IN THE FAIR WORK COMMISSION

B2023/538

EARLY EDUCATION AND CARE INDUSTRY SUPPORTED BARGAINING AUTHORISATION APPLICATION

SUBMISSIONS BY THE AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

1. INTRODUCTION

Overview

1.1. On 6 December 2022, the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (**SJBP Bill**) received Royal Assent. On 6 June 2023, amendments to the enterprise bargaining regime contained in the *Fair Work Act 2009* (Cth) (**FW Act**) subsequently commenced.[1] On that same day, the United Workers Union, Australian Education Union – Victorian Branch and the Independent Education Union of Australia filed an application for a supported bargaining authorisation under the new provisions.

1.2. As a peak council, the Australian Chamber of Commerce and Industry (**ACCI**) intends to make submissions which pertain to the operation of two provisions, as directed:[2] sections 243 and 244 of the FW Act.

1.3. The introduction to this submission will describe the nature of the provisions and outline the arguments which will be advanced.

Section 243

1.4. Section 243 stipulates the conditions upon which, if satisfied, the Fair Work Commission (**Commission**) *must* make a supported bargaining authorisation.[3] There are three such conditions, all of which must be satisfied to compel the making of the authorisation.[4]

1.5. First, an application for the authorisation must have been made (the **Application Requirement**).[5] The Application Requirement prevents the making of a supported bargaining authorisation unless an application for the authorisation has been made in the manner required by section 242.

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[1] See *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) s 2(1) cols 18-23A.
[2] Directions in B2023/538 dated 14 June 2023 [2] (Hatcher J).
[3] *Fair Work Act 2009* (Cth) s 243(1).
[4] Ibid s 243(1)(a)-(c).
[5] Ibid s 243(1)(a).

1.6. Second, the Commission must be satisfied that it is appropriate for the employers and employees that will be covered by the agreement to bargain together, having regard to four considerations (the **Appropriateness Test**).[6] The Appropriateness Test requires the Commission to determine whether it would be "appropriate" for the parties to "bargain together" for a supported bargaining agreement, in contrast to other available avenues for bargaining, particularly bargaining at the enterprise level.

1.7. When undertaking this inquiry the Commission must have regard to the following considerations.

1.7.1. The Commission must have regard to the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector) (the **Prevailing Pay and Conditions Factor**).[7] This factor requires consideration of whether the prevailing pay and conditions *within the relevant industry or sector*. This is distinct from those which apply to the employees specified in the application. The prevailing pay and conditions within the relevant industry or sector favour appropriateness where they impair the parties in their ability to bargain at the enterprise level.

1.7.2. The Commission must have regard to whether the employers have clearly identifiable common interests (the **Common Interests Factor**).[8] This factor requires consideration of whether there is more than one common interest shared by the employers that are each "clearly identifiable", in the sense that they are certain, particular, and ascertainable, without any obscurity.

1.7.3. 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 (the **Manageability Factor**).[9] This factor requires consideration of whether the likely number of bargaining representatives could contribute to delay or compromise the simplicity, fairness and flexibility of the process, taking into account real logistical concerns.

1.7.4. The Commission must have regard to any other matters the Commission considers appropriate (the **Other Matters Factor**).[10] This factor empowers the Commission to consider matters such as the views of the parties, the potential harm to competition or productivity, and the clear statutory preference for enterprise-level bargaining, when

[6] *Fair Work Act 2009* (Cth) s 243(1)(b).
[7] Ibid s 243(1)(b)(i).
[8] Ibid s 243(1)(b)(ii).
[9] Ibid s 243(1)(b)(iii).
[10] Ibid s 243(1)(b)(iv).

contemplating the making of an authorisation.

1.8. Third, the Commission must be satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation (the **Representation Requirement**).[11] This factor requires the Commission to satisfy itself of a jurisdictional fact that at least one employee who will be covered by the agreement will be represented by an employee organisation that meets the statutory requirements for bargaining representatives.

