IN THE FAIR WORK COMMISSION

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

Matter No: (B2023/538)

OUTLINE OF SUBMISSIONS OF THE AUSTRALIAN EDUCATION UNION

A. INTRODUCTION

1. The terms and conditions of employees in the early childhood, education and care sector (**ECEC sector**)[1] are inadequate and require improvement through supported bargaining. In large part, this is due to the gender-based undervaluation of work in the ECEC sector, which is female-dominated.
2. On 6 June 2023, relevant provisions of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**) came into effect. The provisions repealed the ineffectual former low-paid bargaining stream under the *Fair Work Act 2009* (Cth) (**FW Act**) and replaced it with a new multi-employer bargaining stream — the supported bargaining stream. The purpose of the supported bargaining stream is to "[r]emove unnecessary limitations on access to the low-paid bargaining stream (and rename it the supported bargaining stream)"[2] and to address gender pay equity issues.
3. On 7 June 2023, the United Workers' Union (**UWU**), the Australian Education Union (**AEU**) and the Independent Education Union of Australia (**IEUA**) (B2023/538) (**Union Parties**) filed an application under section 243(1) of the FW Act for the Fair Work **Commission** to make a supported bargaining authorisation with respect to a proposed agreement to cover 62 employers in the ECEC sector and their employees performing work

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1 The "ECEC sector" is termed the "children's services and early childhood education industry" in the *Children's Services* ***Award*** *2010*, which modern covers the ECEC sector (clause 3.1 of the Award). It is defined in the Award (and in this application) to mean: "the industry of long day care, occasional care (including those occasional care services not licensed), nurseries, childcare centres, day care facilities, family-based childcare, out-of-school hours care, vacation care, adjunct care, in-home care, kindergartens and preschools, mobile centres and early childhood intervention programs."

2 Commonwealth, *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, p iii.

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covered by the Childrens Services Award 2010, Educational Services (Teachers) Award 2020 and work performed in a long day care setting. On 26 July 2023, the Union Parties filed an **amended application** in which an additional two employers were named.

4. In support of the amended application, the Union Parties rely upon an Agreed Statement of Facts dated (**ASOF**). In addition, the AEU relies upon the Witness Statement of Cara **Nightingale** dated 28 July 2023 (**Nightingale Statement**), which supplements the facts set out in the ASOF with facts that the AEU considers are relevant to the amended application (some of which were not agreed by the parties in the course of making the ASOF).
5. The employers who are respondents to the amended application either consent to the Commission making a supported bargaining authorisation[3] or do not oppose the Commission doing so.[4] For the reasons which follow, the Commission should make orders to make a supported bargaining application.

B. APPLICABLE PRINCIPLES

Overview

6. Section 243(1) of the FW Act sets out criteria, which, if met, require the Commission to make a supported bargaining application. It provides that:

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

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3 Transcript of Proceedings, *Application by United Workers Union, Australian Education Union and Independent Education Union of Australia,* (Fair Work Commission, B2023/538, President Hatcher, 14 June 2023) at [PN67].

4 Ibid at [PN63].

(iv) any other matters the FWC considers appropriate; and

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

7. As is elaborated upon in greater detail below, the object of the new provisions is to improve access to the supported bargaining stream and to ensure that the provisions are easier to access than the previous low-paid bargaining stream.[5] Section 243 seeks to achieve that goal by conferring a broad power on the Commission to assess whether it is satisfied that it is appropriate for the employers and employees that will be covered by a proposed multi-enterprise agreement to bargain together.
8. Although s 243(1) uses mandatory language (by requiring that the Commission "must" make an authorisation if the matters listed in the subsection are satisfied), the broad nature of the Commission's role is obvious when the three considerations listed are examined. The matters listed in s 243(1)(a) (that an application has been made) and s 143(1)(c) (that at least some of the employees are represented by an employee organisation) will ordinarily raise straightforward factual matters.
9. The matter in s 243(1)(b) then requires the Commission to form a broad view as to whether it is appropriate for the employers and employees that will be covered by the agreement to bargain together. In considering whether it is satisfied that it is appropriate for the employers and employees to bargain together, the Commission must form the opinion having regard to the four matters listed in s 243(1)(b). The requirement that the state of mind must be formed "having regard to" the matters listed at (i) to (iv) suggests that those matters must be treated as of significance in the decision-making process.[6]
10. The broad nature of the opinion required to be formed by the Commission is underscored by at least three features of the subsection. *First*, the introductory words in s 243(1) indicate that the opinion to be formed is only whether the Commission considers that it is "appropriate" that the employers and employees bargain together. This is in contrast with the previous s 243(1) which applied to an application for a low-paid authorisation, namely, that the Commission was required to be satisfied it was positively in the public interest to make the authorisation.[7]

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5 Commonwealth, *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, p 160 [922] and p 168 [982].

