TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT HAMPTON

B2023/538

s.242 - Application for the FWC's approval of a supported bargaining authorisation

Application by Independent Education Union of Australia (130N) & United Workers' Union (108V) (284V) and Another
(B2023/538)

Melbourne

10.00 AM, WEDNESDAY, 16 AUGUST 2023
10.00 AM, THURSDAY, 17 AUGUST 2023

PN1

JUSTICE HATCHER: Can I begin by apologising for the cramped conditions but our largest courtroom is currently undergoing a technological renovation. So hopefully that will pay with dividends in the long term but not in the short term. All right, I'll take the appearances. So starting with the applicants, Mr Redford, you appear for the United Workers Union?

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MR B REDFORD: I do, Your Honour. I'm joined at the Bar table by Thomas (Indistinct), initial L.

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JUSTICE HATCHER: All right, Mr Gibian, you appear for the AEU?

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MR M GIBIAN: I do, thank you, Your Honour.

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JUSTICE HATCHER: Mr Aird, you appear for the IEU?

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MR M AIRD: Yes.

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JUSTICE HATCHER: All right, and then with the employers, so Mr Ward, you appear for the Australian Childcare Alliance and what we call the 'Group 1' employers, is that right?

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MR N WARD: Yes, Your Honour. Thank you.

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JUSTICE HATCHER: Ms Stevens, you appear for the Community Childcare Association and Community Early Learning Australia, and I think the 'Group 2 and 3' employers, is that right?

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MS L STEVENS: Yes, Your Honour.

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JUSTICE HATCHER: And Ms Pearson, you appear for G8 Education?

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MS T PEARSON: Yes, I do, Your Honour.

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JUSTICE HATCHER: And then the peak council, so Ms Peldova-McClelland, you appear for the ACTU?

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MS A PELDOVA-MCCLELLAND: Yes, I do, thank you, Your Honour.

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JUSTICE HATCHER: Mr Izzo, you appear for the Australian Chamber of Commerce and Industry?

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MR L IZZO: I do, Your Honour. And just a reminder, I will require permission to (indistinct).

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JUSTICE HATCHER: All right. And Ms Bhatt, you appear for the Australian Industry Group?

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MS R BHATT: Yes, Your Honour.

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JUSTICE HATCHER: All right, does any party oppose permission for legal representation being granted to those parties who have legal representatives? No, all right. That permission is granted. So which of the applicants is – Mr Ward, you're going first.

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MR WARD: Sorry, there's a small number of administrative matters I need to take the Commission to first. Dealing with some of the details of the application. I'm going to apologise; we should have dealt with these before the proceedings commenced. But I'm going to identify what those issues are. It will require Mr Redford to seek leave to amend the application.

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JUSTICE HATCHER: Right.

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MR WARD: But it's more convenient that I deal with them, in terms of description. If I could ask you, initially, just have the amended application in front of you.

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JUSTICE HATCHER: All right, just give us a second, Mr Ward.

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MR WARD: No problem.

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JUSTICE HATCHER: Yes, all right, go ahead.

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MR WARD: Thank you, Your Honour. If you could go almost to the end of the Group 1 employers listed in the application, you'll see fourth from the bottom of the Group 1 employers, under the heading, 'Legal name of business', you'll see 'Landsdale School of Early Learning', does the Commission see that? Can I just indicate that the name that's in the box, 'Legal name of business' and the name

that's in the box, 'Trading name of business', are simply in the wrong box and they need to be reversed. That's number 1.

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Then slightly more complicated, if I could ask you to go to the - slightly above where I've taken you, you'll see a large number of entries concerning entities which are Little Scholars School entities. There's quite a few of them. The names that appear in the 'Legal name of business' box are correct. Unfortunately the names that then appear in the next box, 'Trading name of business' are incorrect. What should be in there is the trading name of the centre operated by each of those entities. The most convenient way I can explain how to arrive at that for the Commission, is to do this: If I could ask the Commission to go to exhibit 13, which is - - -

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JUSTICE HATCHER: Well, I was going to confirm the markings later.

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MR WARD: Sorry, Your Honour?

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JUSTICE HATCHER: I was going to confirm those provisional markings a little later. But what's provisionally been marked as exhibit 13?

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MR WARD: If I could ask you to go to what's provisionally been described as exhibit 13.

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JUSTICE HATCHER: Yes.

PN33

MR WARD: And perhaps I can do this in very short order. If one goes to what's provisionally described as exhibit 13, one will find in that a table, 'Table 1', and it has, in that table – first column is the employer, which is a reference to the legal entity that's properly in the application. And then there is a second column straight after that called, 'Centre name'. That is the actual centre that should be in the column under 'Trading name of the business' for each of those. I won't read them out. But if one could follow the table that's in provisional exhibit 13, that would suffice.

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And one last matter and then I might just make reference shortly to another matter, quickly. There is also an entry in our group, if one goes – again, almost to the end of the Group 1 employers – the second last entry in our group, reference is 'North Epping Early Learning Pty Ltd'. And there is a reference then to a centre which is the Cressy Road Early Learning Centre. There is actually a second centre operated by North Epping Early Learning Pty Ltd that was meant to be referenced. Again, the simplest way I can identify that is to say this: The two centres operated by North Epping Early Learning Pty Ltd are conveniently set out in what is provisionally exhibit 15 of Ms Nesher Hutchinson, and that is the

Cressy Road Early Learning Centre and the Mary Street Early Learning Centre. Again, both of which are contained in Table 1.

PN35

Except for one last matter, we're just seeking some further instructions in relation to some of the details in relation to a company called, 'Radium'. I'll come back to those, if I can, later today. Simply because they operate out of Western Australia. Mr Ritzu's normally trying to upset me. They operate in Western Australia and we just haven't been able to get them out of bed yet to confirm something. So, just, if I have to come back and deal with those later on, I will. But if I could just simply say, those are the matters we wish to address. To the extent that they would require Mr Redford to seek leave to amend the application, my understanding is he will seek leave to amend it to attend to those matters. If the Commission pleases.

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JUSTICE HATCHER: All right, well if there's no dispute about those matters, we'll grant leave to amend and Mr Redford, can you file, as soon as practicable, a further amended application, which reflects those changes?

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MR REDFORD: Yes, Your Honour.

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JUSTICE HATCHER: Yes, all right. Anything else?

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MR REDFORD: I might also start with an administrative matter and that is, firstly, the matter that Your Honour has raised with us yesterday in relation to the evidence.

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JUSTICE HATCHER: Yes.

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MR REDFORD: As I understand it, , there is no objection from any party, that those exhibits outlined in the Commission's note be marked as envisaged.

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JUSTICE HATCHER: All right, so does that document comprehend all the evidence which parties wish to adduce in the proceedings?

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MR REDFORD: My understanding, it does, Your Honour.

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JUSTICE HATCHER: Yes, all right. And I understand that there's no cross-examination required in respect of any witness statement in that list?

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MR REDFORD: My understanding is there is not.

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JUSTICE HATCHER: All right. Well, I think I'll simply confirm that the evidentiary material will be marked as exhibits in accordance with the draft list that's been earlier provided to the parties, and a final version will be posted onto the website.

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MR REDFORD: Thank you, Your Honour. Then there's the matter of the order of proceedings, Your Honour. And the parties have had some discussions about that. And taking into account the way the Commission's dealt with the evidence, I think what has emerged is the proposition that parties simply, one by one, take the Commission through their submissions. Where, obviously, the applicant unions will start; UWU, AEU, IEU. Followed by the representatives for the respondents. And then the peak councils.

PN48

And then there's just a matter of any replies that parties may wish to make. I had thought, Your Honour, that it would be the applicants that might be entitled to reply if they so wished. But that's a matter for the Commission, and the Commission may wish to hear replies, depending on what's said, from other parties.

PN49

JUSTICE HATCHER: All right, we'll generally see how it goes. Obviously, the parties can proceed upon the basis that we've read the written submissions. And so, obviously, although you might wish to emphasise or elaborate points, don't feel any need to unnecessarily repeat anything that's in the submissions.

PN50

MR REDFORD: Thank you, Your Honour. Well, I then had intended to just make some very brief opening comments to place the application into context. And then turn to some submissions. Your Honour, the application comes to the Full Bench today, really after a process that began in late 2022 – in October 2022 – when, what happened was representatives from every part of the early childhood and education sector met. We described it as a crisis meeting. And the nature of the crisis was to discuss amongst the key stakeholders within the sector, the workforce crisis that the sector currently faces. And the genuine and unanimously felt need to ensure that we are in a position to attract and retain early education and care professionals, to work in the sector.

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And what we unanimously resolved at that meeting formed part of a joint statement that was issued which said, among other things, that early childhood education and care has been undervalued, and low wages are a major contributor to the current workforce crisis in the sector.

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All of the key stakeholders in the sector were present. All of the major employers, all of the key peaks, all the key unions. And we resolved to keep meeting, which we did over the course of the first half of this year. Our two explore options to lift wages in the sector, including to explore multi-employer bargaining. And what

has resulted from that process is the application that is before you. The application which concerns 64 employers, together with the three unions in the sector. Covering, we think, around 12,000 employees, representing something like around 10 per cent of the centre based long day care part of the sector that these employers and the unions operate in. The proposition being that this group of employers and these employees engage in multi-employer collective bargaining.

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Early educators are – I would say this to Your Honour – early educators are excited about this historical level of consensus and cooperation that exists in the sector. And some of those educators are in the courtroom today. And what we hope is over the next few months we can embark on discussions leading to a new multi-employer agreement which, with the support of the Commonwealth Government, results in significant increases to what we pay the people who we expect to guide our next generation through their crucial first five years of life.

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In saying that, your Honour, we don't want to sound presumptuous. We understand that, notwithstanding the degree of consensus that exists in the sector and around this application, that we don't understand that the Commission has an important job to do today in navigating its way through what is the first application of its kind, under the new supportive bargaining provisions. None of the parties stand before you today seeking a rubber stamp, in that regard.

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But it would be out suggestion that the approach that the Commission's adopted to this application is a robust and considered approach. The Commission has, before it, 11 sets of submissions, which include the replies that have been filed in relation to the application, a number prepared by some of Australia's most senior industrial practitioners, it has a comprehensive statement of agreed facts before it, containing seven substantial annexures, as well as a number of other witness statements from employers and from union representatives. I'd suggest to you that even before we'd arrived here today this matter has been extremely well ventilated before the Full Bench. I say that, again, because, notwithstanding the hope that what ensues soon, is a significant multiemployer collective bargaining process. We understand that we need to satisfy the Commission as to the application that we've brought before it.

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That being said, it is our contention that what is before you is the type of application that it precisely what the government had in mind when the amendments giving rise to the supported bargaining scheme were introduced late last year.

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In the second reading speech the relevant minister said this. He said:

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Childhood educators, some of whom have spent more than 40 years in the industry, are often incredibly passionate about the job they do, but they

struggle, constantly, with staffing shortages, due to inadequate pay and conditions in the sector. These people have been waiting for a lifetime for their essential work and the work of their colleagues to be properly valued. They should not have to wait any longer.

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Ultimately, the purpose of this application is to achieve that objective and the level of consensus and cooperation that has accompanied it, makes us optimistic that that can be achieved.

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I'll turn now to the substance of the submissions of the UWU. I will say, in relation to those submissions, this. The discussions that I referred to earlier that have occurred between the parties, also involved some level of optimism that this proceeding might be able to be dealt with during the course of just this day, and we appreciate the Full Bench has set aside a second day in reserve, but I think there is a sentiment that if we can be as efficient as possible, that may well be achieved, so I'm going to attempt to hold up my end of the bargain and avoid labouring points that the United Workers Union have already made in the material that we've filed. To that extent we refer to and rely on our outline of submissions, which we filed, and our reply, which we've filed.

PN61

There are several points that I wanted to draw out and emphasise, but I'm aware that there will be submissions made by other parties emphasising other points and I will, in some cases, leave those matters to those other parties, to avoid doubling up.

PN62

Can I say this, in relation to our submissions, just as an opening comment, I make this observation. Not only is there no opposition to the authorisation that we are seeking from the Commission, as I understand it, there is, essentially, no divergence of substance in the way the parties have suggested to the Commission that it should approach the new supportive bargaining scheme.

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The parties are, essentially, agreed about, for example, how the Commission should approach the appropriateness consideration. In substance, how the Commission should approach the consideration, in relation to the prevailing pay and conditions in the sector, how the Commission should approach the common interest factor. Some of the peak councils submissions suggest for alternative interpretations of some aspects of the legislation. We say, though, at the outset, that, and we've said this in our reply, that it should be noted that it would appear that these alternative interpretations that have been contended for by some of the peak councils, even if they were accepted, none, in my submission, should move the Commission to dismiss this application.

PN64

I'll turn to make some comment about the application itself and its scope and who we seek to be covered by the application.

PN65

The application seeks an authorisation in relation to 64 employers, and two were added to that number, as a result of the amended application. These employers we've divided into four groups, and I filed, with the Commission yesterday, a revised note which updated a previous note, I filed before the mention, outlining who those employers are. They, in the amended note, are numbered for convenience.

PN66

It's important to note, at the outset, that we don't seek an authorisation, in respect of all of the employer - I withdraw that. We don't seek an authorisation in respect of all of the employees of the employers. We only seek an authorisation in respect of the employees of these employers who work in what we describe as a long day care setting.

PN67

In the application we describe those employees with precision. We define them as those employees whose work would be covered by the Children Services Award, or the Educational Services Teachers' Award, but then we provide that it is only employees working within that descriptor who work in a long day care setting that are sought to be covered by the authorisation. Then what we also do is, for the avoidance of doubt, we specifically exclude from that scope specified areas of the sector which we do not seek to be covered, for example, kindergarten, or what is sometimes described as preschool. We don't seek an authorisation in relation to employees working in that setting. Family day care is another example. Once you exclude these areas of the sector from the descriptor, what you're left with is the long day care setting.

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The reason for - - -

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JUSTICE HATCHER: Is that a term that is self-explanatory or perhaps does it require a greater definition, in the authorisation, if we make one?

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MR REDFORD: Your Honour, it is a term that's self-explanatory, but, as I say, once you take the coverage of the Children Services Award and then exclude from that coverage those subsectors that I've mentioned, you are left with only the long day care setting. So if there was any doubt about the meaning of the term long day care setting, and we submit that there's not, it's clarified anyway by the nature of those exclusions.

PN71

JUSTICE HATCHER: Mr Redford, I've got a question, it's probably a drafting issue, so we don't have to deal with it now, but about the nominated single enterprise awards that are to be excluded or the parties under which are to be excluded.

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MR REDFORD: Yes.

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JUSTICE HATCHER: Do you want me to raise it now, or shall I raise it when you've finished?

PN74

MR REDFORD: I will come to that, your Honour, if that's okay with you.