Section 244

1.9. The directions in this matter invited ACCI to file submissions in relation to the operation of section 244. This provision relates to variations to supported bargaining authorisations, rather than the making of authorisations, as is being pursued by the applicants in this matter.

1.10. Accordingly, only limited submissions will be made with respect to these provisions in **Part V**.

1.11. With respect to variations to remove employers, ACCI submits that, although the provision turns on the "employer's circumstances", this should not be construed to exclude consideration of circumstances which more substantially relate to the employees or bargaining representatives.

1.12. With respect to variations to add employers, no ambiguity appears to arise in the provisions.

2. APPLICATION REQUIREMENT

2.1. The Application Requirement prevents the making of a supported bargaining authorisation in relation to a proposed multi-enterprise agreement unless an application for the authorisation has been made.[12]

2.2. The Commission cannot make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement on its own initiative. Rather, an application must be made by a party with standing to enliven the Commission's jurisdiction to consider whether a supported bargaining authorisation must be made.

2.3. Construed contextually,[13] it will be insufficient for a party to merely file an application with the Commission. The application must meet the statutory requirements contained in section 242 to constitute an "application" for the purposes of the succeeding section. An application devoid of specifications regarding the employers and employees who will be covered by the agreement will not satisfy the Application Requirement.[14] This is because an application "must" include

[11] *Fair Work Act 2009* (Cth) s 243(1)(c).
[12] Ibid s 243(1)(a).
[13] See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).
[14] *Fair Work Act 2009* (Cth) s 242(2)(a)-(b).

this information.[15] Without it, no application of the nature required by statute has been made.

2.4. Similarly, an application made by a party that is not eligible to do so under section 242 will not satisfy the Application Requirement.[16] This means that the Application Requirement will not be satisfied unless the application is made by a bargaining representative for a proposed multi-enterprise agreement or an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement. These are the only categories of "persons [who] may apply to the FWC for an authorisation".[17] An application made by any other person, such as an employee organisation that is *not* entitled to represent the industrial interests of an employee in relation to work to be performed under the proposed multi-enterprise agreement, is not an "application" for the purposes of section 243(1)(a).

2.5. Finally, an application for a supported bargaining authorisation made in relation to a proposed greenfields agreement will not constitute an "application" for the purposes of section 243(1)(a).[18] Such an application "must not be made" and is therefore ineligible to satisfy the provision.[19]

3. APPROPRIATENESS TEST

Nature of Test

3.1. It is foreseeable that the fate of most applications for supported bargaining authorisations will be determined by the application of the second condition in section 243:

> … [whether] 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 [four considerations] …[20]

3.2. There are several general observations which the Commission should consider when applying the test, particularly when taking into account "any other matters the FWC considers appropriate".[21]

3.3. First, the test is one of appropriateness. This is a broad discretionary standard about which reasonable minds may differ sharply.[22] In a criminal law context, the High Court held that the phrase "considers … appropriate":

> … indicates the striking of a balance between relevant considerations so as to provide the outcome

[15] *Fair Work Act 2009* (Cth) s 242(2).
[16] Ibid s 242(1).
[17] See ibid.
[18] Ibid s 242(3).
[19] See ibid.
[20] Ibid s 243(1)(b).
[21] Ibid s 243(1)(b)(iv).
[22] *Re Tahmoor Coal Pty Ltd* (2010) 204 IR 243, 252 [32] (Lawler VP).

which is fit and proper.[23]

3.4. Although contextually dissimilar, the test of appropriateness in section 243(1)(b) makes the same indication.[24] The Commission must strike a balance between relevant considerations so as to provide a fit and proper outcome. Principally, this assessment must be conducted by having regard to the objects of the division, part and statute.[25] It is not to be done "on the basis of any personal whim or ideological predisposition".[26]

3.5. Second, what must be deemed "appropriate" by the Commission is that the parties "bargain together".[27] This constrains the otherwise broad discretionary nature of the test. The Commission cannot be satisfied that it is appropriate, in a general sense, to make a supported bargaining authorisation. It must be satisfied that it is appropriate for the parties to "bargain together".