6 *National Retail Association v Fair Work Commission* [2014] FCAFC 118; (2014) 225 FCR 154 at [56]; *4 yearly review of modern awards – Award stage – General Retail Industry Award 2020* [2020] FWCFB 6301; (2020) 301 IR 296 at [16].

7 *United Voice* [2011] FWAFB 2633 at [14].

11. *Second*, although the Commission is required to have regard to the matters listed at (i) to (iv), the requirement to have regard to those matters does not suggest that those considerations exhaust the matters which the Commission might properly consider relevant to that standard.[8] This is made apparent by the fact that s 234(1)(b)(iv) requires the Commission to have regard to any other matters it considers appropriate. The Commission is plainly given a broad discretion to determine what considerations it considers are relevant, in any case, to the question of the appropriateness of the parties bargaining together.
12. *Third*, the matters listed at (i) to (iv) are not, given their nature, intended to be determinative of whether it is appropriate for the employers and employees bargaining together. Those matters do not set prerequisites to be satisfied and are no more than matters to be considered in an overall assessment of appropriateness. For example, whilst the relevant employers having common interest is likely to favour a conclusion that bargaining together is appropriate, the absence of common interests would not necessarily dictate the opposite conclusion. The Commission is permitted to determine appropriateness in light of any appropriate matters.
13. As this is the first application to be made under section 243(1) of the FW Act, these issues have not been considered by the Commission or a court. In the circumstances, it is appropriate to say something about each of the matters listed at (i) to (iv).

"Prevailing pay and conditions"

14. The first factor to which the Commission is required to have regard is "the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector)." Reference to the "prevailing" pay and conditions within the relevant industry or sector should be understood to refer, in accordance with the ordinary meaning of the words, to the "generally current" pay and conditions.[9] The subsection also refers to the prevailing pay and conditions in the relevant "industry or sector" and not necessarily limited to particular employers subject of the application.
15. The prevailing pay and conditions of employees may be relevant to the appropriateness question in a number of ways. The reference to "low rates of pay" provides one example. The fact that employees in an industry or sector are generally low paid may indicate that employees may face barriers to bargaining or have difficulty bargaining at a single-enterprise

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8 See, in relation to s 134, *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161; (2017) 253 FCR 368 at [48].

9 *Macquarie Dictionary* (online version).

level.[10] That would, obviously enough, support a finding of appropriateness. Importantly, however, demonstration that employees are low paid (or low paid at any particular level) is not a prerequisite to the making of a supported bargaining authorisation.

16. Prevailing pay and conditions may be relevant for other reasons. Commonality of pay and conditions across an industry or sector, or whether employees are paid at or close to the relevant modern award rates may support a conclusion that it is appropriate that the employers and employees bargain together.[11] In other cases, the level or divergent nature of pay and conditions within an industry or sector may be a factor weighing against a finding of appropriateness although, again, no consideration would be determinative of the Commission's conclusion.

"Common interests"

17. The second factor to which the Commission is required to have regard is "whether the employers have clearly identifiable common interests". A broad interpretation of the term "common interests" is supported by the statutory text as well as the relevant context and apparent purpose of the provision.
18. Section 243(2) provides some guidance as to the meaning "common interests" by providing three examples of "common interests," which "may include":
    (a) "a geographical location;"[12]
    (b) "the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;"[13]
    (c) "being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory."[14]
19. The terms "includes" and "means" are used throughout the FW Act in order to define terms and phrases. As a general matter, "includes" is intended to be used to define terms in a non-exhaustive way, particularly where there is a pattern of using both "includes" and "means" in the legislation (which is generally taken to indicate that the distinction is deliberate).[15] The

10 Commonwealth, *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, p 160 [921].
11 Commonwealth, *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, p 169 [984].
12 FW Act s 24(2)(a).
13 FW Act s 24(2)(b).
14 FW Act s 24(2)(c).
15 *Obeid v Australian Competition and Consumer Commission* (2014) 226 FCR 471; [2014] FCAFC 155 at [50]-[53].

use of the term "includes" in section 243(2) indicates that the three examples that have been provided are not exhaustive.

20. The concept of employers having "clearly identifiable common interests" has also been introduced to ss 216DC and 249 in dealing with single interest employer authorisations. Sections 216DC(3A and 249(3A) set out matters that may be relevant to determining whether the employers have a common interest including geographical location, the regulatory regime and the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises. Those sections also provide some guidance in relation to the concept of a "common interest".
21. The grammatical meaning of "common interest" is a relevant the starting point.[16] The *Macquarie Dictionary* defines "interest" in its noun form as including the following meanings:

> *noun*
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> …
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> *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.*[17]

22. "Common" is relevantly defined in its adjectival form as follows:

> *adjective 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.*[18]

23. Based on its ordinary meaning, "interest" in the combined phrase "common interest" suggests that it refers to something that is of importance to a person and from which a person stands to gain an advantage (or suffer a detriment). Combining it with the term "common" suggests that the above concern(s) is (are) shared with others where persons have a "common interest". Based on the text, this meaning of the term is broad.