PN75

JUSTICE HATCHER: That's all right.

PN76

MR REDFORD: The reason we've only sought an authorisation in respect to long day care, in particular, is, without including other parts of the sector, is, I would say, because of urgency. So the sector, as I've said, is united around the need to deal with wage rates and the need to attract more quality staff. What we want to do is have a bargaining process that is a speedy process, and that prioritises the dealing with wage rates as quickly as possible.

PN77

And whilst a process involving other parts of the sector, we say, could sit comfortably within a manageable process, their dynamics would still cost us some time to navigate. So, for example, navigating issues around state government funding, as it relates to kindergarten or preschool, would be manageable within a bargaining process but it would just cost us a bit more time to navigate, or navigating issues around the fact that there are some types of services that open at different times of the day, like after hours school care, we think could be dealt with within a multiemployer bargaining process, but it would take us more time and we would prefer to prioritise the long day care setting, which, in effect, operates identically across the sector. We think we'll get efficiency out of bringing the focus on that part of the sector, so that's why we defined the scope as we do.

PN78

One final point on that scope question, we do include, within that group of employees we seek to be covered, a qualified chef or cook who works in a long day care setting and that's because these workers are not covered by the Children Services Award. That classification structure, in relation to food services, stops at the Certificate III level, so it doesn't extend to the qualified - to the trade level, but we want to include those employees, where they exist, within the scope of the bargaining process. So we expressly exclude that group of employees.

PN79

Coming now to your Honour's question about the reference we make in the application to the enterprise agreements, it is the case that some of the employers who are named in the application are covered by enterprise agreements. Some of those agreements are in term and some have passed their nominal expiry date.

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It is not the intention of the application that any employee covered by an agreement that has not passed its nominal expiry date is covered by the authorisation.

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JUSTICE HATCHER: We can't do it, in any event.

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MR REDFORD: Indeed.

PN83

We do make that explicit, at item 1(viii) on page 10 of the application and, in an effort to make it even more explicit, we specify, for the avoidance of any doubt, some particular agreements that cover the employers concerned.

PN84

We have copies of all of those agreements to hand up. I didn't intend to take the Full Bench to anything, in relation to the specifics of those agreements, but we thought it was appropriate that the Bench have copies of each of those agreements. So we might hand those up now.

PN85

JUSTICE HATCHER: All right. Mr Redford, that might well answer my question, because the question was about the identity of one of these agreements, which appears to have different titles, depending on which version you look at. Better people than I have used search mechanisms and not been able to find, necessarily, the right agreement.

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MR REDFORD: All right, yes. I think we may have, in fact, made an error in relation to one of the them, which I'll come to, your Honour.

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JUSTICE HATCHER: Right.

PN88

MR REDFORD: But I might take you through - there's a couple of categories of these agreements, I might take you through them in succession. In total there are four in term agreements and they cover five of the employers.

PN89

The first in term agreement, so the first agreement that hasn't reached its nominal expiry date, is called the Victorian Early Childhood Teachers and Educators Agreement 2020. This agreement reaches its nominal expiry date on 30 September 2024. This is a single interest agreement, so it is a single enterprise agreement, for the purposes of section 172 and section 243A(1) and (2).

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JUSTICE HATCHER: So it was approved as a single enterprise agreement - - -

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MR REDFORD: Yes. Yes.

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JUSTICE HATCHER: - - - using the rules at the time.

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MR REDFORD: Yes. Yes, that's right, your Honour.

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This agreement, just for the avoidance of (indistinct), this agreement doesn't cover any of the employees specified in the application because its expressly excluded in the exclusions in the application so therefore there's no activation of the exclusion provisions. The agreement, itself, has very limited application in long day care in any event. This is, fundamentally, a kindergarten agreement but it - and, fundamentally, covers teachers in kindergarten and, therefore, will only cover teachers working in a long day care setting, where they're involved in the delivery of a kindergarten program. So it has very confined application in relation - certainly in relation to these employers. But the two employers that are covered by it are the Ashwood Children's Centre Inc, which is number 42 on the note, and the Hawthorn Early Years Incorporated, which is number 46 in the note.

PN95

The second agreement that has not reached its nominal expiry date is called the Victorian Early Childhood Agreement 2021. Interestingly enough, this is a multiemployer agreement, a multi-enterprise agreement, I'm sorry, so it would appear that, in any event, it wouldn't trigger the exclusion, in section 234A(1). However, it is expressly excluded from the authorisation that we - I withdraw that. Employees who are covered by it are expressly excluded by the authorisation that we seek. It has the same nominal expiry date as the previous agreement, 30 September 2024. This agreement applies to the Coburg Children's Centre Incorporated, which is number 43 on the list.

PN96

There are two further employers covered by in term agreements. Lady Gowrie Child Care Centre, Melbourne Inc, which is number 45, is covered by the Gowrie Victoria Early Childhood Teachers Enterprise Agreement 2022. This agreement has an expiry date of 30 June 2025.

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JUSTICE HATCHER: What was that employer number again?

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MR REDFORD: Number 45, your Honour.

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Again, this is an agreement that is of limited application. It only covers the qualified teachers, so it doesn't cover early childhood education staff in general, it just covers the teachers working in sessional kindergarten programs.

PN100

Similarly, the final employer who is covered by an in term agreement is the Bermagui Preschool Cooperative Society Ltd. That is number 53 on the list. That employer is covered by the Bermagui Preschool Cooperative Society Teachers Agreement 2020, which reaches its nominal expiry date on 18 November 2023.

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JUSTICE HATCHER: What's the employer number?

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MR REDFORD: The employer number is 53, your Honour.

PN103

JUSTICE HATCHER: Thank you.

PN104

MR REDFORD: Finally, just for completeness, I would take the Full Bench through the employers who are covered by agreements that have passed their nominal expiry date, just for completeness. They are number 47, the Hillbank Community Children's Centre Incorporated. Their enterprise agreement reaches nominal expiry date on 30 June 2021.

PN105

Number 48, the Unley Community Child Care Centre Inc, who has an enterprise agreement that reached its nominal expiry date on 30 June 2015.

PN106

Number 49, Yawarra Children's Services. Their enterprise agreement reached its nominal expiry date on 30 June 2015. Glendale Early Education Centre. Their enterprise agreement reached its nominal expiry date on 30 June 2015.

PN107

Then Big Fat Smile, and Big Fat Smile is number 63, and Big Fat Smile has two agreements that cover it. An agreement which reached its nominal expiry date in March 2023, and that's an agreement that only covers its qualified teachers. And it also has an agreement covering long day care, that reached its nominal expiry date on 30 June 2015.

PN108

Now, if I could just go back half a step, your Honour. I made reference to the Lady Gowrie Child Care Centre Melbourne Inc, which is employer number 45. Just excuse me for a second, your Honour. I think I gave you the wrong expiry date, in relation to that agreement, your Honour. There was a correction issued in relation to that agreement. The expiry date, in relation to that agreement is 1 July 2025, I think I gave you 30 June 2025.

PN109

JUSTICE HATCHER: Thank you. Mr Redford, can I just go back one step? In the amended application, at 2.1, in terms of the scope of the order, the last paragraph, (c), this is the one that includes the reference to a qualified chef or cook, am I right in assuming that that might be more accurately specified as work performed ECEC centre and long day care setting that is not covered by the Children Services Award or the Educational Services Teachers' Award?

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MR REDFORD: Yes, your Honour, that would make it clear, yes.

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JUSTICE HATCHER: Right. Yes.

PN112

So, Mr Redford, are you leaving the question of the agreements and the exclusion?

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MR REDFORD: Yes, I was.

PN114

JUSTICE HATCHER: So I think that raises two questions then. So in the amended application one of the agreement cited is number 4, the Victorian Early Educators Agreement 2020, which doesn't marry up with any of the agreements. That was the one we couldn't find. So does that correspond with number 1, in your bundle, does it?

PN115

MR REDFORD: Your Honour, counsel for the AEU may be in a position to clarify that. What I would say, the reference to that agreement was inserted out of an abundance of caution. We don't say that that agreement actually covers any of the employers concerned with the application. We have - the difficulty in finding it, however, your Honour, may be because it is referred to as a 2020 agreement when it is, in fact, a 2021 agreement. That's the error.

PN116

MR GIBIAN: Perhaps if I could just indicate, as I understand it, that's correct, it should be the Victorian Early Educators Agreement 2021. I understand it has an AE number, which is AE514651.

PN117

JUSTICE HATCHER: 516451?

PN118

MR GIBIAN: 51 - sorry, 4651, apologies. If there's any difficulty with that we'll endeavour to clarify it, but that's as I understand the situation.

PN119

JUSTICE HATCHER: So, Mr Redford, the second question that arises is, given that all the other enterprise agreements are excluded, effectively because of the force of the Act and we're required to exclude them from any authorisation, what's the logic of excluding the multiemployer agreement, because that's not by statutory force, that's obviously a decision the parties have made. So what's the basis of that?

PN120

MR REDFORD: Yes, your Honour. Again, firstly, the thinking around that exclusion is that we sought to exclude it, out of an abundance of caution, that's the first thing to say about that.

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JUSTICE HATCHER: If it's not statutorily excluded, is there a merits reason as to why we should include that exclusion?

PN122

MR REDFORD: Well, your Honour, we don't seek that - we don't seek that employees covered by that agreement be covered by the authorisation.

PN123

JUSTICE HATCHER: Yes.

PN124

MR REDFORD: The intention of the parties is to make an agreement that only covers employees that aren't covered by an existing agreement. Employees that are covered by an existing agreement would, we imagine, continue to be covered by those agreements, so that's, as I understand it, the collective thinking, amongst the parties, in relation to what we describe as the proposed agreement.

PN125

JUSTICE HATCHER: I was just going to ask you what the life was, but I can look that up myself, for the multiemployer agreement. Thank you.

PN126

MR REDFORD: This might be a convenient time for me, just in rounding off that part of my submissions, your Honour, to hand up a draft authorisation. But, of course, the draft is now beset with errors and so we'll need to file an amended draft, but I just thought it might be useful to hand up to the Bench how it is that we envisage the authorisation might be put, taking into account the requirements of the Act to describe the employers and the employees that will be covered by the authorisation. And, in due course, the Bench may have a view about how we've gone about doing that, given this is the first one. But, in any event, we'll file an amended version.

PN127

JUSTICE HATCHER: Is there any legal significance attaching to the capitalisation of the Little Scholar's Schools?

PN128

MR REDFORD: It likes to stand out. I don't think so, your Honour.

PN129

I'll now turn to some submissions which largely go to some of the key principles upon which the UWU's case is based, and I only need to make some brief comments about these, just to draw them out. There are a couple of matters that we just thought were appropriate to emphasise, in relation to covering some of the key principles, in terms of how we construed these new provisions.

PN130

The first is, we submit that the revised explanatory memorandum accompanying the amendment Act is of particular assistance to the Commission in this matter, both because it is the first application of its kind, but also of how explicit it is, in

relation to how the supportive bargaining scheme was intended to work, including, specifically, in relation to the early education sector.

PN131

So, for example, at item 37 of the statement of compatibility with human rights, which form part of the revised explanatory memorandum it is said that:

PN132

> *The supportive 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 education and care.*

PN133

And that statement is made, I count, three times in the document. Again at paragraph 921 of the revised explanatory memorandum and then at paragraph 979 of the revised explanatory memorandum. Our submissions are based, in part, around the idea - around the submission that the Commission should have particular regard to the explanatory memorandum in this matter.

PN134

Secondly, we also rely on what we submit to you is a very well established principle that legislative history is part of the context in which a statutory provision should be construed. We submit that the Commission should have careful regard to the way this scheme has been amended, in relation to the new scheme, also taking into account that the renovation of the statute that occurred, by way of the amendment Act was, according to the explanatory memorandum, specifically intended to make it easier to access multiemployer bargaining, through the supported scheme, than it was, in relation to the low paid scheme. That's at paragraph 922 of the explanatory memorandum.

PN135

In particular we submit to you that the removal of several considerations is particularly relevant to the way in which the new provisions should be construed. Namely, the alteration to section 243(2)(a), which is a removal of the requirement to consider substantial difficulty, bargaining at the enterprise level. Section 243(2)(b), the removal of the history of bargaining consideration from the scheme. Section 243(2)(c), the removal of the consideration of relative bargaining strength. And section 243(3)(a), the removal of the improvements to productivity and service delivery consideration that existed, in relation to the low paid bargaining scheme.

PN136

Indeed, the Full Bench will have noted there is an extremely useful annexure to the AEU's submissions, which goes through, in detail, all of the ways in which the two schemes compare.

PN137

Thirdly, we say, in relation to first principles, undoubtedly the provisions must be construed on their plain meaning but also construed in context, having regard to matters, including the objects of the Act.

PN138

In our reply submissions we say that the object of the Act that gives emphasis to collective bargaining, at the single enterprise level, sits comfortably with the scheme provided for in division 9 of part 2(4) and it's object to address constraints on bargaining, at the single enterprise level, by providing access to multiemployer bargaining.

PN139

We took issue, in our reply, with some submissions which attempted to replace the word 'emphasis' in section 3(f) with 'preference', which seemed to then set up formulations involving almost the restoration of the provisions that have been removed from the scheme around, for example, substantial difficulty bargaining at the enterprise level, or the examination of the history of bargaining, considerations which are now, we say, no longer relevant and are not conditions precedent to access supportive bargaining because a system that emphasises bargaining at the single enterprise level can also be one that, in a particular case, prefers bargaining at a multi-enterprise level, because it's considered more appropriate.

PN140

We would submit to you that that is demonstrated, in particular, by the operation of provisions, such as section 172(7) and, indeed, section 172(5), both of which provide that when a supported bargaining authorisation, or a single interest bargaining authorisation, as the case may be made, that the making of an agreement of a kind other than a multi-enterprise agreement is not permitted, that it is, in fact, preferred, indeed, mandated, because, in those circumstances, those authorisations have been given because applications for those authorisations have satisfied the Commission that it's appropriate for that to be the case. In that system the emphasis on single enterprise bargaining still exists, notwithstanding that in those circumstances multiemployer bargaining can be preferred.

PN141

With those principles in mind, I'll turn to what appears to be the key consideration for the Commission, in relation to this application and supportive bargaining applications in general, and that is the appropriateness consideration, whether it is appropriate for the group of employers and their employees to bargain together.

PN142

In relation to this, by way of principle, we have submitted and we do submit that this is a consideration of broad compass. We submit that there will be many circumstances in which it is appropriate for a group of employers to bargain together and that those circumstances are not confined and they're not narrow. We submit this s plain, from the way section 243(1)(b) is set out. That is, that the provision requires the Commission to have specific regard to certain matters: the prevailing pay and conditions in the industry or sector, the common interests, the number of bargaining representatives, in relation to the manageability of the process and those specified considerations are themselves cased in broad terms, they're broad considerations on their plain meaning.