3.6. The phrase "bargain together" must be read contextually in the first instance.[28] In the context of section 243, the words "bargain together" mean engaging in bargaining for an enterprise agreement that will cover all the relevant parties *in the manner prescribed by the division*. The Commission cannot make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement unless it would be appropriate for the parties to bargain together for a supported bargaining agreement. If it would be appropriate for the parties to bargain together for another form of multi-enterprise agreement (particularly a single-interest agreement), yet inappropriate for the parties to bargain together for a supported bargaining agreement, section 233(1)(b) would not be satisfied.

3.7. Additionally, given the discretionary nature of the test, if it would be *more appropriate* for the parties to bargain together for a multi-enterprise agreement in another manner not prescribed by the division, this would be a factor that tends against (but is inconclusive of) the appropriateness of the parties bargaining together for a supported bargaining agreement. The application of the test may, in some circumstances, involve consideration of submissions regarding the preferability of other streams of multi-enterprise bargaining.

3.8. The test must also be construed with the statutory objects in mind. Relevant to the application of provisions within the enterprise bargaining regime is the object of "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining".[29] The objects of

[23] *Mitchell v The Queen* (1996) 184 CLR 333, 346 (Dawson, Toohey, Gaudron, McHugh and Gummow JJ).
[24] Cf *Re Tahmoor Coal Pty Ltd* (2010) 204 IR 243, 252 [32] (Lawler VP).
[25] See, eg, *Acts Interpretation Act 1901* (Cth) s 15AA.
[26] *Re Tahmoor Coal Pty Ltd* (2010) 204 IR 243, 253 [39] (Lawler VP).
[27] *Fair Work Act 2009* (Cth) s 243(1)(b).
[28] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
[29] *Fair Work Act 2009* (Cth) s 3(f).

part 2-4 of the FW Act (enterprise bargaining) reflect a similar sentiment, intending "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" as well as "to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements".[30]

3.9. The objects of division 9 in part 2-4 of the FW Act, within which section 243 is situated, include:

> (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.[31]

3.10. Collectively, these objects manifest a clear statutory preference for bargaining at the enterprise-level. Both the objects of the FW Act at large and those in part 2-4 make this preference explicit, while the preference is implicit in the objects of division 9. These latter objects are aimed at addressing constraints on the ability of employers and their employees to bargain at the enterprise level.[32] The Act contains no similar mechanism to address an inability to bargain in other streams. This reflects the statutory preference for the starting point of bargaining to be enterprise-level bargaining.

3.11. This preference for bargaining at the enterprise-level is further demonstrated by the second reading speech of the Minister for Employment and Workplace Relations (**Minister**) on the SJBP Bill, in which it was stated that:

> Bargaining at the enterprise level delivers strong productivity benefits and is *intended to remain the primary and preferred type of agreement making*. For employees and employers that have not been able to access the benefits of enterprise level bargaining, these reforms will provide flexible options for reaching agreements at the multi-employer level.[33]

3.12. Accordingly, the capacity of the relevant employers and employees to bargain together at the enterprise level is directly relevant to the appropriateness of instead bargaining for a supported bargaining agreement. Where the parties are capable of bargaining for a single enterprise

[30] *Fair Work Act 2009* (Cth) s 171 (emphasis added).
[31] Ibid s 241 (emphasis added).
[32] Ibid s 241(c).
[33] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2180 (Tony Burke, Minister for Employment and Workplace Relations) (emphasis added).

agreement, the Commission should be dissuaded from being satisfied of the requirement in section 243(1)(b).

Prevailing Pay and Conditions Factor

3.13. The first consideration to which the Commission must have regard in its assessment of the appropriateness of the parties bargaining together for a supported bargaining agreement is:

> (i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector) …[34]

3.14. Two key observations can be made about this consideration and its operation in relation to the test of appropriateness.