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16 *Kingston v Keprose (No 3)* (1987) 11 NSWLR 404, 423 (McHugh J) (cited with approval by McHugh J in *Bropho v State of Western Australia* (1990) 171 CLR 1, 20).
17 *Macquarie Dictionary* (online version).
18 *Macquarie Dictionary* (online version).

24. The concept of what constitutes an "interest" under the general law is similarly expansive. The issue has been considered, particularly in the area of standing for judicial review of administrative action. In that context, the question of whether a person is aggrieved by a decision requires a consideration of the interests of a person. The concept of "interests" can take a variety of forms and includes, but is not confined to, legal rights, privileges, permissions or interests.[19]
25. The examples provided in s 243(2) are also instructive. The subsection indicates that common interests will include geographical location, the nature of the enterprise, the terms and conditions of employment in the enterprises and the source of funding for the relevant enterprises. The examples suggest that examination of whether the employer has "clearly identifiable common interests" is intended to be focused on the objective features of the employers, such as location, nature of the business and funding, rather than an interrogation of their subjective views at the time of the application. That is unsurprising given that an application will be made prior to bargaining occurring or the parties having formulated their positions and subjective assertions as to the likely position of an employer in bargaining are likely to be self-serving.[20]
26. Given the inclusive nature of the way in which "common interests" is defined; the ordinary meaning of the terms "common", "interest" and "common interest"; and the broad range of concerns that are recognised in the general law as being interests, the phrase "common interests" is a broad term and should not be construed as erecting a high hurdle.

"Number of bargaining representatives"

27. The third factor to which the Commission is required to have regard is "whether the likely number of bargaining representatives for the agreement would be inconsistent with a manageable collective bargaining process". That consideration demonstrates a concern as to the practicality of the bargaining process where it will involve multiple employers and identifies one feature which may affect whether the bargaining process is manageable, namely, the number of bargaining representatives.
28. The fact that there are a number of bargaining representatives would not, of course, necessarily lead to a conclusion that the bargaining process would not be manageable. The

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19 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* [2014] HCA 50; (2014) 254 CLR 394 at [61]; *Australian National Imams Council Limited v Australian Communications and Media Authority* [2022] FCA 913 at [87]-[89].

20 See, in another context, *United Voice v MSS Security Pty Ltd* [2013] FWC 4557 at [91].

Commission would need to consider the number of bargaining representatives in the context of the particular bargaining, industry and parties concerned. It may be, for example, that the history in a particular industry or sector demonstrates that bargaining involving a large number of bargaining representatives has been successful or that it is likely most or all bargaining representatives are likely to adopt similar positions in bargaining.

29. The relevance of the likely number of bargaining representatives must also be considered in light of the surrounding provisions. In particular, the number of bargaining representatives may provide a basis for the Commission including some, but not all, employers in an authorisation.[21] Furthermore, an assessment as to whether the number of bargaining representatives would be consistent with a manageable bargaining process would need to consider the fact that individual employers are able to subsequently apply to be removed from the authorisation.[22]

"Any other matters the FWC considers appropriate"

30. The final factor to which the Commission is required to have regard is "any other matters the FWC considers appropriate". The subsection makes clear the scope of the discretion conferred on the Commission to assess whether it is appropriate for the employers and employees to bargain together. The term "any other matters the FWC considers appropriate" allows the Commission to take into account any matters it considers appropriate consistent with the objects and purposes of the FW Act, particularly, as those objects and purposes have been modified by the SPBP Act. The matters that might be relevant are constrained only by the subject matter, scope and purpose of the legislation.[23]
31. The objects and purposes of the new provisions, in light of the extrinsic materials are discussed in more detail below. The relevant matters that can and should be taken into account will vary from case to case, but are likely to include:
    (a) Whether relevant employee organisations and employers support the making of a supported bargaining authorisation and their reasons for supporting or not supporting an authorisation being made;[24]

21 FW Act, s 243(1)(b).
22 FW Act, s 244(1).
23 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).
24 Commonwealth, *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, p 169 [983]-[984].

(b) Whether the relevant employees are in a female-dominated industry or belong to a female-dominated vocation which have historically often not benefited from collective bargaining;

(c) Gender-based under-valuation of work which arise from long-standing and ingrained features of the labour market which are unlikely to be effectively addressed or acknowledged in bargaining at a single-enterprise level;

(d) The need to improve terms and conditions of employment to address workforce challenges in industries such as the ECEC sector, particularly where employers are substantially reliant on government funding.