PN143

For example, the concept of common interests is exemplified, but not in an exhaustive way. But the examples that are provided are, themselves, quite broad

concepts. For example, the nature of the enterprises of the employers is, itself, a broad concept. Then, in addition, the appropriateness consideration involves the Commission being entitled to give consideration to any other matter it considers appropriate.

PN144

So we say that any submission that would have the Commission cast these terms narrowly or any submission that they are intended only to apply to a narrow set of circumstances, we take issue with that submission. We think the Commission need not and should not find that the concept of appropriateness is a narrow one.

PN145

We also say, in our reply, that broadness, in terms of construing the conditions of entry into the scheme, should not be confused with a speculative exercise. So, for example, in our submission, some kind of prediction over what would happen if a supportive bargaining agreement was made, some sort of prediction of what would happen to certain sectors of the economy, if that happened, or its impact on customers, or its impact on members of the community cannot be, we say, part of the consideration, at the point of which an application for a supportive bargaining authorisation is made, because that would involve a speculative exercise, in relation to an agreement which may or may not be struck, in the supportive bargaining process and what that agreement would provide for and then its potential implications over this or that group.

PN146

Nor, we say, can the possibility that a supportive bargaining agreement, if one was made, could be varied to include other employees, nor can that be taken into account, we submit. All of the potential effect of the variation of a supportive bargaining agreement, if one was made, over employers who are the subject of a variation application that was granted by the Commission, the idea that the effect on those employers could form part of the Commission's considerations, at the point of which an authorisation is being sought, we submit that that can't be the case.

PN147

Arguments about the, or submissions about the appropriateness of a variation to include an employer in a supportive bargaining agreement should be made at the time the (indistinct) is being sought, we submit.

PN148

JUSTICE HATCHER: Mr Redford, wouldn't that set part of the context on which we decide - that is, that's the scheme of the Act? That is, to use an IR term, whether or not the process can be gamed, you know, to make an agreement with a small group of unrepresented sectors of an industry and then, effectively, seek to establish a standard and rope in other employers, to use another old IR term.

PN149

I don't think there's any suggestion that's what's being done here, but just as a point of construction, why wouldn't the Commission at least have regard to the fact that that's the scheme of the Act and it could be used in that way?

PN150

MR REDFORD: Your Honour, I find it very hard to imagine the circumstances in which that would be possible for the Commission to arrive at any sense of a probative finding, in relation to that sort of gaming concept, at the point of the authorisation being sought. Your Honour, there might also need to be evidence that there was a conscious attempt to do so because otherwise the Commission would have to engage in an extraordinary level of speculation as to how the parties might go about constructing the agreement and then how and who they might seek to, as you say, rope into the process. Then, importantly, how that then bears on the appropriateness consideration when what the Commission's task is, is to look at those employers who are seeking, or look at the employers who are being sought to be covered by the authorisation and determine whether it's appropriate for them to bargain together.

PN151

So I don't go as far as to answer you question no, by saying it's impossible but, perhaps, I don't want to be flippant about my response, my response is, anything's possible. And that that's where that consideration might fall.

PN152

JUSTICE HATCHER: Thank you.

PN153

MR REDFORD: I would turn then, your Honour, to a couple of points about the first part of the appropriateness consideration, which is the issue around the prevailing pay and conditions. I will make submissions to you about this matter, separate to the issue about low pay, which I'll come to. The prevailing pay and conditions factor raises the question around how the examination of the prevailing pay and conditions in an industry or sector might conceivably make it appropriate for a group of employers to bargain together. We say two things about this: (1) that where the prevailing pay and conditions are largely award-based, we say this feature of a sector makes it appropriate for a group of employers to bargain together because it is suggestive of the fact that the employees and the employers in that sector have not had the benefits of bargaining at the single enterprise level, making the idea of multi-employer bargaining with support more appropriate.

PN154

JUSTICE HATCHER: So what connotation do we give to the word, 'prevailed' – that is, what sort of proportion of the workforce might that suggest?

PN155

MR REDFORD: In relation to that question, your Honour, we join with submissions that have been made by most parties – certainly the AEU, the ATCU and I think also the representatives for the group 1 employers, who appear to submit that the meaning that should be attributed to that word, 'prevailing', should be generally current. We submit that this concept, the pay and conditions in an industry or sector that are generally current does not require that pay and conditions are uniform. That construction does allow for some reasonable variation within pay and conditions, as could be expected to occur in a large industry or sector. But our submission is that that term, 'prevailing', means generally current.

PN156

JUSTICE HATCHER: Right, so no doubt you'll come to the facts of the particular application in due course but I'm just interested to understand what you have to say about how that word in the statute would relate to the matters set out in paragraphs 20 through to 23 of the agreed statement of facts.

PN157

MR REDFORD: Yes, your Honour.

PN158

JUSTICE HATCHER: You can just come to that whenever it's convenient.

PN159

MR REDFORD: I'll come to that quickly. I'll make one point in relation to the prevailing conditions consideration and then come to the matter that your Honour has raised. The other point we make is that in this application we submit to you that the award-based nature or the prevalence of the reliance on the award that exists in a sector makes it appropriate for these employers to bargain together but we also say that in relation to this application, it's not necessary for the Commission to determine all of the circumstances in which the prevailing pay and conditions will bear positively on the question of whether it's appropriate for a group of employees to bargain together.

PN160

In other words, there is a submission made by the Australian Chamber of Commerce and Industry at paragraph 217 of its submissions that says:

PN161

> *The prevailing pay and conditions should only favour the appropriateness of the parties bargaining together if it contributes to a need for support to bargain or the imposition of constraints on the ability of employees and employers to bargain at the enterprise level.*

PN162

And I emphasise the use of the word, 'Only'. We submit that it's not necessary for the Commission to find that way in relation to this application and for example, decide or comment that these are the only conditions in which the prevailing pay and conditions will support the appropriateness of supporter bargaining. But we have submitted that in this case, the reliance on the award is one example of how those provisions can work. Turning specifically now to your Honour's question: we submit that the evidence that's before the Commission in this matter shows that the sector of which these employers are part, is one in which the pay and conditions that are generally current are based on the award – are award-based.

PN163

I'll take you through how we say that is the case. Firstly, at paragraph 17 of the statement of agreed facts, it is a fact in evidence in this matter that there is a relatively high level of award-dependency in the ECEC sector. This assertion is reiterated in several of the statements filed by the group 1 employers. All of the statements filed by the group 1 employers say that the employers pay a

combination of award wages and over-award wages. The statement filed by Ms Connelly says at paragraph 5: 'We pay a combination of award wages and bonuses'. The statement of Ms Portino at paragraph 5 says: 'We pay award wages to attract staff'. In addition, the witness statement filed by Ms Pearson for G8 – and I'm just looking for the exhibit list – sorry, your Honour – which is exhibit no.3: this statement at paragraph 17 says: 'G8 employees are covered by the two awards'. Incidentally, this statement also confirms that G8 employ around 10,000 staff. At 19 she says: 'G8 has a relatively high degree of dependence upon the two modern awards to underpin the terms, conditions and pay of team members'. Similar evidence is given by Ms Stephens in her statement, which is exhibit 4 at paragraphs 33, 34 and 46. So that's the first evidentiary matter we say supports the submission we make, that the pay and conditions that are generally current in this sector are award-based.

PN164

Secondly, at paragraph 17 of the statement of agreed facts, we said that the number of employees in the ECEC sector who are covered by enterprise agreements is relatively low. This assertion is also supported by some of the evidence that has been filed. G8, for example – again, exhibit 3, the statement of Ms Pearson, G8 doesn't have any enterprise agreement. None of the group 1 employers have an enterprise agreement. Only five of the community sector employers have an in-term agreement and then as I've taken the Full Bench through, those agreements have very limited application in relation to the operation of those employers insofar as their long day care operations are concerned.

PN165

Another five of the community sector employers have expired agreements. But the Full Bench may recall those agreements in large part are very old. Most of those agreements expired in 2015. Some of these matters are discussed by Ms Stephens in her statement at paragraph 53. That's exhibit 4, paragraph 53, where she discusses the challenges in the sector in relation to making enterprise agreements. She says:

PN166

> *The level of Commonwealth funding dominates decision-making as it concerns terms and conditions for employees. Without certainty of government funding, the reality is that agreements and any improvements to terms and conditions cannot be concluded. The reality of the dominance of Commonwealth funding is common and dominant across all of the group 2/3 employers.*

PN167

The third part of the evidentiary construct around the assertion we make in relation to this matter is at paragraph 16 of the statement of agreed facts, and this is statistical evidence supporting the assertions that I've taken the Full Bench to – at this paragraph of the statement of agreed facts it is said that pay rates for 57.8 of employees in ECEC are based on one of the relevant awards and 20.9 of employees in ECEC are paid between 0.1 and 10 per cent above the award rate of pay – or less than 10 per cent of the award rate of pay. This assertion is reiterated in the statement filed by Ms Nightingale at paragraph 12. That's exhibit 2. Fourthly, at paragraph 17 of the statement of agreed facts, it is said that the

method of setting pay for ECEC occupations and overall work force is award 61.9 per cent and collective agreement 29.7 per cent and this is based on the Australian Bureau of Statistics employee earnings and hours survey.

PN168

And then finally, at paragraph 19 of the statement of agreed facts, it is said that employers in the ECEC sector, who are not covered by an enterprise agreement and whose primary industrial instrument are the CS or the Children Services Award and the Education and Services Teachers Award generally pay their employees at or around the levels set in those awards, which is also borne out by the national workforce census figures that I mentioned before show that 78.7 per cent of employees in the sector are paid either of the award level or less than 10 per cent above the award.

PN169

So we submit on the basis of that evidentiary picture that the Commission can safely conclude that the pay and conditions which are generally current in this sector, are based on the award, not on some other set of bargained standards. I'll turn then to the question of the low rates of pay prevail consideration, which is of course now a subset of the consideration around low rates of pay – around the rates of pay that prevail in the industry or sector. The thrust of our submission in relation to this matter is that low rates of pay prevails. That term, 'Low rates of pay prevails', is not equivalent to the phrase, 'The needs of the low paid', as it's used, for example, in the modern awards objective.

PN170

As a result, the approach to the term, 'The needs of the low paid', which is now well-established, and that is what I describe as the two thirds median measure, that to the extent that that approach is relevant to the term that is used in the supported bargaining scheme, that it cannot operate as a threshold or as a hard barrier in terms of the construction of that term. Essentially what we submit is that in relation to the phrase, 'low rates of pay prevailing', that what the Commission is looking at here is essentially a composite concept, which could involve considerations such as the two-thirds median measure but as we said in our submissions, should also include a consideration as to whether pay is at or around award levels. So a significant portion of a workforce may be paid less than the two thirds median measure but the workforce could also be paid out around award levels and the Commission need not concern itself with whether half the workforce is paid less than two-thirds median or some other proportion of the workforce is paid less than the two-thirds median measure.

PN171

We certainly have consideration to the fact that some of the workforce might be, together with considerations such as whether employees are paid at or around award levels.

PN172

JUSTICE HATCHER: But doesn't the words in brackets in 243(1)(b)(i) effectively pose a question which we have to answer? That is, the requirement to have regard to it suggests that a question we have to answer as part of (i) is whether low rates are paid (indistinct) the industry or sector and that would have a

'Yes' or 'No' answer. Now, I know it doesn't mean that the application fails but don't we have to address that question?

PN173

MR REDFORD: Yes, I'll accept that, your Honour. Yes.

PN174

JUSTICE HATCHER: And that requires some assessment of what is meant in the statute by, 'Low rates of pay'.

PN175

MR REDFORD: Yes, your Honour. Yes.

PN176

JUSTICE HATCHER: So - but are you suggesting that the concept of low rates of pay in this section should have a different meaning from low paid in the context of the Modern Awards objective and the Minimum Rates objective?

PN177

MR REDFORD: I am, your Honour. Yes. Yes. I am suggesting that it's a term that has a broader meaning, that in relation to the needs of the low paid, the Commission needs to give consideration to who the low paid are.

PN178

JUSTICE HATCHER: Yes.

PN179

MR REDFORD: So the Commission needs to approach that question more from the perspective that the two-thirds median measure operates as a delineation between a group of workers and another group of workers and what we're suggesting here is that it's possible for the Commission to make a determination that while rates of pay prevail in an industry or sector without making such a delineation based on the two-thirds median measure - - -

PN180

JUSTICE HATCHER: Well, so how else might we do it? I mean, the mere fact that someone's paid an award rate does not mean they're low paid because in some awards, rates of pay are, you know, obviously not low and they're quite high, particularly when it comes to professionally qualified people.

PN181

MR REDFORD: Yes.

PN182

JUSTICE HATCHER: This might be apposite to the teachers aspect of this matter.

PN183

MR REDFORD: Yes. Yes, I accept that, your Honour. But if the approach was to look at an award and say, 'Well, only those rates of pay in the award that fall below the two-thirds median measure are low paid', that would be where we

would say the Commission need not operate - I withdraw that. That use the measure as that kind of threshold.

PN184

We don't think that's what's envisioned by the statute and it may well be that employees who are paid slightly above the two-thirds median measure but at the award level, may well still be considered to be part of a group that form part of the low rates of pay prevail concept.

PN185

JUSTICE HATCHER: In any event, if you turn to the statement of agreed facts, leaving aside the concept of what constitutes a child carer for the purpose of statistics, if both on the EEH measure and the COE measure, median weekly earnings are below the two-thirds threshold then it must follow that the majority of child carers are low paid.

PN186

MR REDFORD: Indeed, your Honour. That would be our submission and to provide even further comfort, a very significant portion of those employees paid at the award certificate III level, which is a level 3.1 level in the Children Services Award, are paid a rate of pay which falls below the measure as well.

PN187

And then in addition, I've made submissions to the Commission about how the evidence shows that the industry is highly award dependent. So a significant portion of the industry is paid out at around award levels as well as those measures.

PN188

JUSTICE HATCHER: Do you know if that expression in the data would include teachers or not?

PN189

MR REDFORD: I think, your Honour, and I might need to double-check this to be sure, but I think it would not. I think there's another ABS classification that covers teachers. I'll check that, your Honour, and if I've got that wrong, I'll let you know.

PN190

I'll turn now to the next consideration that forms part of the appropriateness concept and that's the common interest. I'm not going to make any submissions to you about the principles around common interest outside of those that we addressed in our submissions, save to say this.

PN191

We would submit to you that whilst the common interest is clearly a broad term, there are examples provided in the Act but it's a non-exhaustive list of examples. Where an applicant comes to the Commission and the employers who are concerned in its application have several of the common interests that are on the list of examples that are provided in the Act, that's compelling and we say that that is the case in relation to this application.