3.15. First, the prevailing pay and conditions within the relevant industry or sector must be relevant to the appropriateness of the parties bargaining together. Otherwise, there would be no basis for the legislature requiring the Commission to have regard to it when considering whether it is appropriate for the parties to bargain together.

3.16. To determine what kind of prevailing pay or conditions within an industry or sector to which the legislature intended the Commission to have regard when exercising its discretion under section 243(1)(b), recourse should be had to objects of the division. As previously discussed, the objects of the division demonstrate that the purpose of supported bargaining authorisations is to "assist and encourage employees and their employers who require support to bargain" and "address constraints on the ability of those employees and their employers to bargain at the enterprise level".[35]

3.17. Accordingly, the prevailing pay and conditions within the relevant industry or sector should only favour the appropriateness of the parties bargaining together if it contributes to a need for "support to bargain"[36] or the imposition of "constraints on the ability of those employees and their employers to bargain at the enterprise level",[37] thereby meriting the involvement of the Commission.[38]

3.18. Although it is no longer strictly necessary that the prevailing pay and conditions within the relevant industry or sector be "low",[39] it is therefore clear that they must serve 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, which is "supported".[40]

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[34] *Fair Work Act 2009* (Cth) s 243(1)(b)(i).
[35] Ibid s 241(a)-(b).
[36] Ibid s 241(a).
[37] Ibid s 241(b).
[38] Ibid s 241(c).
[39] Ibid s 243(1)(b)(i), noting the word "including".
[40] Ibid div 9 (title).

3.19. Second, the consideration turns on the prevailing pay and conditions *within the relevant industry or sector*, rather than those which apply to the employees specified in the application.

3.20. Although it may be open to the Commission to consider the specific pay and conditions which apply to the employees specified in the application when taking into account the Other Matters Factor, it does not form part of this specific mandatory consideration. Accordingly, when having regard to this consideration, the Commission should only take into account any evidence pertaining to the pay and conditions of the employees specified in the application insofar as it could be useful in understanding that of the wider industry or sector.

Common Interests Factor

3.21. The second consideration to which the Commission must have regard in its assessment of the appropriateness of the parties bargaining together for a supported bargaining agreement is:

> (ii) whether the employers have clearly identifiable common interests …[41]

Pluralisation of the phrase

3.22. The noun in the expression "common interests" is in its plural form. Accordingly, whether the employers have clearly identifiable common interests should only be accepted as a factor favouring the appropriateness of the parties bargaining together if the employers share *more than one* clearly identifiable common interest. The reasons for this are as follows.

3.23. The *Acts Interpretation Act 1901* (Cth) requires words in the plural form to be interpreted to include the singular.[42] However, this is subject to any contrary intention in the statute.[43] "The Privy Council has formulated and approved a method of determining the legislative intention"[44] where a question about the plurality of a word arises "which often may be helpful"[45] and has been recognised in Australia.[46] In *Sin Poh Amalgamated (H K) Ltd v A-G* [1965] 1 All ER 225, Lord Pearce held:

> The Interpretation Ordinance was intended to avoid multiplicity of verbiage and to make the plural cover the singular *except in such cases as one finds in the context of the legislation reason to suppose that the legislature, if offered such amendment to the bill, would have rejected it*.[47]

3.24. Naturally, this is not an invitation to speculate on hypothetical outcomes of legislative processes; rather, it is a question of whether, were its attention to have been drawn to the

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[41] *Fair Work Act 2009* (Cth) s 243(1)(b)(ii).
[42] *Acts Interpretation Act 1901* (Cth) s 23(b).
[43] Ibid s 2(2).
[44] *Taxation, Deputy Commissioner of (NSW) v Mutton* (1988) 12 NSWLR 104, 109 (Mahoney JA).
[45] *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651, 656 (Lord Morris for the Board).
[46] *Medved v Dunlop Olympic Ltd* (1990) 21 NSWLR 288, 291-292 (Kirby P and Handley JA).
[47] *Sin Poh Amalgamated (H K) Ltd v A-G* [1965] 1 All ER 225, 228 (Lord Pearce for the Board) (emphasis added).

potential availability of singularity in an instance of plurality in the wording of a statute,[48] the legislature would have understood the character of legislation to have changed.[49] Here, both the legislation itself and extrinsic material suggests that it would have.