C. CONTEXT OF THE PROVISIONS

Legislative history

32. The context provided by the legislative history of section 243(1) of the FW Act also supports a broad construction of the provision. The provisions must be construed in context to ascertain the contextual meaning of the words used.[25] Context is considered at the first stage of the interpretative task, not after some ambiguity or uncertainty has been identified.[26] Context is understood in a broad sense and includes the surrounding provisions and the statute as a whole, including its structure, as well as extrinsic materials illuminative of purpose, the mischief the provision was designed to address, and matters of legislative history.[27]

33. Under the version of the FW Act that existed immediately before the reforms that commenced on 6 June 2023, Division 9 of Part 2-4 contained provisions for a stream of bargaining called the "low-paid bargaining" stream. Sections 241 and 242 were amended and s 243 repealed and replaced with a new section 243 by the SPBP Act. The amendments and repeals of the previous provisions are set out at Annexure A to these submissions, which provides a side-by-side comparison with the current provisions.

34. The "low-paid bargaining" stream was ineffectual and under-utilised. In around 13 years of operation, the Commission only made one low-paid bargaining authorisation. The provisions

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25 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] ((McHugh, Gummow, Kirby and Hayne JJ).

26 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *CPB Contractors Pty Ltd v CFMMEU* [2019] FCAFC 70 at [57] and [60] (Wheelahan and O'Callaghan JJ).

27 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; at [30] (Bell P); *Pope v WS Walker & Sons Pty Ltd* [2006] VSCA 227; 14 VR 435 at [31] (Neave JA and Bell AJA, agreeing) (citing *R v Lavender* (2005) 222 CLR 67 at [41]-[42]).

provided a number of barriers to authorisations being made, even where relevant employees were found to be low-paid. Such barriers included the following:[28]

(a) Applicants were required to establish that relevant employees were low-paid, which required a comparison between relevant employees and those receiving less than two-thirds of median adult ordinary-time earnings (as well as having regard C10 and C14 rates in the *Manufacturing and Associated Industries and Occupations Award*);[29]

(b) Applicants were required to establish that relevant employees did not have access to collective bargaining or faced substantial difficulties in enterprise bargaining. In this regard, the extent to which legal mechanisms had been utilised was considered relevant.[30] A failure to use such mechanisms as majority support determinations or seek to engage in protected industrial action meant a lack of access to collective bargaining was not established.[31] Similarly, a denial or frustration of bargaining had to be established[32] and unsatisfactory outcomes of previous bargaining was not considered to be relevant.[33]

(c) Unwillingness to bargain and differences of positions on claims leading to a "not necessarily … simple, amicable bargaining process" was found to be relevant as to whether a low-paid bargaining authorisation would be of assistance.[34]

(d) A slightly lower amount of bargaining strength was insufficient to make a finding in the public interest to grant an authorisation.[35] Evidence as to bargaining strength was closely assessed and difficult to establish.[36]

(e) Complicated tests were applied to compare terms and conditions of relevant employees to "relevant industry and community standards", with conjecture as to appropriate comparators.[37]

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28 *United Voice* [2014] FWC 6441 at [130] (Gostencnik DP).

29 *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [103] (Watson VP); *United Voice* [2014] FWC 6441 at [28], [30] (Gostencnik DP).

30 *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [104] (Watson VP).

31 *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [106] (Watson VP); *United Voice* [2014] FWC 6441 at [131] (Gostencnik DP).

32 *United Voice* [2014] FWC 6441 at [53], [66] (Gostencnik DP)

33 *United Voice* [2014] FWC 6441 at [55] (Gostencnik DP)

34 *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [111]; [155] (Watson VP).

35 *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [123] (Watson VP).

36 See, eg., *United Voice* [2014] FWC 6441 at [76]-[84] (Gostencnik DP). But see: *United Voice* [2011] FWAFB 2633 at [25], which took a permissive approach to generalised evidence.

37 *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [124]-[128] (Watson VP); *United Voice* [2014] FWC 6441 at [89] (Gostencnik DP).

(f) Difficulties were encountered in establishing or even identifying productivity improvements.[38]

(g) Difficulties were encountered in establishing employee support whereas demonstrating employer opposition was often straightforward.[39]

(h) The legislative preference for enterprise-level bargaining was a significant public interest factor against the making of an authorisation and attempts to negotiate common terms across an industry was found to weigh against the public interest.[40]

35. Despite the substantial barriers outlined above, two factors — commonality in the nature of employers and third-party control through funding arrangements — were factors that were relatively easy to satisfy under the low-paid bargaining provisions. In *United Voice* [2011] FWAFB 2633, a Full Bench found that commonality could be demonstrated through the provision of a list:

> ***It appears that the list of respondents has been compiled from the residential aged care provider list maintained by the Australian Government. The respondents therefore have common characteristics in terms of operations, service and care provision and employee functions and duties****. Although the details of funding arrangements may differ we assume that funding is administered in a consistent manner across the sector. Terms and conditions of employment may differ where enterprise agreements operate, but otherwise there is a high degree of commonality.*[41]

36. Funding arrangements were found to be a relevant factor by a Full Bench in *United Voice* [2011] FWAFB 2633 at [33]:

> *There is no doubt that funding plays a pervasive role in workplace relations in the sector. The level of funding is a significant consideration when employers make decisions in relation to wages and conditions to be afforded to their employees. The Australian Government plays a dominant role in the provision of funds. The combined employers submitted that while the tribunal could direct the Government to attend a conference, the Government cannot be compelled to make more funds available and that it is unlikely to do so. While this submission raises relevant considerations, in the present situation s.243(3)(d) requires*

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38 *United Voice* [2011] FWAFB 2633 at [29]; *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [133]-[135] (Watson VP); *United Voice* [2014] FWC 6441 at [108] (Gostencnik DP).