PN192

Firstly, these employers are undoubtedly substantially funded directly by the Commonwealth and this is supported by the evidence and it's an agreed fact. It's at paragraph 34 of the statement of agreed facts and there is an explanation in the statement of agreed facts about the childcare subsidy which is what the funding arrangement is called.

PN193

Secondly, we've made submissions that in addition to the examples provided for in the supported bargaining scheme, the Commission can also and should also have regard to the examples of what a common interest is in - that are provided for in the single interest scheme.

PN194

And one of those examples is a common regulatory regime and, in our submission, the evidence is very clear that these employers who are specified in this application most certainly have a common regulatory regime and the nature of that regime is outlined at paragraphs 24 to 33 of the statement of agreed facts.

PN195

It's called the National Quality Framework and that evidence in the statement of agreed facts is bolstered by the various witness statements that have been filed where, in particular, employers who are subject to this application explain the way in which they are subject to that regulatory regime.

PN196

Thirdly, there is commonality in the nature of these employers' enterprises. We contend that it's uncontroversial but the meaning of the word, 'Nature', can encompass many of a group of employers' characteristics and that a broad approach should be taken in relation to that term.

PN197

So characteristics such as operations, service and care provision, employee functions and duties are, just to name a few, are matters that can form part of the nature of an employer's enterprise. In this matter, we divide the commonalities in relation to the nature of the employers' enterprises into two categories.

PN198

So firstly, we say there is commonality in the nature of these employers' enterprises because the common regulatory regime requires them to operate in such a similar manner and we set that out in our outline of submissions at paragraph 51 and we mention there some aspects of that commonality of nature such as the ratio requires that the employee ration requirements that the employers are required to meet.

PN199

That in turn, affects staffing numbers, the ages and the number of children, the hours and days of operation, the way the services are assessed and rated for compliance, the mandate curriculum, the qualifications of staff that are required, regulation around fees.

PN200

So all of these matters create a structural commonality in relation to the nature of the enterprises of the employers and then secondly, in relation to that structural similarity, there are a range of other commonalities in relation to the nature of the employer's enterprises such as the fact they operate in the same sector, they provide the same services, they're covered by the same awards, their employees essentially perform the same work.

PN201

We outline that at paragraph 52 of our outline of submissions.

PN202

VICE PRESIDENT ASBURY: Sorry to interrupt your train of thought, but can I just take you back to what you said at the outset about long day care and standalone kindergartens which seem to be excluded from the application. Other than when they operate, is there a distinction between the standalone kindergartens and long day care?

PN203

MR REDFORD: Yes, your Honour. The fundamental distinction is in relation to the funding arrangements and so in relation to kindergartens, a substantial portion of the funding is through State Government, not Commonwealth Government.

PN204

JUSTICE HATCHER: Just going back to the concept of common interests in (b)(ii), this may sound a bit silly, but does the use of the plural suggest that one common interest isn't enough?

PN205

MR REDFORD: I think, your Honour, there are going to be others who might well engage in that question.

PN206

JUSTICE HATCHER: Do you have anyone specific I should ask?

PN207

MR REDFORD: No. Can I raise the bat and let that one go through the keeper, your Honour.

PN208

JUSTICE HATCHER: All right. Well played.

PN209

MR REDFORD: I'll just turn briefly to a submission about the fact that the employer's concerned that this application had other common interests and again, there are various submissions about this and others will make those submissions. It's collectively said amongst the parties that there are a range of other common interests that these employers have that make it appropriate that they bargain together.

PN210

We've submitted that there are two in particular that I'll just briefly mention. One is that we've submitted that these employers have a common interest because they want to bargain together and I thought I should explain that.

PN211

So it might be said that the views of the parties in relation to a supportive bargaining application are a matter that should be properly considered in relation to the other matters consideration, the section 243(1)(b)(iv) consideration and there's a suggestion in the revised explanatory memorandum at paragraph 984 that that is the case, that the views of the parties may be one of those other matters the Commission may consider and I will come back to that.

PN212

But we do submit that where a group of employers 'view is that they want to bargain together, that is itself a common interest especially when they are substantially reliant on a common funding source which may be government funded or it may be some other common funding source and what they want to do is bargain together to better navigate their interaction with that funding source as a group.

PN213

We submit to you that that is in itself a common interest and a common interest amongst the employers who are subject to this application. In relation to that matter about the views of the parties being relevant as are other matters factor we do say that the views of the respondent employer who is opposed to being included within a supported bargaining authorisation is going to be of uncertain assistance to the Commission.

PN214

I am not suggesting that it might not be taken into account under the other matters factor, but undoubtedly the provisions envisage a situation in which an employer will be included within a supported bargaining application who does not want to be included within that application. But if it is appropriate for that employer to be part of the group employers in respect of whom it is appropriate that they bargain together based on the factors in the Act then I would suggest to you that the views of the employer who says it doesn't want to be included is unlikely to carry much weight.

PN215

In relation to those other matters that the Commission might consider as to whether or not it's appropriate for a group of employers to bargain together, again there are various submissions made on this matter that I will leave other parties to make. The matters that the UWU specifically raised in support of our submission that it's appropriate for these employers to bargain together are that this sector does bear - so this is the first one - this sector does bear several of the specific characteristics which have been observed to have a negative effect over parties ability to bargain effectively at a single enterprise level.

PN216

We want to be careful about this submission. We don't submit that it is a condition precedent for the employees of a group of employers who are the

subject of a supported bargaining application to have to bear the hallmarks of a group of employees who had those characteristics, those characteristics suggestive of a difficulty bargaining at the single enterprise level. We don't suggest that's a condition precedent, but where they do exist, and we say they do exist in this matter, then that is a relevant factor, and we mention some of those characteristics at paragraph 59 of our outline.

PN217

The one I wanted to draw out was the predominance of small enterprises in this sector. This is a sector with a predominance of small enterprises. The statement of agreed facts confirms that 79 per cent of the sector are small providers; 79 per cent of the sector are small providers. So that's a provider with only one early education and care service, and would be a centre employing somewhere between 15 and 20 staff. So 79 per cent of the employers in this sector - I'm making this assertion to you from the Bar table, but I doubt that there will be any objection to it. There may be, but I doubt it. But 79 per cent of the employers in this sector employ less than 20 employees. And the predominance of small business has been a factor recognised as being an impediment to bargaining at the single enterprise level, and I would suggest that's logical and stands to reason, and it's a characteristic that is present in relation to this application.

PN218

I only have one other matter to go to, your Honour, other than a brief conclusion, and that is the matter at section 243(1)(b)(iii), which is the question about the bargaining representatives and whether the number of those bargaining representatives is consistent with a management process. This is again one of those matters that other parties had had more to say about than the United Workers' Union, and that will remain the case in relation to the submission I want to make to you.

PN219

I don't want to say much about it, because in our respectful submission there is simply no question in relation to this matter that that requirement is met. The number of bargaining representatives is consistent with a manageable bargaining process in relation to this matter. The number of bargaining representatives in this matter is clearly eight, and I say that because it is in evidence that the employers have provided authorisations to various bargaining representatives to be their bargaining representative. Those authorisations are in evidence.

PN220

And so what we have is Mr Mondo and Mr Ward bargaining representatives for that group 1 group of employers, and as I understand it Mr Mondo and Mr Ward are acting as a team. And then we also have the groups 2 and 3 employers having as their bargaining representative the SILA organisation or the CCC organisation. Both of those organisations we understand it are acting as a team and they have the assistance of Ms Stephens. So taking that into account what we have in effect here is a bargaining process with a group of participants that number six, and in my submission that is clearly a number consistent with a manageable process, and it's a number of bargaining representatives in respect of which there have been many agreements made under the Act.

PN221

In conclusion, your Honour, we submit that it's appropriate for these employers and their employees to bargain together, taking into account that this is a sector which has not generally been able to access the benefits of collective bargaining at the single employer's level, and thus its rates of pay and conditions are largely award-based and are low. It is also appropriate taking into account they have common interests, including several of those specifically set out in the legislation. There are also several other factors weighing in favour of appropriateness, particularly that they wish to bargain together, but also that their particular circumstances are such that they will benefit from the assistance the Commission can provide through supported bargaining.

PN222

The number of bargaining representatives will be consistent with the management process, and the employees specified to be covered and their employers are not excluded from the operation of the scheme, and so it's on this basis that the UWU seeks the authorisation sought by the application.

PN223

JUSTICE HATCHER: Thank you. Mr Gibian, I think you're next.

PN224

MR GIBIAN: Yes. Thank you. As the Commission knows - - -

PN225

JUSTICE HATCHER: Can we address all the hard questions to you?

PN226

MR GIBIAN: No doubt. As the Commission knows this is a significant proceeding involving the first application under the new supported bargaining provisions. It involves 64 employers in the early childhood and education care sector covering what has been described as the long day care operations and employees covered by the Children Services Award or the Education Services Teachers Award or otherwise in the long day care setting.

PN227

Can I address just at the outset the questions that were raised in relation to the exclusions of various, or employees covered by various named existing enterprise agreements, and those that are I think correctly named in whatever other deficiencies it may still have, the draft authorisation that was handed up, correctly named on the second last and last pages of the draft authorisation. I think four of them are ones to which my client is party, those numbered 2, 3, 4 and 5.

PN228

There is perhaps two things I needed to say about that. Hopefully we will be corrected if there's any further detail matters that need to be dealt with. Your Honour the president asked a question about the merit basis for those employees not being included within the supported bargaining authorisation that is sought. In short it is simply that there are existing arrangements which have been negotiated either at a single enterprise level or at a multi enterprise level which are appropriate for those employees as between the industrial organisation and the

employer concerned. Some of those employers have other employees that are not covered by those agreements that are sought to be part of the supported bargaining authorisation.

PN229

There is some evidence in Ms Nightingale's statement at paragraphs 31 and 32 in relation to those arrangements and to the effect that they have been beneficial processes which have produced good outcomes for those employees and should be continued to be dealt with under those arrangements.

PN230

JUSTICE HATCHER: So the test - this raises a slightly broader question about the construction of 243(1)(b).

PN231

MR GIBIAN: Yes. I was going to say that. The second thing I was going to say is it's not a matter, to be candid, I reflected upon or is referred to in the submissions, but there may be a question as to whether the Commission could in a sense expand the employers and employees that are sought to be subject to the authorisation because of the words in section 243(1)(b), the introductory words, which refer to the words in brackets which indicate that the Commission must be satisfied that it is appropriate for the employers and employees, which may be some or all of the employer and employees specified in the application.

PN232

So there does seem to be allowance for the Commission to specify a subset, but not to specify employers or employees who are not subject of the application. That is also said, I perhaps don't have to go to it, but that's also said at paragraph 983 of the revised explanatory memorandum, which - if I could just have a moment - it's the second sentence of that paragraph:

PN233

> *The Fair Work Commission would not be required to make the authorisation in relation to all of the employers and employees specified in the application, but would be able to specify just that subset of employers and employees that meet the criteria.*

PN234

Perhaps it doesn't reflect directly on the question, but implied at least it seems to suggest is a subset only to this within the description.

PN235

JUSTICE HATCHER: But presumably if we thought appropriateness required some expanded we could simply invite an amendment to the application and deal with it in that application.

PN236

MR GIBIAN: I don't think I could say that would be outside of the Commission's procedural powers. Perhaps related to that - Deputy President Hampton, you had a question about the relevance, if any, of the potential future of roping in, if that's

the correct expression, of employers to either the authorisation or I suppose any ultimate agreement that is made.

PN237

In our submission it's difficult to see how that would be relevant at the outset of deciding whether it's appropriate to make the authorisation in the first place, because as Mr Redford said, and it's been said in the written submissions, such an implication would have its own tests to pass at the time that it came to be considered by the Commission under the relevant provisions.

PN238

I wouldn't rule out the possibility that there may be a case, and no one suggested it's the case here, but if it were thought that the employers and employees who had been selected were in some way contrived or artificial or for some ulterior purpose that that would touch upon the appropriateness question, but not because of the potential for future roping in, in itself.

PN239

DEPUTY PRESIDENT HAMPTON: I think that was the way the question was pitched.

PN240

MR GIBIAN: Yes. And exactly how that would look would depend upon the case. That was all I was going to say about the exclusions of the particular enterprise agreements unless there's anything further that would assist.

PN241

Obviously enough we have got some written submissions. What I propose to say orally was to touch upon matters in three parts. Firstly just some brief matters of clarification so far as the issues that are dealt with in the agreed statement of facts and perhaps a short explanation of why we have referred to some additional matters in Ms Nightingale's witness statement.

PN242

Secondly, I was just going to go briefly to the explanatory materials, just by way of making some – or reinforcing some submissions that we have made as to the general approach that will be taken to these new provisions. And thirdly, go to the particular considerations under section 243(1)(b). There doesn't seem to be any issue either of principle or in application of the particular case to 243(1)(a) or (c), which seem to be reasonably straightforward, factual matters. Both generally and in this case.

PN243

Firstly then, as to the matters of background, could I ask the Bench to turn to the agreed statement of facts - or the statement of agreed facts. I just wanted to clarify some matters. Firstly, at paragraph 10, on the second page, the members of the Bench will have seen that there's a description of what's described as the early childhood education and care sector, as has been explored, the employers and employees that are sought to be covered by the authorisation, subject of this application, are part rather than all of that sector so described. Being long day care – in the long day care setting.

PN244

Notwithstanding that parts of the agreed statement of facts are obviously addressed to the sector more generally, I just wanted to reiterate why that was both appropriate and oughtn't concern the Commission.

PN245

The first is, as has been observed in the written submissions, that the prevailing pay and conditions factor in subsection (b)(i) – 243(1)(b)(i) – refers to the pay and conditions within the relevant industry or sector, not limited to the particular employer, subject of the application.

PN246

Secondly, and in any event, much of the material will – I'm sorry, I'll go back a step – there's no suggestion by any party that the information recorded in the agreed statement of facts and the documents to which reference is made therein, would be markedly different if the long day care part of the sector was excised. Can I just make that clear. Annexure 1 to the statement of agreed facts is the 2021 Early Childhood Education Care National Workforce census.

PN247

I have little page numbers in the top right-hand corner, which I'd understood to be the pages of the annexures. If the Bench would go to page 29. There's a heading, 'Two' – internally it's page 5 of the document. There's a heading, 'Point 2, ECEC Workforce' and then a '2.1 ECEC Workforce Overview', a reference in the second paragraph to the number of staff in the sector. And in the third paragraph, a reference to the fact that centre-based day care services employed over two - - -

PN248

JUSTICE HATCHER: Sorry, Mr Gibian, so - - -

PN249

MR GIBIAN: I'm sorry. I've got a page – little '29' in the top, or little '5' in the bottom.

PN250

JUSTICE HATCHER: Top right, okay.

PN251

MR GIBIAN: Top right, yes. Or a little '5' in the bottom right.

PN252

JUSTICE HATCHER: Yes, got it. Thank you.