3.25. First, the examples of common interests expressly provided by section 243(2) would generate radically different outcomes if a singular common interest was permissible to engage the Common Interests Factor. For instance, section 243(2) provides that "being substantially funded … by the Commonwealth" would constitute an example of a common interest.[50] If only a single clearly identifiable common interest were to be sufficient to favour the appropriateness of the parties bargaining together, this would mean that this factor would apply to any two enterprises which receive such funding, even if they are vastly different in every other respect. Under this interpretation, a childcare centre and defence manufacturer could conceivably be held to have "clearly identifiable common interests".

3.26. Second, but relatedly, the language of section 243(1)(b)(ii) means that the threshold at which it would be engaged would be significantly altered were a single clearly identifiable common interest to be sufficient. The provision uses the conjunction "whether", which invites consideration of two alternatives; its binary nature means that either the employers which would be covered by the proposed supported bargaining agreement share clearly identifiable common interests or do they not. The character of the provision, and thereby the legislation,[51] would be fundamentally different if the threshold created by this binary question was merely a matter of ascertaining whether the employers shared *any* clearly identifiable common interest. It would, in effect, create a factor that favours the appropriateness of parties bargaining together *by default* for a significant proportion of the economy.

3.27. In countless instances of comparing two employers, at least *one* common interest will be identifiable, particularly given the examples expressly provided in section 243(2). Despite the vast diversity of businesses, two that are randomly selected will frequently have *something* in common, whether it be a similar size, location, industry, terms of employment, funding,[52] or are involved the same supply chain. This interpretation would essentially reduce the meaning of the consideration to an exercise of mere box-ticking. Evidently, it must be rejected.

3.28. Third, considering the substance and tenor of the legislation as a whole,[53] it is clear that the pluralisation of the phrase was deliberate and an "an apparently careful choice".[54] This is shown

[48] *Taxation, Deputy Commissioner of (NSW) v Mutton* (1988) 12 NSWLR 104, 109 (Mahoney JA).
[49] See *Pfeiffer v Stevens* (2001) 209 CLR 57,74 [59] (McHugh J).
[50] *Fair Work Act 2009* (Cth) s 243(2)(c).
[51] *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651, 658 (Lord Morris for the Board).
[52] See *Fair Work Act 2009* (Cth) s 243(2).
[53] *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651, 656 (Lord Morris for the Board).
[54] *Commissioner of State Revenue (Vic) v The Muir Electrical Co Pty Ltd* (2003) 8 VR 200, 207 [14] (Callaway JA, Ormiston JA agreeing at 201 [1], Eames JA agreeing at 212 [31]).

by the use of its singular form elsewhere in sections 216DC and 249, which provide matters relevant to determining "whether the employers have *a common interest*" in relation to single interest authorisations.[55]

3.29. This is not to suggest that the singularity in these provisions suggests that under that stream of multi-enterprise bargaining, a single clearly identifiable common interest would be sufficient to engage the provisions; rather, it suggests the drafters of the legislation have been cognisant of the grammatical number of common interests. These sections merely provide examples of "matters that may be relevant" to determining whether a common interest exists, of which more than one is still required to enliven the consideration.

Clearly identifiable

3.30. For the consideration in section 243(1)(b)(ii) to favour the appropriateness of the parties bargaining together, it is insufficient for the employers specified in the application to merely have multiple "common interests". The "common interests" must also be "clearly identifiable".