39 *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [139]-[141] (Watson VP); *United Voice* [2014] FWC 6441 at [115], [118] (Gostencnik DP).

40 *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [152] (Watson VP).

41 *United Voice* [2011] FWAFB 2633 at [27]. See also *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [132] (Watson VP) (despite a common funder and a degree of difference in the enterprises of some of the relevant employers); *United Voice* [2014] FWC 6441 at [98]-[101] (Gostencnik DP) (commonality due to same type of clients; common legislative framework; substantially the same services).

an examination of the extent to which a person, which is not the employer, has control over the terms and conditions of the employees of the employers who will be covered by the agreement. ***The dominant role of the Australian Government through the funding arrangements makes it such a person. That fact favours the grant of the application. Whether funding might increase if the authorisation were granted is an important question, but it would not be appropriate to make a finding about it even if we were in a position to do so.*** *Equally, bargaining might identify circumstances in which the overall effect of any improvements in wages might be minimised through improvements in productivity and service delivery.*

37. The legislative history demonstrates that the low-paid bargaining provisions provided substantial barriers to the low-paid bargaining stream, which was not utilised effectively as a consequence.

Explanatory Materials

38. The *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) (**EM**) makes it plain that the purpose of the amendments and repeals in relation to the Predecessor Provisions was to "[r]emove unnecessary limitations on access to the low-paid bargaining stream (and rename it the supported bargaining stream)".[42]
39. More specifically, the EM provides that:

Part 20 would reform the low-paid bargaining provisions in Division 9 of Part 2-4 of the FW Act and create the supported bargaining stream. ***The supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level.*** *For example, those in low-paid industries such as aged care, disability care, and* ***early childhood education and care*** *who may lack the necessary skills, resources and power to bargain effectively. The supported bargaining stream will also assist employees and employers who may face barriers to bargaining, such as employees with a disability and First Nations employees.*

The provisions would amend the existing low-paid bargaining process. When an application for a supported bargaining authorisation is made, the FWC must consider whether it is appropriate for the parties to bargain together. The FWC would consider the prevailing pay and conditions in the relevant industry, whether employers have clearly identifiable common interests, and whether the number of bargaining representatives would be consistent with a manageable collective bargaining process. ***The***

[42] Commonwealth, *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, p iii.

proposed supported bargaining stream is intended to be easier to access than the existing low-paid bargaining stream.[43]

40. Further:

> *By increasing access to the renamed supported bargaining stream,* ***the Bill intends to assist workers who require support to bargain. This might include those in low paid occupations, government-funded industries, and female-dominated sectors****, as well as employees with a disability, employees who are culturally and linguistically diverse and First Nations employees who may be employed in such sectors and face additional hurdles.*[44]

41. The legislature was mindful of the barriers created by the Predecessor Provisions:

> *The supported bargaining stream is intended to be easier to access than the existing low-paid bargaining stream.* ***The revised criteria for making a supported bargaining authorisation is intended to address the limited take-up of the low-paid bargaining process****.*[45]
>
> …
>
> *These amendments would deliver on the Jobs and Skills Summit outcome of ensuring workers and businesses have flexible options for reaching agreements, including removing unnecessary limitations on access to single and multi-employer agreements.*[46]

42. In his Second Reading Speech, the Minister made clear that gender equity was a fundamental concern of the SPBP Act. He noted the lack of progress in reducing the gender pay gap and observed that:

> ***Some of the most undervalued workers in our country are workers in female-dominated industries.*** *Many are the very workers who put their health and safety on the line to guide us through the shutdown period of the pandemic. Workers in health care, aged care, disability support,* ***early childhood education and care****, the community sector, and other care and service sectors.*[47]

43. The Minister noted that:

> ***Gender equity is at the very heart of our government's agenda; and this bill will place gender equity at the very heart of our Fair Work system—where it belongs****.*

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43 Ibid p xi [37]-[38].
44 Ibid p xxiii [109]. See also at p xlviii [253]; p 160 [921]; p 168 [979].
45 Ibid p 160 [922].
46 Ibid p 161 [927].
47 Commonwealth, *Hansard (House of Representatives)* (27 October 2022) p 2177.