PN253

MR GIBIAN: Yes, and then the third paragraph under that heading on the page indicates centre-based day care services employed over two-thirds of the ECEC workforce, 67.7 per cent. So we're talking – in the day care setting, at least – of a significant majority of the sector as a whole. Obviously, we're dealing with a subset of employers within that setting in this application, but it puts those figures in perspective.

PN254

Secondly, we've referred, in our submissions, to paragraph 12 of the agreed statement of facts, which refers to the proportion of the workforce within the sector who are women. That's also elaborated upon in annexure 1 to the statement of agreed facts. If the Bench would go on to page 33. There, table 4 contains information as to the age, gender and indigenous state of workforce by service type. The first column is 'CBDC', which is centre-based day care. And if you go down to the gender breakdown within the centre-based care, which is about two-thirds of the way down the page, you'll see the figure is, in fact, 95.9, so far as centre-based care is concerned.

PN255

I just note in passing that the matter referred to at paragraph 13 of the statement of agreed facts, namely, the proportion of small operators, is also supported by the evidence of the employers in this matter. Particularly, Ms Stevens at 22 and Mr Mondo, at paragraph 10 of their respective statements.

PN256

JUSTICE HATCHER: So the statistic that the sector's female dominated, where does that bear upon the statutory tests?

PN257

MR GIBIAN: I'm sorry?

PN258

JUSTICE HATCHER: The statistic that the sector is female dominated, where does that bear upon the statutory test?

PN259

MR GIBIAN: We've referred to it as a matter that is otherwise – otherwise the Commission would consider appropriate to take into account, under (iv). And it's a matter which features quite heavily in the extrinsic material as well as being relevant as a rationale for endeavouring to liberalise access to a supported bargain stream.

PN260

The Bench was taken to paragraph 16 and 17 of the statement of agreed facts, as demonstrating the degree of award reliance or the close alignment of wages and conditions within the sector, to award rates and conditions. Again, by reference to annexure 1 to the statement of agreed facts, can I just provide some further clarity in that respect. At page 37, in the top right, there's a heading, 'Wages'. Page 13 of the actual document, in its internal numbering. The members of the Bench will see at the top of the page, there's a heading, '2.2.1 Wages'. And it's indicated that table 5 – or the report records that as indicated in table 5, more than half of all paid staff were paid the award rate for their position. And one in five were paid up to 10 per cent above the award. Those are the figures that were reflected in the statement of agreed facts.

PN261

Again, within table 5, there's a breakdown by service type. And the centre-based day care, the proportion of the award is much the same – 57.1 in the first

column. The proportion of up to 10 per cent is somewhat higher – 25 per cent. So we're sort of above 82 per cent or something either at the award rate or within 10 per cent of the award rate. And I was just also going to note that there's a significant 'don't know' element in it as well. So if you take that out, the proportion is actually significantly higher. It's virtually everyone. The proportion above 10 per cent is something like eight per cent at most.

PN262

JUSTICE HATCHER: So this expression, 'contact staff', that's anybody who deals with children?

PN263

MR GIBIAN: That's as I would understand it, yes.

PN264

JUSTICE HATCHER: So that would include teachers?

PN265

MR GIBIAN: That's my understanding, yes. I'll clarify that if I've got that wrong. But it was certainly my assumption.

PN266

So that just reinforces the point that it's actually even somewhat greater than is reflected on the text of the agreed statement of facts.

PN267

Finally, so far as the statement of agreed facts is concerned, I wasn't going to go to the detail of it. It's dealt with in the written submissions, but so far as the rates of pay are concerned, Your Honour, The President, asked some questions about paragraphs 20 to 23. I will have to come back to you about the reference to childcare and the ABS statistics. We'll look at that over lunch.

PN268

The point, as Mr Redford said, that is sought to be drawn from that – from those paragraphs – is that a majority of the employees would be earning below the two-thirds medium earnings threshold. And I think as Mr Ward's submissions also point out, and Mr Redford did orally, the most prevalent classification is that of level 3.1, the rate of which is also below that threshold, to the extent it's relevant. I'm going to say something briefly about that in due course.

PN269

There is then, from paragraph 24 onwards, some relatively detailed information relevant to regulatory standards. The only matter I wish to emphasise – I wasn't going to go to the detail of that – the only matter that I wish to emphasise about that is that the provisions under the – or the requirements under the National Quality Framework are not only perhaps categorised as a common regulatory environment, but they are matters which are – shape and have a very immediate impact upon the nature of the operations of the employer and the nature of the work performed by the employee. So it's not merely a regulatory – a regime that the employer has to abide by, which might be present in other industries, and have perhaps a less direct effect upon the nature of the operations and the nature of the

work. This is a regulatory regime which shapes and fundamentally affects those matters.

PN270

And finally, there's a summary of the funding arrangements from paragraphs 34 onwards, and the critical role of Commonwealth funding from that respect. Which I think is adequately described in the submissions.

PN271

Can I then just briefly emphasise why we've included some additional matters within Ms Nightingale's statement. It was marked as exhibit 2 on the list, as I understand it. If I could go to that statement. The first two matters to which reference is made, really, from paragraph 7 onwards, is firstly, to make some observations which, I'm sure among those who are present here, would be uncontroversial as to the significance and value of the early childhood education and care sector. In contributing both to the education and the development of children and contributing economically to allowing parents - particularly women - to participate in the workforce.

PN272

And from paragraph 11 onwards, the serious and well documented difficulties with attraction and retention, which are experienced by that sector. Both of those matters are relevant, in our submission, to the appropriateness question. Because they demonstrate that existing enterprise bargaining arrangements have not been successful in addressing those challenges. And that part of what is hoped to be able to be achieved by supported bargaining authorisation, is improvements in pay and conditions which would help to address attraction and retention difficulties.

PN273

The extent to which and whether that is achievable will depend upon the course of bargaining, but it is certainly part of the rationale for the new provisions that supported bargaining may be an appropriate method of endeavouring to address matters, or to concerns of that nature. Particularly where they address a critical sector such as early childhood care and education.

PN274

JUSTICE HATCHER: Well, presumably there's also an issue of supply of properly qualified staff, regardless of how much you might pay them. That is, if there's no one in the training pipeline, doesn't matter how much you offer.

PN275

MR GIBIAN: I certainly wouldn't say anything which would understate the challenges that there are in that area. But you may have seen, Your Honour, from Ms Nightingale's statement, the information as to retention as well as attraction. Particularly at paragraphs 13 and 14 and the documents that are referred to therein, that is that it's not merely an attraction problem but it is a retention problem and certainly that is a matter which - attraction may take a little bit longer to be addressed, no doubt, to the extent that I'm sure (indistinct) qualified staff but certainly there's hope that difficulties with retention could be improved through improved pay and conditions.

PN276

JUSTICE HATCHER: Certainly there is no indication in the material that the work value adjustments to teachers' salaries have achieved anything in terms of attraction retention, is there?

PN277

MR GIBIAN: It may be that we're not there to - that is we haven't had sufficient time in order to assess whether that's the case. If my recollection, at least, of the timing of those matters is accurate, I think the studies that are referred to in Ms Nightingale's statement, at least, would not allow an assessment as to the extent the Commission is assisted or not.

PN278

The next matter I was just going to clarify, within Ms Nightingale's statement, is from paragraph 27 to 31 or 32 perhaps. Ms Nightingale gives some information in relation to bargaining, both a comparison of teachers in the early childhood education care sector and elsewhere, particularly in schools, and the experience of bargaining collectively for one of the excluded agreements, which I understand is generally referred to be (indistinct) Vectia(?).

PN279

That is relevant material for a couple of reasons. Firstly, as I'll come to, in terms of prevailing rates of pay, so far as teachers is concerned, and their relevance to an appropriateness assessment and, indeed, to a low rates assessment, it is relevant to have regard to the evidence that the rates for teachers in this sector are inferior, generally speaking, to those of teachers, similarly qualified, in other sectors.

PN280

The second is that Ms Nightingale's evidence in relation to what has been able to be achieved, particularly through the Vectia agreement, negotiated on a multiemployers basis, can give some comfort to the Commission, not that there's any certainties to the outcome of bargaining, but there is significant potential for a multiemployer approach, particularly supported by the Commission in achieving some benefits for employers and employees, subject of the present application. That has been the experience of my client, in the sector itself.

PN281

Finally, at paragraphs 33 to 35, Ms Nightingale provides some information or supplements the material in the agreed statements of facts, in relation to the feminised nature of the workforce and the implications of that matter. I was going to return and say something about that at the conclusion of my submissions.

PN282

Can I turn then to the second matter that I said I would address, and that is, I wanted to just take the Full Bench, briefly, to some of the extrinsic material, for the purposes of reinforcing some general observations that we've made, in relation to the approach that the Commission would adopt in assessing an application under the new provisions.

PN283

I think we provided an electronic bundle, I'm not sure how it's easiest accessed, but there were a number of cases and some authorities and what are described as other authorities, in fact, extrinsic materials. The first of those is the minister's second reading speech. It commences - I'm not sure it's tabbed, but it's the first document under the 'Other authorities' heading. Within the electronic document it commences at page 163. I think you should be able to click on it, I'm told, on the introductory page.

PN284

There are two parts of it that are referred to in the written submissions. The fist, they are at page 2180 and 2181. Firstly, at page 2180 a passage referred to in a number of the submissions. About at point 3 on the page, the paragraph immediately appearing above the bolded heading, 'A stronger role for the Fair Work Commission', the minister said that:

PN285

Bargaining at enterprise levels delivers strong productivity benefits and is intended to remain the primary and preferred type of agreement making.

PN286

He then went on, however, to say that:

PN287

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 in the multiemployer level. This is intended deliver more equitable and inclusive wage outcomes and will benefit more Australians.

PN288

Then, over the page, on page 2181, at about point 4 on the page, there's a bolded heading, 'Single interest' - sorry, at about point 2 on the page, there's a bolded heading, 'Supported bargaining stream'. I note what the minister said, in the first two paragraphs, particularly under that heading. Namely, that:

PN289

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 an enterprise level.

PN290

And then:

PN291

The unnecessary hurdles to entry in the current low paid stream will be replaced by a broad discretion in 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.

PN292

Now, similar observations are made in the revised explanatory memorandum, particularly at paragraphs, I perhaps don't need to read them, but paragraphs 37 to 39, 109 to 110 and 922, all of which emphasising the intention of enabling easier access to the supported bargaining stream and to address limited take up of the pre-existing low paid stream.

PN293

JUSTICE HATCHER: What page of the bundle is this on?

PN294

MR GIBIAN: Sorry. The extracts that we've made from the explanatory memorandum commence at page 171. Paragraphs 37 and 38 appear on page 172 and the Bench would have seen, particularly at paragraph 37, the reference, in the second sentence, to the supportive bargaining stream being intended to assist those employees and employers who may have difficulty bargaining at a single enterprise level, and examples are given, such as aged care, disability care and early childhood education care, who, it is said, may lack the necessary skills, resources and empower to bargain effectively.

PN295

On page - this is an extract, I emphasise, from the explanatory memorandum, rather than the whole thing. At page - it's paragraph 109 and 110.

PN296

SPEAKER: One-seven-four.

PN297

MR GIBIAN: I'm sorry?

PN298

SPEAKER: Page 174.

PN299

MR GIBIAN: One-seven-four, I'm told.

PN300

The Full Bench will have seen the assertion, in 109 particularly:

PN301

The bill will promote the right to working rights in work by many existing low paid streams to assist people who face barriers in bargaining to negotiate terms and conditions of employment, increasing access to the renamed supportive bargaining stream.

PN302

Again, reference to low paid occupations, government funded industries and female dominated sectors.

PN303

Then, at 110 that:

PN304

Increasing the accessibility of collective bargaining promotes the right to enjoyment of just and favourable conditions of work by enabling employees to leverage collective power of multiemployer bargaining.

PN305

Then the last reference I made is at 176, in paragraph 922.

PN306

There are really two points, or two observations that we've made in the written submissions, arising from that. The fist is, obviously enough, the intention of the new provisions to make easier access to a supportive bargaining stream but also, and as importantly, the manner in which that's sought to be achieved is by conferring a broad discretion upon the Commission, informed only by three quite generally stated considerations and permitting the Commission, in (iv) of section 243(1)(b), to have regard to any other matter it considered appropriate in assessing the appropriateness of the employers and employees bargaining together.

PN307

As has been observed, we annexed, to our first written submissions, a table seeking to identify the differences between the preceding low paid bargaining from provisions and the new supportive bargaining provisions. What that really demonstrates, without going to them discretely, is the desire to strip out what were seen as proscriptive or overly complex requirements to be met in order to obtain such an authorisation and replacing them with a more general discretionary determination by the Commission as to appropriateness, informed, as I say, by a much smaller number of more generally stated considerations and that each of those should not be seen as a barrier to or a matter to be proved or demonstrated, in order to obtain access to an authorisation but, rather, and no more than the matters to be considered by the Commission, in making a broad discretionary judgment on appropriateness. That was really part of what was perceived to be the difficulty with the low paid bargaining stream.

PN308

The second general observation that we've made in the written submissions and which is borne out by the secondary materials, is that the concern about access to the supportive bargaining stream is concerned not merely with the capacity of employers and employees to bargain, in the sense of to collectively bargain to have an enterprise agreement at all, but as to the outcomes of the enterprise and bargaining process, that is, as to whether the bargaining has been effective in allowing agreements to be made which meet the needs of the industrial parties. That's made plain by the repeated references to the desire for the supportive bargaining stream to support improved pay and conditions and fairer outcomes for employers and employees.

PN309

That answers a couple of the, or a number of the submissions which have been advanced by, particularly, AiG and ACCI, that, firstly, the mere fact there have been agreements in the past might be seen as a factor militating against the granting of a supported bargaining authorisation. We don't think that's right in itself. That is, the mere fact that there have been, well, it's a minority in this case, but in any particular application that there have been single enterprise agreements

made, in the past, covering employees, do not, in itself, suggest that it's not appropriate for there to be a supportive bargaining authorisation going forward.

PN310

That might be particularly the case, for example, where the outcome of those agreements has been rates of pay and conditions which vary very minimally from those in the award. That is demonstrating that there hasn't been effective bargaining in – at least perhaps suggesting that there hasn't been effective bargaining in the way in which that is envisaged by the explanatory materials and secondly is that we don't think that the reference to there being an emphasis on enterprise-level bargaining that remains in the objects of the Act, suggests a hierarchy. The new provisions, as the explanatory materials make plain, acknowledge the benefits of enterprise level bargaining but also acknowledge their constraints and the fact that they have or not produced benefits for various employers and employees.