3.31. The Oxford English Dictionary defines the word "identifiable" as "able to be identified".[56] It then relevantly defines the word "identify" in the sense of "relating to categorisation or description" (as opposed to "relating to association", i.e. whether two matters are identical) as "[t]o ascertain or assert what a thing or who a person is; to determine the identity of; to recognize as belonging to a particular category or kind".[57]

3.32. In *Re Lushington and Comcare* (2001) 63 ALD 765, Deputy President Burns of the Administrative Appeals Tribunal noted that, after consideration of similar dictionary definitions, there is a "connotation of certainty and particularity implicit in the word 'identifies'".[58]

3.33. The ordinary meaning of the word "identifiable" means that the common interests shared by the employers must be certain, particular, and ascertainable. The requisite degree of certainty, particularity, and ascertainability of these common interests is then magnified by the requirement for them to be "*clearly*" "identifiable".

3.34. The Oxford English Dictionary relevantly defines the word "clearly" as "[w]ith optical distinctness; without obscurity; opposed to *dimly*".[59] Alternatively, it defines it as "[w]ith clearness and distinctness of expression or exposition; plainly."[60]

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[55] *Fair Work Act 2009* (Cth) s 216DC(3A), 249(3A) (emphasis added).
[56] *Oxford English Dictionary* (online at 7 August 2023) 'identifiable' (defs 1).
[57] Ibid 'identify' (def II.5.a).
[58] *Re Lushington and Comcare* (2001) 63 ALD 765, 777 [46] (Burns DP).
[59] *Oxford English Dictionary* (online at 7 August 2023) 'clearly' (def 2).
[60] Ibid 'clearly' (def 4).

3.35. Accordingly, the common interests shared between the employers must not only be certain, particular, and ascertainable; they must also be distinctly and plainly so, without any obscurity.

3.36. In *Bevan v Dairy Vale Metro Co-op Ltd* (1989) 56 SAIR 398, Russel J described the meaning of the adverb "clearly" in relation to an unfair dismissal provision:

> By using the adverb 'clearly' I think that the Parliament is drawing the attention of the Commission to the well known principle that whilst courts, and in the present case, the Commission, in determining civil matters have to be satisfied on the preponderance of probability, the degree of probability will always depend upon the nature and gravity of the issue to be determined.[61]

3.37. In a similar respect, by modifying the word "identifiable" with the adverb "clearly", the legislature has expressed an intention for the Commission to ensure that the common interests shared by the employers are more than merely "identifiable" on the balance of probabilities.

3.38. Evidently, there are several circumstances in which the Commission should not regard the consideration in section 243(1)(b)(ii) as favouring a finding of appropriateness, even when a party has made submissions regarding the purported existence of multiple common interests shared between the employers.

3.39. First, if the purported common interests shared by the employers are opaque, in the sense that the precise *nature* of the interests is not ascertainable, then the Commission should be dissuaded from regarding the consideration in section 243(1)(b)(ii) as favouring a finding of appropriateness. For instance, if it is submitted that two employers specified in an application share a common interest of being situated in the same "geographical location", however, the extent to which one of the employers can be genuinely described as situated at the site in that geographical location is ambiguous or variable, then the consideration should not be regarded as favouring a finding of appropriateness. For example, this may arise where the parts of an enterprise are spread across different locations, potentially warranting inquiries into where it is substantially situated or from where it is actively managed and controlled (noting that the common interests are to be shared by the "employers" and not necessarily the "employees" of the enterprise).

3.40. Second, if the purported common interests shared by the employers are opaque, in the sense that the *degree* to or *manner* in which the employers share them in common is not ascertainable, then the Commission should be dissuaded from regarding the consideration in section 243(1)(b)(ii) as favouring a finding of appropriateness. For instance, if it is submitted that two

[61] *Bevan v Dairy Vale Metro Co-op Ltd* (1989) 56 SAIR 398, 405 (Russell J), quoted in *Daniel Systems Australia Pty Ltd v Collinson* (1994) 55 IR 480, 483 (Commissioner McCutcheon).

employers specified in an application are of a similar "nature",[62] however, the precise manner in which the nature of these enterprises is similar is ambiguous, then the consideration should not be regarded as favouring a finding of appropriateness.