> *Under our reforms, gender equity will be included as an overarching object of the Fair Work Act, in the modern awards objective and in the minimum wages objective.*
>
> *These amendments will embed gender equity as a central goal of our workplace laws; and set* ***a clear expectation that the Fair Work Commission must take into account the need to achieve gender equity when performing all its functions****—when setting the minimum wage; when considering changes to awards; and in all other decisions it takes.*[48]

44. The Minister tied these over-arching concerns to the objects of the supported bargaining stream:

> *The bill will rename and* ***remove barriers to access the existing low-paid bargaining stream, with the intention of closing the gender pay gap and improving wages and conditions in sectors such as*** *community services, cleaning, and* ***early childhood education and care****, which have not been able to successfully bargain at the enterprise level.*
>
> ***Unnecessary hurdles to entry in the current low-paid stream will be replaced by a broad discretion for the Fair Work Commission*** *to consider the prevailing rates of pay in the industry, including whether workers in the industry or sector are low paid.*
>
> *The commission must also be satisfied that employers who would be covered by a supported bargaining authorisation have clearly identifiable common interests, for example, whether or not they are substantially funded, directly or indirectly, by the Commonwealth, a state or a territory.*[49]

45. The Minister made particular mention of "Jane" from Brunswick East:

> *I recently visited an early childhood education centre in Brunswick East, where the director, Jane (who I understand is with us today) told me she has spent 40 years in the industry. She is incredibly passionate about her job, but struggles* ***constantly with staffing shortages due to inadequate pay and conditions in the sector. She has been waiting for a lifetime for the essential work of her and her staff to be properly valued. She should not have to wait any longer.***[50]
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> …

48 Ibid p 2177-8.
49 Ibid p 2182.
50 Ibid p 2178.

> ***This bill is for those workers, like Jane in Brunswick East, who have been waiting far too long for their work to be properly valued****. This bill is for all the employers who want to treat their employees fairly without fear of being undercut by unscrupulous competitors.*[51]

46. The EM and the Minister's Second Reading Speech make it clear that the purpose of the amendments to, and repeals of, the low-paid bargaining provisions was to:
    (a) Remove barriers that would prevent access to the supported bargaining stream;
    (b) Provide access to the supported bargaining stream for groups like ECEC sector employees;
    (c) Provide a mechanism for dealing with the gender pay gap;
    (d) As illustrated by "Jane", provide a mechanism for ECEC sector employees to be provided for decent pay and conditions in order to address the workforce challenges in the ECEC sector.

D. APPLICATION

47. The Commission can be satisfied that the requirements for the making of a supported bargaining authorisation are met. The material before the Commission and the ASOF make clear that the Commission has an evidentiary foundation to be satisfied that:
    (a) An application for an authorisation has been made by the Union Parties in accordance with s 242(1) and that each of the unions is entitled to represent the industrial interests of employees in relation to work to be performed under the proposed multi-enterprise agreement (s 243(1)(a)).[52]
    (b) At least some of the employees who will be covered by the proposed multi-enterprise agreement are represented by the Union Parties (s 243(1)(c)).[53]
    (c) The coverage of the proposed multi-enterprise agreement does not include employees who are covered by a single-enterprise agreement that has not passed its nominal expiry date and would not cover employees in relation to general building and construction work (s 243A(1) and (4)).[54]
48. The Commission can also be satisfied that it is appropriate for the employers and employees that will be covered by the proposed multi-enterprise agreement to bargain together for the purposes of s 243(1)(b). It is appropriate to address the considerations in turn.

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51 Ibid p 2183.
52 ASOF at [7].
53 ASOF at [9].
54 ASOF at [4] and [6].

Prevailing pay and conditions

49. Evidence as to prevailing pay and conditions of employees in the ECEC sector supports a conclusion that it is appropriate for the employers and employees to bargain together. A number of features of the prevailing pay and conditions of employees are relevant:

    (a) Employees in the ECEC sector are substantially award dependent or receiving rates of pay close to the level in the relevant awards. The ASOF indicates that 57.8% of employees in the ECEC sector are award dependent and 20.9% of employees are paid between 0.01% and 10% above the award rate of pay.[55] Employers who are not covered by an enterprise agreement generally pay their employees at or around the award rate of pay.[56]

    (b) Many employees in the ECEC sector would be considered to be low paid defined as persons whose ordinary-time earnings are below two-thirds of median (adult) ordinary-time earnings of all full-time employees based on either the ABS Characteristics of Employment (COE) data (being $1,016.76 per week) or ABS Employee Earnings and Hours (EEH) data (being $1,062.00 per week).[57] By comparison, the median weekly full-time earnings for "child carers" based on COE data is $1,000 per week and based on EEH data $1,059 per week.[58]

    (c) In relation to AEU members in particular, the evidence indicates that employees in long day care have terms and conditions of employment that are less favourable than other AEU members. For example, an early childhood teacher in the ECEC sector is not paid as much and does not have the same workload protections as early childhood teachers in community or local government kindergartens or a teacher in a primary school. The same circumstance affects Certificate III and Diploma qualified educators in the ECEC sector.[59]

Common interests

50. The employers that are the subject of the application have common interests which, again, favours a conclusion that it is appropriate for the employers and employees to bargain together, including:

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55 ASOF at [16].
56 ASOF at [19].
57 *Annual Wage Review 2022-23* [2023] FWCFB 3500 at [89].
58 ASOF at [20]-[23].
59 Nightingale Statement at [30]-[31].