PN311

That's the reason why we have said that the Commission would not approach such an application on the basis that there was some conception of supported bargaining being available in narrow circumstances or exceptional circumstances. Unless there's anything further in relation to those matters of general observation, I was going to turn to the third matter that I said I would address – that is the particular considerations within section 2431B and in turn the prevailing pay and conditions element, the collect common interest element and the manageability component. Firstly, as to the (i), the matter to which the Commission is directed to have regard, is:

PN312

> *The prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector).*

PN313

The initial observations that we've made about that in the written submissions is that the departure from the earlier provisions is that this is not intended to be a low-paid test – the change in wording from, 'low-paid', to, 'supported bargaining authorisations', is conscious and deliberate and reflects the fact that low rates of pay is an aspect of prevailing pay or conditions to which regard may be had but not a requirement for – or even assumption – that it ought be necessary in order for it to be appropriate for authorisation to be made. What the section directs attention to is firstly for the Commission to have regard to the prevailing pay and conditions, whatever they may be and assess the appropriateness of an authorisation or the appropriateness of the employers and employees bargaining together in light of those pay and conditions. There are clearly aspects of the prevailing pay and conditions leaving the level of pay, whether it's low pay or otherwise, which may be supportive of it being appropriate that employers and employees bargain together. The examples we've given have been if there is commonality or a reasonable degree of commonality between the pay and conditions afforded by the employers if the prevailing pay or conditions reflect or depart only minimally from those prescribed in the underlying or relevant modern award are all features that may support a view that it is appropriate for employers

and employees bargain together, leaving aside any consideration of low rates of pay.

PN314

So far as the low rates element is concerned, we agree with the submissions that the UWU has made, namely that it's the change from low-paid to a reference to the considerations including low rates of pay does not necessarily direct attention at an absolute level or that the two thirds of median earnings threshold, which has been used in the minimum wages context, that low rates of pay may be a more versatile – have a more versatile content than that and is not - - -

PN315

JUSTICE HATCHER: It might be rather than using an economy or labour-market-wide measure such as the low-paid threshold, it may be a relative concept directed at the employees to be covered by the authorisation. So for example, to the extent that it covers teachers, teachers aren't low paid in the general sense but you no doubt contend that teachers in the sector are lower paid compared to most other teachers in Australia. Is that the way it's put?

PN316

MR GIBIAN: Yes. I was going to say basically exactly that: namely, that another way in which the rates of pay may be considered low rates of pay, the expression being, 'low rates', is not in an absolute sense compared to everyone else but compared to other employees performing comparable work with comparable qualifications which is the way we put it here with teachers and that would be an element, particularly when one has regard to the rationale for these provisions: that is that supported bargaining authorisation is appropriate or it ought be an available avenue because single enterprise arrangements have not been effective in order to depart from basically basic award standards or to allow bargaining effectively for improvement in pay and conditions. That plainly supports the way in which your Honour put it.

PN317

JUSTICE HATCHER: So on that very issue of teachers' pay, is there something in the agreed statement of facts that specifically addresses that?

PN318

MR GIBIAN: The comparison with other teachers - - -

PN319

JUSTICE HATCHER: Well, teachers more generally. I mean, I think there was some findings about this in the work value case but - - -

PN320

MR GIBIAN: It's dealt with in Ms Nightingale's. It's dealt with in Ms Nightingale's statement, albeit relatively briefly. All right, it is referred to in Ms Nightingale's statement, particularly paragraph 30. As has been pointed out to me, the observations in relation to award reliance that are both the material in the agreed statement of facts and the employers' statements are general – that is applying to teachers as well as to other staff within the sector.

PN321

JUSTICE HATCHER: Sorry – paragraph 30 is about educators.

PN322

MR GIBIAN: I'm sorry.

PN323

JUSTICE HATCHER: Twenty-nine, it's 29.

PN324

MR GIBIAN: Twenty-nine, I'm sorry. On that point, I was just going to identify that there are some observations made in the small number of decisions under the previous low-paid authorisation scheme that – to which we think don't carry over, as it were. But I thought it would – it was appropriate to identify two of them. Within the bundle of authorities that we provided the third case was the Aged-Care Low-Paid Authorisation decision [2011] 207 IR 251. I was just going to note that at paragraph 17 of that decision – I'm sorry, the decision starts at page 61 in the bundle and paragraph 17, which is page 255 of the report, page 65 of the bundle. Paragraph 16 sets out what was then the consideration or the factor, namely whether granting your authorisation would assist low-paid employees who have not had access to collective bargaining. Then in the second sentence, the Full Bench said:

PN325

> *We have no doubt that in the context of the provisions of Division 9 the phrase is intended to be a reference to employees who are paid at or around the award rate of pay and who are paid at the lower award classification levels.*

PN326

At least to the extent that the expression's obviously changed from, 'low-paid', which in common with other parts of the Act suggests an (indistinct) to low rates of pay and as we say, we wouldn't embrace the second part of that as being continuing to be applicable for the reasons that I've discussed with your Honour the President; namely, that we do think some comparative or relative assessment of the rates of pay is permissible under the current or contemplated by the current provision in (i). The other decision to which we've referred in the written submissions is the first on the list, ANMF v IPN, and at paragraph 94, Vice President Watson referred to the need for the concept of low-paid to have an absolute meaning or, sorry, consistent with the word that His Honour used.

PN327

Again, we don't think that that's carried through by the new provision and that it does, as I've said, allow a relative rather than an absolute assessment of whether the rates of pay be considered low. I thought it appropriate to identify that there had been some consideration of that expression in this instance in the previous provisions. I don't know that there is too much that I need to say in relation to the application of that consideration in the present matter. Leaving aside whether the rates are described as low, the commonality of the pay and conditions within the sector and the fact that they, very overwhelmingly, are at or close to award rates, are all supportive of it being appropriate that the employers and employees

bargain together, as is the evidence in relation to the medium ordinary time earnings for employees in the sector.

PN328

So far as teachers are above what would be low paid in a general sense, as your Honour has anticipated our submission is that relatively speaking they are still low rates of pay. But in any event, they attract the award and are relatively common throughout the industry and sector, all of which supports it being appropriate that employer and employees bargain together. Unless there's anything further on the prevailing rates of pay factor, the second factor to be considered in (ii) is whether the employers have clearly identifiable common interests. For the reasons that we've given in the written submissions, both this is only a factor to be taken into account. Again, it's not a matter to be proved or a perquisite to the granting of an authorisation.

PN329

Secondly, the concept of, 'clearly identifiable common interests', should be given a broad rather than any narrow construction, consistent with the overall intention of the provisions to liberalise access to supported bargaining regime. Now, there is some debate in the submissions on the plural/singular issue, which your Honour the President raised. We have responded to that in the written submissions, including by reference to the Acts Interpretation Act provisions, section 23(b), which suggests that the singular includes the plural and the plural includes the singular, at least in the absence of a contra intention. But I'd be minded just to take a step back for a moment and to just contemplate what is meant by, 'common interests', in this context, particularly if you go to subsection (2), which gives the examples of common interests – section 243(2). It indicates that examples of common interests that employers may have include various matters – so it's not exhaustive, but gives some indication: geographical location, nature of enterprise, and terms and conditions of employment and being substantially funded from a similar source.

PN330

Although they are described – those elements are described – in subsection (2) as examples of common interests, perhaps looking at their nature seems more accurate to describe them as objective – or to view them as objective features of the employer's operations, which are likely to give rise to common interests in relation to the bargaining: that is given the nature – if the nature of the enterprise is similar, the employers are likely to have common interests in having rates of pay which are appropriate to the classifications for the - of work which are performed in that type of enterprise or hours of work arrangements which accommodate the needs and operations of that type of enterprise, rather than the nature of the enterprise itself being a common interest, if the distinction is apparent.

PN331

And seen in that way, these are not singular or plural at all. Common interests is the expectation that because of objective features of their operations, employers are likely to have matters which are commonly - or in relation to which they share a priority or give importance to in the context of what is contemplated to be the multi-employer bargaining.

PN332

JUSTICE HATCHER: Well, the way subsection (2) is drafted suggests that each one of (a), (b) and (c) is a common interest.

PN333

MR GIBIAN: I agree that that's the way that it is - that that is - it - the words that are used suggests they are examples of common interests, but I think when one looks at what's intended and the nature of the - those - the matters that are identified, they are, as I say, more properly viewed as objective features of the operations of the employer which are likely to give rise to common interests rather than the limbs of being a common interest, and geographical location may be a similar one in the sense that the commonality of outlook or expectation of employers and employees within a geographical area may produce a common interest rather than itself being a common interest, if you understand the distinction.

PN334

JUSTICE HATCHER: Well, so you could have a Broken Hill town employees' agreement.

PN335

MR GIBIAN: Well, it would be a matter as to what evidence was before the Commission as to why that was appropriate, either because of the commonality of the interest or otherwise, but it would depend upon the employers who are seeking to be - or employees who are sought, I should say, perhaps, to be included within an authorisation of that type.

PN336

I was just going to note that a similar concept is used in section 249 of the Act and, I think - I'm sorry. I've forgotten the number. It's one of the 216 capital numbers. I'll find it again - in the same terms. Two-four-nine is dealing with single interest employer authorisations, and the members of the bench will have seen subsection (3) which provides that the requirement of that subsection are met if, in the delay, the employers have clearly identified what common interests, and then 3A provides that for the purposes of paragraph 3(a), matters that may be relevant in determining whether employers have a common interest include the following, and there's reference to geographical location, regulatory regime and the nature of the enterprises that - to which the agreement will relate and the terms and conditions of employment of those enterprises. Two of those matters, confusingly, are also features of subsection (2) of section 243.

PN337

The only observation I was going to make in relation to those sections is that we don't think they are directed - look, now, some different wording is used in 3A, but we don't think they're intended to encapsulate a different concept, and it would be surprising if they were given that the same language is used in section 249(3)(a), and perhaps 3A more - although different words are used than in subsection (2) of section 243, we don't think one would read into that a different intended meaning. It's an example of simply legislation which has been drafted, and 3A suggests it was added in a later point in the drafting process to really identify the same matter, and it's perhaps more accurately identified in the intent

of the provision in 3A of 249, namely, that it is a matter which it would be relevant in determining whether employers have common interest or common interests.

PN338

JUSTICE HATCHER: Does the requirement for the common interests to be clearly identifiable suggest that they have to be obvious or self-evident?

PN339

MR GIBIAN: I think we've put it in the written submissions as apparent or ascertainable, but - - -

PN340

JUSTICE HATCHER: That would cover identifiable. It's clearly identifiable.

PN341

MR GIBIAN: Well, sufficiently apparent and or ascertainable. I mean, I don't know that there's - look, as I say, we would not wish to read it narrowly that it erects some high test to be met. We think, really, it is, perhaps, more directed at this being - which we've also said in the written submissions - I - look, I'm seeking to identify what objective features of the employer's operations that are apparent or ascertainable that are likely to lead to them having common interests in connection with bargaining rather than asking each employer what they think their interests are at the start of the - or indeed before the bargaining is, in fact, occurred.

PN342

It's about objective features of the operations that suggest they're likely to have common interests. They might, at the outset, not think they have common interests. You know, in this case, it's not that the employers are supporting the application and say they have common interests, but there may be examples of an application where employers say they don't have common interests. That's not meant to be the test.

PN343

The test is to look at objective features of the operations which would suggest common interests are likely, and that's consistent with the examples in subsection (2) of geographical location or nature of enterprise or source of funding, and that's the purpose that we really think is sought to be achieved by the use of the words 'clearly identifiable' rather than just saying whether they have common interests that might suggest that it's an inquiry into what they subjectively think their interests are before the bargaining has even commenced.

PN344

The other - the final observation I was going to make about the plural singular issue was really that - I'm not sure interests or interest is really either plural or singular, that is, it's talking about the - whether you say, 'I have a common interest with you', or, 'I have common interests with you', you're talking about the - what is being discussed is the matters which are of importance or are of significance to that person. They're not necessarily singular or plural, and we certainly don't think you would read it as suggesting that there has to be both a geographical

location and a singular enterprise or both a similar enterprise and a common funding source, for example. One of those, that is, a similar enterprise, would have common interests ordinarily, plural rather than singular, if one understands the difference.

PN345

Here, there are clearly commonality of interests between the employers. For the reasons we've given in the written submissions, there's a similarity as to nature of enterprise, the nature of the work performed, the terms and conditions which are commonly applied so - to the employees in their employment, the common regulatory arrangements which touch upon the title of work and the nature of the operation and the reliance on Commonwealth funding are all apparent sources of common interests in the present case.

PN346

The - I don't really - I didn't really wish to say very much about the consideration in (iii), the manageability consideration, other than to - there's no issue which is raised here about that matter.

PN347

There are a number of bargaining representatives, but no one suggests that there's any reason to believe the bargaining process would not be anything other than manageable. There are only two general observations I was going to make. One is that whilst it requires consideration in a predictive sense of the - whether the likely number of bargaining representatives would lead to the process being other than manageable, it - the consideration doesn't suggest that there is some number that is particularly relevant. One would have to look at the type - the identity and type of the bargaining representatives', perhaps, history of their interactions with one another, if that were relevant.

PN348

JUSTICE HATCHER: Well, it's likely so. I suppose one would have to take into account the possibility that employees might nominate themselves or other persons as bargaining representatives.

PN349

MR GIBIAN: It's obviously predictive in a number of senses. One is it refers to the likely number of bargaining representatives which the Commission may have some information about, but clearly cannot know with any certainty because, as Your Honour says, employers and employees may subsequently change their minds about their representation and nominate themselves.

PN350

JUSTICE HATCHER: Well, with the employer, it's not a case of changing their mind if they're not in the union or they don't want the union to be their default representatives. They - any number of them could nominate themselves or other persons.

PN351

MR GIBIAN: Of course. And it's very difficult to know how the Commission could foresee the extent to which that's likely to happen at the outset. The other

general observation I was going to make is the standard is manageable. It's clearly not perfect, streamlined or entirely efficient. It's manageable, and what is manageable rather than unmanageable is no doubt an impressionistic assessment, but it would take into account the assistance the Commission is able to give as well particularly in the supported bargaining context.

PN352

That is the whole purpose of the supported bargaining is to allow multi-enterprise agreement, but also to provide a role for the Commission in assisting that bargaining process. As I say, there doesn't seem to be an issue raised in relation to the - that would suggest the Commission ought not be satisfied that that is a consideration which favours an appropriateness finding in this case.

PN353

Finally, the other matters to which we've referred in our submissions at least which, in our submission, the Commission would consider it appropriate to take into account included some of the matters I mentioned, the support of the authorisation by the employers and employee organisations that are involved in these proceedings. The importance of the early childhood education and care centre, the attraction and retention difficulties which have been encountered or are being encountered in that section - in that sector.

PN354

The final issue that we've referred to is the feminised nature of the workforce and the potential for there to be gender based - historically gender-based undervaluation of work. Now, I've - the last thing I wanted to say, really, was that in response to that, there's been submissions that there would need to be some probative evidence about that type of issue of a - of some greater volume than there is in order for the gendered nature of the workforce to be considered in this context.