3.41. Third, if the purported common interests shared by the employers are identifiable, but not plainly so, then the Commission should be dissuaded from regarding the consideration in section 243(1)(b)(ii) as favouring a finding of appropriateness. For instance, if there are arguable and rival contentions as to the identifiability of the purported common interests, then the consideration should not be regarded as favouring a finding of appropriateness.

3.42. Finally, it should be noted that isolating the meaning of "clearly identifiable" is not precluded by the general proscription against doing so for composite expressions.[63] The words "clearly identifiable common interests" includes an expression ("common interests"). This expression is then modified by an adjective ("identifiable") and a connected adverb ("clearly"). The four words do not collectively constitute one single composite expression; the words "clearly identifiable" *modify* to raise the threshold of what amounts to "common interests" (at which the provision would be enlivened), rather than conjoin with the phrase to create a new composite result.[64]

Manageability Factor

3.43. The third consideration to which the Commission must have regard in its assessment of the appropriateness of the parties bargaining together for a supported bargaining agreement is:

> whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process …[65]

3.44. The Revised Explanatory Memorandum accompanying the SJBP Bill partly clarified the nature of this consideration, stating parenthetically:

> … for example, employers may need to form bargaining units; this consideration is not intended to allow employers to try to opt out by encouraging employees to appoint individual bargaining representatives …[66]

3.45. However, these statements do not clarify what number of bargaining representatives for the agreement might be inconsistent with a manageable collective bargaining process; naturally, that is left to the discretion of the Commission.

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[62] *Fair Work Act 2009* (Cth) s 243(2)(b).
[63] *XYZ v The Commonwealth* (2006) 227 CLR 532, 544 [19] (Gleeson CJ).
[64] *Victims Compensation Fund Corp v Brown* (2003) 77 ALJR 1797, 1805 [34] (Heydon J, McHugh ACJ, Gummow, Kirby and Hayne JJ agreeing at 1798 [1]-[4]).
[65] *Fair Work Act 2009* (Cth) s 243(1)(b)(iii).
[66] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) 169 [984].

3.46. In exercising that discretion, the Commission should pay particular attention to the objects of part 2-4 of the FW Act, in which section 243(1)(b)(iii) is situated. Specifically, the object of providing "a simple, flexible and fair framework"[67] for enterprise bargaining should disfavour the making of supported bargaining authorisations where the simplicity and flexibility of the negotiations may be jeopardised by the sheer number of likely bargaining representatives.

3.47. Similarly, the object of "ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay"[68] should discourage the Commission from making authorisations that have the propensity to lead to the lodging of applications which receive a significant number of diverse views from unaligned employee organisations, employees and employers, impeding the Commission's processes to no fault of its own.

Other Matters Factor

3.48. The fourth and final consideration to which the Commission must have regard in its assessment of the appropriateness of the parties bargaining together for a supported bargaining agreement is:

> any other matters the FWC considers appropriate …[69]

3.49. Evidently, this provision leaves discretion to the Commission to determine what other matters might be appropriate. The matters will inevitably vary with the circumstances surrounding each application and the nature of the enterprises specified therein. However, there are some matters to which the Commission should regularly turn its mind when contemplating the appropriateness of parties bargaining together for a supported bargaining agreement, namely:

3.49.1. the views of the parties, noting the Commission's obligation to perform its functions and exercise its powers in a manner that is fair and just, which includes consideration of genuine concerns that are raised by employers regarding the likely impact on their businesses caused by multi-enterprise bargaining;[70]

3.49.2. the potential to harm to competition or productivity, noting the statutory objects of promoting productivity and acknowledging the special circumstances of small and medium-sized businesses;[71] and

3.49.3. as outlined previously, the clear statutory preference for enterprise-level bargaining, which should disfavour the appropriateness of the parties bargaining together for a supported bargaining agreement where they have the capacity to do so on an enterprise-

[67] *Fair Work Act 2009* (Cth) s 171(a).
[68] Ibid s 171(b)(iii).
[69] Ibid s 243(1)(b)(iv).
[70] Ibid s 577(1)(a).
[71] Ibid ss 3(a) and 3(g).

level.