(a) The nature of the enterprises conducted by the employers have a high degree of commonality in that they involve the provision of education and care to children in a long day care setting.

(b) The employers in the ECEC sector are subject to common regulatory regimes, including:

i. The National Quality Framework for employers in the ECEC sector was established in 2012, including the Education and Care Services National Law 2010, the Education and Care Services National Regulations and the National Quality Standard. The National Quality Standards set a benchmark for the nature of the education and care services provided by ECEC employers across seven quality areas and result in a high degree of commonality in the nature of the services provided.[60]

ii. The Council of Australian Governments has developed the "Early Learning Framework" for pre-school age children and "My Time, Our Place – Framework for School Age Care in Australia". Employers in the ECEC sector across Australia are required to base their educational programs on one of the two approved learning frameworks (or in Victoria the Victorian Early Years Learning and Development Framework).[61]

(c) Employers across Australia operating in the long day care setting, including centre based care, family day care, out of school hours care and in home care, are substantially funded by the Commonwealth through the Child Care Subsidy underpinned by Commonwealth legislation. In order to obtain the Child Care Subsidy, employers are required to be an "approved provider" and to participate in the same digital platform. The Child Care Subsidy is then paid directly to the employer and passed on to families through reduced fees.[62]

(d) As has been discussed above, many employees in the ECEC sector are award dependent and receive pay and conditions in accordance with or close to the relevant modern awards. Only a minority of employees in the ECEC sector are covered by enterprise agreements.

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60 ASOF at [24]-[29].
61 ASOF at [24]-[25].
62 ASOF at [34]-[43].

Number of bargaining representatives

51. At present, with the exception of G8 Education Limited, all of the relevant employers are represented by bargaining representatives, the Australian Childcare Alliance, the Community Child Care Association or Community Early Learning Australia. G8 is its own bargaining representative. There are three union bargaining representatives proposed to be involved in the bargaining, namely, the AEU, the UWU and the IEUA. There does not appear to be any suggestion that the likely number of bargaining representatives for the proposed multi-enterprise agreement would cause the bargaining process to be unmanageable.

Other matters the FWC considers appropriate

52. There are a range of other matters that the Commission should consider appropriate to be taken into account and support a conclusion that it is appropriate for the employers and employees to bargain together. Those matters include the following:

    (a) The Union Parties and the representatives of all the employers strongly support the making of a supported bargaining authorisation. That fact is relevant to the appropriateness assessment and supports an inference that supported bargaining will have utility and good prospects of facilitating agreement.

    (b) The ECEC sector to which the proposed multi-enterprise agreement would apply is of fundamental and undeniable importance to the development of children throughout Australia. Early childhood care and education benefits a child's development and provides key social and economic returns through enabling the economic participation of parents, particularly women.[63] Effective determination of terms and conditions of employment for employees in the ECEC sector is vital and will be supported by the making of a supported bargaining authorisation.

    (c) The ECEC sector faces severe workforce challenge in attracting and retaining staff despite a consistent increase in demand for ECEC services. Recent research has indicated that the average tenure of contact staff at their current child care services is 3.6 years, that about one-third of qualified educators leave the profession within 4 years and the annual job turnover is more than 30%.[64] Peak bodies and employers acknowledge the serious workforce challenges faced by the sector.[65] It is hoped that supported bargaining may assist to improve conditions for employees in the ECEC sector and help address workforce challenges.

63 Nightingale Statement at [7]-[10].
64 Nightingale Statement at [12]-[15].
65 Nightingale Statement at [21].

(d) The workforce in the ECEC sector is highly feminised with approximately 92.1% of the workforce being women.[66] It is overwhelmingly likely that gender-based assumptions in relation to the nature of the work and skills involved in caring and education of children has contributed significantly to the undervaluation of work in the sector.[67] Ingrained and long-standing assumptions about the value and nature of the work are likely to not be addressed through single-enterprise bargaining. The employees who would be covered by the proposed multi-enterprise agreement are precisely the type of workers who it was intended should benefit from supported bargaining.

E. CONCLUSION AND DISPOSITION

53. The Commission can be satisfied that it is appropriate for the employers and employees subject of the application to bargain together and that the other requirements for the making of a supported bargaining authorisation are met. The Commission should make a supported bargaining authorisation as sought.