PN355

In that respect, in our submission, that's somewhat - or misunderstands the type of issue which is being assessed in this type of application. The Commission's not obviously enough being asked to undertake some kind of work value assessment or to make any determination as to whether there is a gendered undervaluation of work.

PN356

What the - the functions of these provisions is to provide access to a supported bargaining stream in part with the intention of addressing the paying conditions in certain industries which have - the Parliament has fought, not had access to the benefits of - or obtained benefits from single enterprise bargaining or enterprise-level bargaining in the way that other industries have including with the intention of closing the gender pay gap.

PN357

So all the - the way in which we put it is that this is a highly-feminised workforce. It's undertaking a type of work which the Commission can well understand, and I don't think could be disputed, is the type of work which is as - and has historically been subject of gender-based perceptions as to its value and in

relation to which the evidence otherwise suggests bargaining to date has not resulted in rates of pay or conditions which are, to any significant degree, above minimum award standards. Where that's - - -

PN358

JUSTICE HATCHER: But the problem with the undervaluation contention is if it's an award-dominated industry, that suggests the problem lies in the award, not - now, don't you have to demonstrate that the gender predominance has something to do with an incapacity to bargain?

PN359

MR GIBIAN: What - all we - well, in terms of - perhaps we've used slightly a - adopted an expression which, in its strict terms, we don't mean in the sense that gender-based undervaluation to the extent it's applied to an award requires an assessment of whether the work has been properly valued or whether the value of the (indistinct) of that work in the setting of award rates has been affected by gender-based assumptions as to the nature and skills involved in that work.

PN360

What we're looking at here is the - opening the window to a form of multi-enterprise bargaining, the object of which is intended to allow groups which have not been able to obtain benefits through enterprise level bargaining as other sectors have historically because of the nature of those sectors. In part, frequently because they are female dominated industries and various aspects of the nature of those industries have prevented employees from benefiting from enterprise bargaining in the same way as other sectors.

PN361

They include perceptions, no doubt, as to the value and nature of the work. They include the nature of those industries as being heavily funded. Heavily relied upon, Commonwealth or State Government funding. But have inhibited outcomes in bargaining in those sectors.

PN362

JUSTICE HATCHER: And even now the breadth of the object in Section 3 referring to general quality, it's probably sufficient, isn't it, just to say that it's predominantly female and low pay?

PN363

MR GIBIAN: Yes.

PN364

JUSTICE HATCHER: That by itself probably indicates it's contributing to the gender pay gap regardless of the reasons why that's come about?

PN365

MR GIBIAN: Where it's – particularly where it's combined with evidence that the rates of pay and conditions closely match the award and bargaining as not been able to achieve any significant enough lift in pay and conditions. And that that's affecting an overwhelmingly female dominated industry.

PN366

And I don't think any of that requires any particular proof beyond what's in the agreed statement of facts and the other material before the Commission. Unless there's anything further, those were my submissions.

PN367

JUSTICE HATCHER: Thank you. Mr Aird, how long will you - think you will be?

PN368

MR AIRD: Very concise and brief.

PN369

JUSTICE HATCHER: Well, can we do you and then adjourn for lunch?

PN370

MR AIRD: Thank you.

PN371

JUSTICE HATCHER: All right.

PN372

MR AIRD: Your Honour, I think there was some discussion about the coverage of teachers in the application and their prevalence as regard to failing paying conditions. It's addressed in the agreed statement of facts at 15(c) and at Annexure 1 it provides the detailed information. There were some issues, I think with the numbering of Annexure 1 where it says in the top right corner, it's page 38 or in the middle of the bottom of the page, it's page 14, which indicates that Bachelor Degrees or teachers in the sector upon a viable amount of around 12.4 per cent.

PN373

In discussions in regard to your comment Your Honour, about how that would equate to standards in the sector, professional standards, we address those in our submissions at paragraph 17 and 18. Where the Full Bench, we noted at paragraph 17 of our submissions has acknowledged that collective bargaining amongst the school teacher cohort across the country has achieved significantly higher rates of remuneration and we give a practical example at paragraph 18 in comparison to New South Wales, Department of Education teachers and also in comparison to teachers paid under the – what's known as the Catholic Systemic Agreement in New South Wales, which indicates that there are a very significant differential in rates of pay that are accorded to teachers in the profession in the Early Childhood Sector as compared to the school teaching sector.

PN374

Your Honour, another point we'd like to raise, it is in the submissions but we'd like to emphasize the point. Your Honour raised a point around teacher supply and we want to take you to the submissions that the IEU make at paragraph 20, but they are also contained in the statement of Ms Nightingale at 23 of her statement.

PN375

We want to raise and bring to the Full Bench's attention the trajectory of the crisis that we are facing in the Early Childhood Sector. So in the discussion about – Your Honour's discussion about supply, we have seen, as we note at paragraph 20, in the Australian Graduate Surveys, there was in 2017 at 43 per cent, entering the profession already an extremely low number. And it's been a downward trajectory now reaching 29 per cent in 2021.

PN376

And this is a professional degree qualification. And we are now seeing 29 per cent of graduates entering the profession. So when we have a discussion about supply, we are facing a loss of a whole generation of teachers not entering the profession that is apparent that they would like to enter and we say that is demonstrative about – demonstrably about the pertaining pay and conditions. If you go to - - -

PN377

JUSTICE HATCHER: Well, perhaps but it might be a supply problem as well, that is simply less insufficient number of teachers graduating and if you have insufficient numbers on that, naturally won't be enough to go to the lowest payers.

PN378

MR AIRD: Yes, but they're choosing not to enter that profession, 29 per cent are entering the profession and we also note that over 50 per cent are entering schools. So that's – they're making that choice. So we're saying part of this application is to make a prevailing paying conditions more beneficial so it becomes a more attractive proposition. There are graduating Early Childhood Teachers who are choosing in an increasing number not to enter the profession. The trajectory is decreasing quite significantly from 43 per cent of graduates entering the profession to 29 per cent.

PN379

And we wanted to make the point that this is an Early Childhood Graduate Degree where we took you to the earlier numbers in regard to graduates in the profession, 10 per cent of the 12.4 per cent are doing a four year degree in Early Childhood Education and they are substantially – and on an increasing trajectory – not entering the early childhood sector. We say that is a course of serious and ongoing concern. Now, it's not just – it's not just the crisis that's before you. It's the trajectory of the crisis. And I understand that's just a snapshot of the issue, but we would take you to - - -

PN380

JUSTICE HATCHER: Just so I understand this. So these figures are about teachers who specifically take an early – a specific early childhood teacher qualification, rather than taking a generalised teacher's qualification.

PN381

MR AIRD: That's correct, Your Honour. That's correct.

PN382

JUSTICE HATCHER: And we can have generalised – people with a general teacher's degree, equally going to early childhood, but they're not in these figures?

PN383

MR AIRD: Yes. These are submissions from the Bar table, but we took instructions from my colleagues this morning and the degrees are 0-5, 0-8 and 0-12. So they're predominantly 0-5, 0-8 that people are studying for the profession. They're 0-8 has become expanded because people are looking at access to primary schools because of paying conditions.

PN384

The figures speak for themselves. I am not going to try to overindulge the rhetoric about the motivations, but we are seeing 43 per cent gap towards the 29 per cent. But I would make the point that this is a professional qualification. So there's probably men in here with an Arts degree or a Law degree. This is, you know, this is a specific professional degree that has been issued. You know, it's akin to issuing an RN degree, a nursing degree, a medical practitioner's degree. People enter that field. It's a professional degree to practice that profession and we are seeing from an already low figure of 43 per cent that now collapsing to 29 per cent. And we have to – if we think about the impact that's having, on the prevailing pay and conditions, I take you to Ms Nightingale's statement at paragraph 24. This is of course a really serious concern and highlights the urgency of the matter that's before us.

PN385

JUSTICE HATCHER: What paragraph?

PN386

MR AIRD: Paragraph 24 of Ms Nightingale's statement. So we talked about in these proceedings, the common interest and the regulatory framework that's in place as many of the employer parties here today would know and probably struggle with is the ratio requirements and we have seen this figure is in regard to the ratio requirements for a graduate teacher to be in the ECEC setting and in 2016, there was 6.7 per cent of ECEC centres seeking a waiver for not being in a position to meet ratios.

PN387

In 2023 for the first quarter that Ms Nightingale identified and it's at CN12 is the Annexure to provide the substance for the figure that's arrived at, there is 16.2 per cent. Now, these figures are about the standards – a minimum standard to provide for the safety, care and development of young children. 16.2 per cent is the number for the first quarter of 2023 arising from 6.7 per cent in 2016.

PN388

So what the IEU is saying to the Full Bench today and I want to endorse the comments of my friend from the UWU who talked about the excitement of Early Childhood Teachers who were out the front this morning. We would say, add to that, to say there's an excitement, there's a determination. But we want to be direct to the Full Bench and if it seems indulgent, well, so be it, but there is also a desperation amongst the teaching cohort, amongst the educators for some action and how do we address the pertaining paying conditions. That's why the

application is before the Commission today. That's why if the Commission is minded to grant the authorisation, we would respectfully say - after considerations if they are minded to grant the application, we would respectfully say don't delay. Because Union applicant parties, the respondent parties are ready to sit down and bargain. They are ready to get to work if you are minded to grant the authorisation. Unless there are any further questions, Your Honours.

PN389

JUSTICE HATCHER: All right. Well, if it's convenient, we will now adjourn for lunch and we will resume at 2 with you, Mr Ward.

PN390

MR WARD: Yes.

PN391

JUSTICE HATCHER: All right.

LUNCHEON ADJOURNMENT **[1.00 PM]**

RESUMED **[2.03 PM]**

PN392

JUSTICE HATCHER: Mr Ward?

PN393

MR WARD: Thank you, Your Honour. I will try to be reasonably brief. Can I just start by dealing with a couple of those housekeeping matters including one that came from Your Honour, the Presiding Member.

PN394

I indicated before lunch this morning, that there might be some further amendments required to the application in relation to Radium. Can I simply indicate now that we will deal with that - - -

PN395

JUSTICE HATCHER: In the amended document?

PN396

MR WARD: In the amended document.

PN397

JUSTICE HATCHER: Yes, all right.

PN398

MR WARD: That might be the simplest way to deal with it. Your Honour, the Presiding Member, also asked a question about whether or not the names in the draft determination – subdraft authorisation that were capitalised, whether there was any reason for that. Can I indicate to Your Honour that that is in fact how the names are actually registered with ASIC. They're actually registered in the capitalised form.

PN399

VICE PRESIDENT ASBURY: Shouting.

PN400

MR WARD: Well, I think we might be kinder to them and say they obviously have a degree of emphasis rather than shouting, Your Honour.

PN401

DEPUTY PRESIDENT HAMPTON: Don't want to scare the children, I should hope.

PN402

MR WARD: Yes. Perhaps they need to be heard, yes. I will make sure that that is in the appropriate form again, liaising with the United Workers Union.

PN403

In terms of our submissions today, can I say that I think we have already engaged to a degree with a ranker between the two councils. I suspect we have engaged sufficiently. Unless I am drawn into it, I am going to avoid getting further into that. But I will say this. There's a very strong likelihood that the odd brick might be thrown my way from one of them in their oral submissions and if we do feel mortally offended by anything they say, we might seek a very brief reply. But we will try and avoid that at all costs.

PN404

We will focus our submissions today on the following. I want to take the Commission to the evidence we have filed. And to discuss what findings can be reached from the evidence that they are relevant to the Commission exercising its discretion in these matters.

PN405

I then want to talk firstly about why the employers described as the ACA employers or the first group. Why they actually fit the purpose of Division 9. It's not something that's been said to date, but I will go to that. I then intend to deal, as my learned friend, Mr Gibian did with the broader question of appropriateness and I will deal with the prevailing conditions issue, a common interest issue, the manageability issue and other matters in the context of the evidence.

PN406

And then finally, with some degree of care, there are just a few small matters that have arisen in some of the reply submissions I want to comment on. And with great respect, I do want to go to a matter that His Honour, the President raised this morning with my colleagues.

PN407

JUSTICE HATCHER: Before we go any further, Mr Ward, just a perhaps a housekeeping matter. I only noticed this recently. The statements of your witnesses, this is not meant to be a criticism, in fairly standard form to identify categories.

PN408

MR WARD: Yes.

PN409

JUSTICE HATCHER: But one of them, Ms Atkinson answered it by giving the name of every single employee. I am just wondering whether there's any redaction that should be - - -

PN410

MR WARD: Sorry, I was going to come to that, Your Honour. I saw that last night and was going to deal with it. I think it would be useful for those names to be redacted.

PN411

JUSTICE HATCHER: Okay.

PN412

MR WARD: Sorry, yes, I did – yes, in some detail in this one. Yes, and a level of diligence that was probably not required.

PN413

Can I start then with Exhibit 16 which is the statement of Paul Mondo. Now, Mr Mondo obviously plays a large role in this matter. Mr Mondo is the President of the Australian Childcare Alliance National Committee. He's operated in the industry for over 18 years in his own right as a centre operator. And I don't intend to read his evidence but can I just indicate for the Commission what the Commission should draw from this evidence.

PN414

I don't have the reference for it in the materials, but it is Exhibit 16 in (indistinct). The first thing I wanted to say is that I pick the point that my learned friend was (indistinct) which is, excuse me, at paragraphs 10 to 12, Mr Mondo indicates that in the context of the ECEC industry, long day care centres make up an overwhelming majority of that industry. And as such, the data for the ECEC industry is reasonably reflective of long day care. I think it – put another way, in old language, it's the best evidence available to assist the Commission in what actually occurs in long day care.

PN415

Mr Gibian took the Commission to some of the material filed with the agreed statement of facts and I think he indicated that long day care represents something like two-thirds of the ECEC industry. So Mr Mondo from his board experience is affirming that the data that has been put before the Commission about the ECEC industry is reasonably reflective long day care and therefore should be accepted as representing long day care.

PN416

In paragraphs 13 to 18, Mr Mondo explained some things, how the employment roles in the operating character of long day care centres and as we will say later on, that those roles and that character is common to all of them.

PN417

JUSTICE HATCHER: So in relation to the cook, what award would cover that, please?

PN418

MR WARD: Sorry?

PN419

JUSTICE HATCHER: The cook. What award would cover that person there?

PN420

MR WARD: Can I just take some instructions on that, if I can? We will come back to that, Your Honour. Sorry, I hadn't quantified that. It certainly wouldn't be covered – the cook certainly wouldn't be covered by the Children's Services Award or the Teachers' Award.