3.50. Under this consideration, parties may also adduce evidence relating to the pay and conditions of the employees specified in the application (having previously outlined that this evidence cannot fall within the Commission's consideration under section 243(1)(b)(i), except for extrapolative purposes). Noting the objects of division 9, this evidence should only be probative of appropriateness to the extent that it demonstrates "constraints on the ability of those employees and their employers to bargain at the enterprise level".[72]

3.51. Finally, when exercising its discretion under section 243(1)(b), the Commission should have regard to the manageability of the bargaining process taking into account the degree of commonality between the employees specified in the application. While this matter may not neatly fit within either subparagraph (ii) or (iii), it is clearly analogous to those considerations and therefore consistent with legislative intention.

3.52. For example, if the employees of two employers specified in an application are undertaking sufficiently different work, this matter should disfavour a finding of appropriateness. This is because it would impede the bargaining process.

4. REPRESENTATION REQUIREMENT

4.1. The third condition which must be satisfied to require the making of a supported bargaining authorisation under section 243 is that:

> (iii) the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation.[73]

4.2. No arguable ambiguity in this paragraph is apparent. It merely requires the Commission to satisfy itself of a jurisdictional fact that more than one employee who will be covered by the agreement will be represented by an employee organisation. These representatives must meet the statutory requirements for employee organisation acting as bargaining representatives,[74] because otherwise, the Commission cannot be "satisfied" that the employees "will be" represented by them.[75]

5. VARIATIONS

Variations to remove employers

5.1. Section 244(1)-(2) stipulates how variations can be made to remove employers specified in

[72] *Fair Work Act 2009* (Cth) s 241(c).
[73] Ibid s 243(1)(c).
[74] Ibid s 176.
[75] Ibid s 243(1)(c).

supported bargaining authorisations.[76] The relevant test in the provisions is whether, following an application from the specified employer,[77] the Commission is satisfied that "it is no longer appropriate for the employer to be specified in the authorisation" "because of a change in the employer's circumstances".[78] If it is no longer appropriate, the FWC "must vary the authorisation to remove the employer's name".[79]

5.2. Clearly, the reference to whether it remains "appropriate" for the employer to be specified in the authorisation is a reference to the test of appropriateness in section 243(1)(b). The Commission must be satisfied that "because of a change in the employer's circumstances" in relation to one of the four considerations to which it must have had regard in making the authorisation (although, noting that the fourth consideration allows the Commission to have regard to any other matter), it is no longer appropriate for the specified employer to bargain together alongside the other parties covered by it.

5.3. Accordingly, although section 244(2) turns on the "employer's circumstances", this should not be construed to exclude consideration of circumstances which more substantially relate to the employees or bargaining representatives, as long as there is some nexus with the employer. For instance, although the pay and conditions of the employees specified by the authorisation could more precisely be described as the circumstances of the employees, as the employer is the provider of their pay and conditions, a change in them should still be capable of constituting a change in the employer's circumstances.

Variations to add employers

5.4. Section 244(3)-(5) stipulates how variations can be made to add the name of a new employer to a supported bargaining authorisation. No ambiguity appears to arise in these provisions which requires submissions at present. It is anticipated that the Commission will rely on past precedent when satisfying itself of whether adding the employer's name to the authorisation would be "in the public interest".[80]

Filed on behalf of the Australian Chamber of Commerce and Industry

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[76] *Fair Work Act 2009* (Cth) s 244(1)-(2).
[77] Ibid s 244(1).
[78] Ibid s 244(2).
[79] See ibid.
[80] Ibid s 244(4).