common interests which will likely promote an orderly and constructive bargaining process leading to successfully making a multi-enterprise agreement for long day care;

(iii) the limited number of known and likely bargaining representatives and their character is consistent with a manageable collective bargaining process;

(iv) the Commission should also give weight to the fact that the lack of bargaining in long day care has in large measure been driven by an inability to engage effectively with the funding body as part of the process and an SBA allows for this impediment to be overcome;

(v) the Commission should also give weight to the fact that a multi-enterprise agreement for long day care will support quality childcare which is a major contributor to supporting workforce participation; and

(vi) the Commission should also give weight to the fact that the ACA and the ACA employers support the making of the SBA.

b) (s 243(1)(c)) We understand that the Applicants act as bargaining representatives for employees who will be covered by the proposed multi-enterprise agreement and as such represent them.

c) (s 243A (1) to (3)) Based on the evidence the Commission is not prevented from specifying an employee employed by an ACA Employer because they are covered by a single-enterprise agreement that has not passed its nominal expiry date.

d) (s 243A (4)) Based on the evidence the Commission is not prevented from making a SBA because it would cover employees in relation to general building and construction work.

162. For the reasons set out above, the ACA Employers submit that the Commission can be satisfied that it is appropriate for the employers and employees covered by the Application to bargaining together for a multi-enterprise agreement.

163. The Commission should therefore grant the application and make the supported bargaining authorisation claimed.

Filed for and on behalf of the Australian Childcare Alliance Employers

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