MARK GIBIAN SC

Counsel for the AEU

Dated: 28 July 2023

66 ASOF at [12].
67 Nightingale Statement at [34]-[35].

Annexure A: Side-by-side comparison of provisions – low-paid bargaining vs supported bargaining

The highlighting in the table below has the following indications:

- Matters that have been removed from express consideration
- Matters that have been retained as considerations
- Matters that are new matters for consideration
- Matters that have been roughly retained as considerations
- NB: Text that is largely the same is not highlighted

Previous provision (existing immediately prior to 6 June 2023)	**Current provisions (on and from 6 June 2023)**	**Observations**
Section 241		
Division 9—Low-paid bargaining 241 Objects of this Division The objects of this Division are: (a) to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs; and (b) to assist low-paid employees and their employers to identify improvements to	Division 9—Supported bargaining 241 Objects of this Division The objects of this Division are: (a) to assist and encourage employees and their employers who require support to bargain, and to make an enterprise agreement that meets their needs; and [*NB. no (b) in current s 241*]	• References to "low-paid employees" have been removed • Notion of "supported" bargaining introduced • Section 242(b) has been removed.

productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises; and (c) to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and (d) to enable the FWC to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements. *Note: A low-paid workplace determination may be made in specified circumstances under Division 2 of Part 2-5 if the bargaining representatives for a proposed enterprise agreement in relation to which a low-paid authorisation is in operation are unable to reach agreement.*	(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.	
Section 242		
Low-paid authorisations	Supported bargaining authorisations	
		The provisions are relevantly the same

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

Section 243		
When the FWC must make a low-paid authorisation Low-paid authorisation (1) The FWC must make a low-paid authorisation in relation to a proposed multi-enterprise agreement if: (a) an application for the authorisation has been made; and (b) the FWC is satisfied that it is in the public interest to make the authorisation, taking into account the matters specified in subsections (2) and (3).	Supported bargaining authorisation—main case (1) The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if: (a) an application for the authorisation has been made; and (b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together, having regard to: (i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and (ii) whether the employers have clearly identifiable common interests; and (iii) whether the likely number of bargaining representatives for the agreement would be	• Section 243(1)(b) of the old provision involved a public interest test that required the Commission to take into account the matters set out in sub-section (2) and (3) of the old provision. • This has been replaced with a test of appropriateness having regard to three main sets of considerations o Current pay and conditions (including low pay); o Clearly identifiable common interests; o Number of bargaining representatives / manageable bargaining process; o The Commission can also have regard to "any other matters the FWC considers appropriate". • The criterion in 243(1)(c) (representation of employees) of the new provision is new.

	consistent with a manageable collective bargaining process; and (iv) any other matters the FWC considers appropriate; and (c) the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation. *Note: This subsection is subject to section 243A (restrictions on making supported bargaining authorisations).*	
FWC must take into account historical and current matters relating to collective bargaining (2) In deciding whether or not to make the authorisation, the FWC must take into account the following: (a) whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level; (b) the history of bargaining in the industry in which the employees who will be covered by the agreement work;	Common interests (2) For the purposes of subparagraph (1)(b)(ii), examples of common interests that employers may have include the following: (a) a geographical location; (b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises; (c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.	• The following mandatory criteria of the old provisions have been removed: 243(2)(a); 243(2)(b); 243(2)(c); 243(2)(d). • Section 243(2)(d) of the old provision has been, to an extent, subsumed into section 243(2)(b) of the new provisions

(c) the relative bargaining strength of the employers and employees who will be covered by the agreement; (d) the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards; (e) the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.		
	Supported bargaining authorisation—declared industry etc. (2A) The FWC must also make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if: (a) an application for the authorisation has been made; and (b) the employees specified in the application are employees in an industry, occupation or sector declared by the Minister under subsection (2B). *Note: This subsection is subject to section 243A (restrictions on making supported bargaining authorisations).*	No equivalent in the old provisions

	(2B) The Minister may, by legislative instrument, declare an industry, occupation or sector, if the Minister is satisfied that doing so is consistent with the objects of this Division set out in section 241.	No equivalent in the old provisions
FWC must take into account matters relating to the likely success of collective bargaining (3) In deciding whether or not to make the authorisation, the FWC must also take into account the following: (a) whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates; (b) the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; (c) the views of the employers and employees who will be covered by the agreement; (d) the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the		• The following mandatory criteria of the old provisions have been removed: 243(3)(a); 243(3)(c); 243(3)(e). • Section 243(3)(b) of the old provision is found in section 243(1)(b)(iii) • Section 243(3)(d) of the old provision has been, to some extent, subsumed into section 243(2)(c) of the new provisions

employer, or employers, that will be covered by the agreement; (e) the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that: (i) would cover that employer; and (ii) would not cover the other employers specified in the application.		
What authorisation must specify etc. (4) The authorisation must specify: (a) the employers that will be covered by the agreement (which may be some or all of the employers specified in the application); and (b) the employees who will be covered by the agreement (which may be some or all of the employees specified in the application); and (c) any other matter prescribed by the procedural rules.	What authorisation must specify etc. (3) The authorisation must specify: (a) the employers that will be covered by the agreement; and (b) the employees who will be covered by the agreement; and (c) any other matter prescribed by the procedural rules.	The provisions are substantially the same.

Operation of authorisation (5) The authorisation comes into operation on the day on which it is made.	Operation of authorisation (4) The authorisation comes into operation on the day on which it is made.	The provisions are the same.