PN421

Paragraph 19, Mr Mondo commences by explaining the role of the National Laws, the National Regulations. The role of a ACECQA as the overarching regulatory body. He then talks about the National Quality Framework and it's important that these should be drawn and contemplated distinctly from general laws like traffic laws and whatever. This is a form of regulation specifically designed which impacts how long day care centres actually operationalise themselves and therefore operate and are licensed.

PN422

JUSTICE HATCHER: Has there been any change in the regulatory framework since the Work Fairly decision in the Teacher's case?

PN423

MR WARD: Not of any material sense, Your Honour, but if there's anything of any material nature, we will make sure we take that on notice and inform the Bench. Paragraphs 21 to 49 very importantly, Mr Mondo talks about the role of the National Quality Standards.

PN424

He talks about the fact that there are seven key quality standards, that they are common for long day care centres and he explains in great detail how they typically operationalise in long day care settings. And again, that's an important ingredient which is common to all of the long day care centres that we represent and I will explain the relevance of that later on in terms of the common interest issue.

PN425

Paragraph 50-51, he talks about – further talks about ACECQA and in paragraph 52, to 56, he talks about the practical operation of the child care subsidy. And importantly, he talks about the role that plays in the setting of fees and how it is operationalised from a centre's perspective.

PN426

We ask the Commission to take that as contextual evidence which would apply across the sector and obviously is affirmed when one looks at the individual evidence from the witnesses we have called.

PN427

Mr Mondo then goes on from paragraph 57 to 68 to talk about his centre that he currently owns and operates, being Bimbi Early Learning and Kindergarten in Victoria. Now, Mr Mondo's evidence is consistent with the evidence of the other 16 witnesses we have called in the proceedings. Those witness statements are Exhibit 6 to 22. I don't intend to go to them individually other than to try and draw some general findings that are consistently apparent from each of them and those findings are these.

PN428

Each of the witnesses attest to the fact that they have read the application in terms of its scope and coverage and each of them attest to the fact that they operate within that scope and coverage. Secondly, none of the employers I represent operate with an enterprise agreement of any form. Be it a single interest enterprise agreement or be it a party to a current agreement covering industries or whatever. They also thirdly, indicate that they pay at award rates or moderately above those rates dependent on market and I note that the agreed statement of facts which has been gone to at some detail today, has highlighted that award rates are prevalent and that to the extent that over award payments are paid, they're relatively modest in that 0-10 per cent category. And the evidence of the witnesses we call supports that proposition.

PN429

They all indicate that their keen motivation to now bargain is the ability to involve the Commonwealth to fund the outcome. And I will return to that in its relevance later on, but it's very clear that the scheme of bargaining up until this point has not accommodated in an appropriate fashion, the opportunity to involve the Commonwealth and one of the unique features of Division 9 through to section 246 of course is not only as I will come back to the support the Commission can give which we will be asking for but very importantly, the role that the Commonwealth can play at being brought into the proceedings and the negotiations.

PN430

Very importantly, it's clear that they all strive to provide high quality care and early learning and development for young children of similar ages, depending on their jurisdiction, it's 0-5 or 0-6 years of age. It should be uncontroversial that they were all funded by the Commonwealth Childcare Subsidy and it's been indicated in – in some of our material, I think Mr Mondo's material that is occasionally supplemented by the occasional state scheme but the common feature is, is that the childcare subsidy operates across all long day care centres.

PN431

They affirm what Mr Mondo said and that is that they all operate under the National laws, National regulations, the NQF, the NQS and they're all regulated by ACECQA and the authorisation of that gives them their distinct character and their capacity to be licensed to operate. It's also important to note that there is a very high level of commonality between the types of workers they employ in terms of the roles they perform and the work they perform.

PN432

All of the evidence indicates that the Australian Childcare Alliance has been involved in tripartite dialogue that the United Workers Union indicated to this morning. And at that – participated in that dialogue for many months. And it's on that basis that each of the witnesses support the making of the authorisation and entering into negotiations. Now, all of that, we say is entirely relevant and entirely supportive of the making of the authorisation sought and we will now explain why we say that's the case.

PN433

I'd like to start if I can, with Section 241 which is the - - -

PN434

VICE PRESIDENT ASBURY: Now, Mr Ward, before you do that - - -

PN435

MR WARD: Please do.

PN436

VICE PRESIDENT ASBURY: Mr Mondo says in paragraph 11 of his statement that the centres operate under the National Quality Framework so it seems that the long day care centres of preschool and kindergarten operate under the same National Quality Framework but they're funded differently?

PN437

MR WARD: Yes. Yes, they are. So if you, I think, there was a question this morning asked about preschools and kindergartens. Predominantly, you're talking there about state funding. So that's that final – we're in Victoria at the moment, it's that final year going into - in preparation for school, that kindergarten year.

PN438

That's a State funded matter, it's not a childcare subsidy matter. So if that's what you're specialising in, your interest is State funding. In terms of long day care centres, what we're predominantly focussed on there is the childcare subsidy, yes.

PN439

VICE PRESIDENT ASBURY: Except they're operating under the same National Quality Framework.

PN440

MR WARD: They did.

PN441

VICE PRESIDENT ASBURY: And essentially, it seems like they deliver very similar, if not the same - - -

PN442

MR WARD: I'm not going to suggest, your Honour, that I can say anything to the contrary of that, the NQF applies obviously to all of them. If you look at what they're actually doing, how they manifest and operationalise the NQF, it's going to be slightly different.

PN443

If you're dealing with a child who's preparing for transition to school, obviously the nature of the curricular and whatever is going to be different from if you're dealing with a one-year-old where you're going to be dealing predominantly with play-based learning activity and the like, but, yes, the NQF does apply to all.

PN444

I should just say that in relation to section 243, there was consideration about what the extra words meant in the brackets about, 'You can make the authorisation for all or some.' I might just deal with this issue now. We certainly wouldn't be inviting the Commission to suggest a broader scope to the application.

PN445

The scope has been chosen for a variety of reasons, one of which I'll come back to later on but I would say this, if there was ever - if there was a, respectfully, contemplation of suggesting a broader scope then obviously that might change my client's position as to its involvement and we might need to be reheard on the matter. But I don't think anybody's inviting a broader scope. Yes, the NQF applies more broadly.

PN446

In relation to section 241, section 241 sets out the objects to division 9 which is the supported bargaining division and it reads as follows:

PN447

> *The objects of this division are to assist and encourage employees and their employers who require support to bargain, to make an Enterprise Agreement that meets their needs and to address constraints on the ability of 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 to enable the Fair Work Commission to provide assistance to low paid employees and their employers to facilitate bargaining for enterprise agreements.*

PN448

I'm, without being mischievous, I'm just going to note the fact that the phrase, 'Low paid' appears there. I'll come back to the low paid issue later on. The first thing I want to do is I want to agree with Mr Gibian when he took the Commission to the explanatory memorandum and quoted some elements from the memorandum to the effect of, and I'm not going to give the full quote, but to the effect of that the supportive bargaining stream was intended to assist certain groups.

PN449

I think that's an important proposition, but it really isn't intended to be at large, it's actually intended to support the types of employers and employees who fit the category that section 241 sets out. It's for those people. Now - - -

PN450

JUSTICE HATCHER: But what's the support being referred to on these - - -

PN451

MR WARD: Sorry?

PN452

JUSTICE HATCHER: The whole concept of supported bargaining and the reference to support to bargain in 241(a), what's that actually talking about?

PN453

MR WARD: In terms of - as a matter of character what is it talking about?

PN454

JUSTICE HATCHER: Well, what is the support? I mean, we grant the authorisation but what is - for what purpose that is - what support does that lead to? I mean I - - -

PN455

MR WARD: Well, I'll answer that in a very practical way. My presumption would be that it's not about the support from the people standing at the Bar table or their bargaining reps, my presumption would be that it contemplates a very active role for the Commission, particularly - - -

PN456

JUSTICE HATCHER: So it directly relates to section 246.

PN457

MR WARD: I think it does. It can't relate to what I might do or what Mr Mondo might do. It has to relate to that and I think it possibly relates also to the fact that the Commission now has the power to involve other persons who might impact the outcome itself but the obvious one, in our consideration, is the Commonwealth but there might be others in different situations.

PN458

For our part, and we'll get to this at the end, but for our part, we would be inviting the Commission to actually identify a member of the Bench who actually could play a supporting and facilitating role because at an appropriate time we'll be asking the Commonwealth to join the proceedings, the process of negotiations and I can assure the Bench that that's going to be pretty complex.

PN459

And I think the process would be benefitted from having the Commission assist the parties in facilitating that. Now, that might not be at the first meeting or the second meeting of the parties but we certainly think that it's in the nature of what you have before you that active facilitation of the Commission is contemplating support.

PN460

JUSTICE HATCHER: But it's not talking about financial support.

PN461

MR WARD: Well, I could be cute and say, 'Yes', but I'm not sure it really is, no. No, I think when you look at what that is aimed at, it's aimed at a class of

people who don't do this, don't have a history of doing it, probably need some help along the way in doing it. That help has to be directed at help provided by the Commission rather than the help provided, per se, by someone like me.

PN462

Now, you could take a slightly broader view of that and you might say, 'This view from an employee perspective (indistinct) union, hang on for a minute, you might say this view.'

PN463

Well, the fact that unions play a central role in this form of bargaining a little bit different from the role they would play in single enterprise bargaining because in single enterprise bargaining, they only come to the table if they're a bargaining representative, be it a default bargaining representative or appointed bargaining representative.

PN464

Here they seem to have a broader statutory role, so in that sense, perhaps part of the argument from the employee's perspective is the support is coming from the industrial organisations, that being the union, who are playing a more kind of custodial role across the process rather than necessarily being Bob Smith or Jane Smith's actual bargaining representative. So that might also be a flavour.

PN465

JUSTICE HATCHER: I suppose another perspective might be from the employer's view where - particularly where they're small employers, the support comes from being able to assemble in a critical mass and the economy is a scale that comes without love and trying to have resources to bargain alone.

PN466

MR WARD: Well, and I think I have to adopt that. I would definitely adopt that because it's actually the case that it's presented by those we represent. I mean, if you contemplate it, I press this is purely submission, it's not a matter of evidence, but I sincerely doubt that any of those we represent are likely to be in a position financially or otherwise, to engage myself or Mr Mondo to act for them and to engage possibly with the Commonwealth around funding and whatever.

PN467

So the answer is, 'Yes', to that in the sense of employers how have no history of doing this who might be small in scale, don't have the resources, don't have the experience and skills, are coming together in a more collective process where they can pool their resources and as is the case in this matter, have somebody like myself and Mr Mondo act for them collectively. Yes.

PN468

JUSTICE HATCHER: Well, there's certainly - so there's a mystery in 241 as to why there's no (b), but if we go to (c) that seem to be the matters we've discussed.

PN469

MR WARD: Well, I put that down to how we'd hand-marked up the new version of the Act ourselves, I didn't actually know if it was - it's an error in - well, look,

you know, when I talk about what low paid means, let's not get too carried away, it's (indistinct). Everybody likes this drafting exercise. Every - it's just a joke but yes, that's exactly right.

PN470

The other thing that - from our perspective as to why we are the type of employer and their employees who fit supportive bargaining, I've said this already, but I will say it again, it's fundamental to those I represent that the Commonwealth's involved. It's fundamental.

PN471

Absent the Commonwealth, there is a futility in being involved and section 246 creates this unique window of opportunity to ensure at the appropriate time and in a respectful way that the Commonwealth as the funding body, participates in the process and in that sense, those we represent, we say, are the very type of person who the Minister had in mind when Division 9 was created. So that's the first point we want to make.

PN472

If I then come to the question of appropriateness, I think I'll deal firstly with this question about prevailing terms and conditions of (indistinct) the common interest, manageability of matters, I don't really want to say much more about the discretion itself. We've written extensively on the concept of being satisfied. We've written extensively on what appropriate means.

PN473

We've written extensively on what having regard to means. Frankly, I would have thought that most of that is relatively uncontroversial on any basis. So we come then to the first limb of 243(1)(b)(i) which is this question about prevailing. I think we're on the same page as the unions about what, 'Prevailing', actually means. It's what's current. It's what's actually happening. It's contemporary.

PN474

I want to make the following points, if I can. We will go to our written submissions very briefly as well. I just want to make the first point that the consideration is about rates and conditions. It's not just about rates, there's been a terribly large amount of conversation about rates but it is about rates and conditions.

PN475

It is first and foremost about that which prevails. There is then the secondary consideration of low rates of pay. I'll come to that last. I'll just dispose of the conditions issue. I think it's reasonably uncontroversial that the primary conditions that operate are award conditions. I think that's reasonably uncontroversial.

PN476

If one looks at the amended statement of facts and one looks at the nature of award reliance, I think it's reasonable to draw a conclusion that in terms of the conditions they're predominantly award-based. Now, there's no evidence of this but of course it probably goes without saying that some of the conditions in the

long day care sector arise from policies and contracts of employment and the like, but the overarching rock bed of the conditions are going to be award-based.

PN477

There's nothing to suggest that there are weird or unique conditions operating out there that might be something you take into consideration under this limb. The question then about rates really - perhaps with conditions but rates particularly is - you're then just simply asked to understand what's happening and I'll come to the low stuff in a minute, but the real question about what's happening is we would ask the Bench not to get sort of overly indulgent, with respect to those.

PN478

What's happening and what is its relevance. It's relevance is to whether or not these people should be authorised to sit in a room together and negotiate an agreement and perhaps I can deal with this in the negative rather than the positive, you could think of circumstances where you might discern what is prevailing that might weigh against you thinking it's appropriate and if you had an industry or a sector where you had wildly divergent conditions or wildly divergent rates, you might think that might weigh against whether or not it's appropriate to put them in a room and to actually try and negotiate an Enterprise Agreement that meets the needs of their employers and employees.

PN479

So that would be a good example but I would ask the Commission to focus really on the purpose of asking the question of what is prevailing. It's more about whether or not, having considered what's prevailing, it's relevant for these people to be sitting in the room together to negotiate, i.e., it's appropriate to grant the authorisation.

PN480

We then come to this question about the low thing, if I can say that and I might just start by taking the Commission to our submissions in chief. Again, I apologise, I don't have the number where they sit in the materials but I might - and I won't be too tedious when I do this, but I would ask the Commission to go to paragraph 79 and there seems to be a lot being made of the phrase, 'Low rates of pay', and whether or not it operates in distinction to the notion of low pay.

PN481

We're not too anxious about that. Those terms seem to be used quite interchangeably both by this tribunal and also by the Minister - the Minister's very comfortable using both terms as well. We've identified there that – in the recent aged care work value case, the Commission's interchangeably used the notion of low rates of pay and low paid. We've identified, in paragraph 80, that the Australian Government itself, in its submission to the annual (indistinct) review, used them interchangeably.

PN482

We've identified, in paragraph 81, when discussing this matter, the explanatory memorandum to the bill used this phrase:

PN483

To support a bargaining stream is intended to assist those employees and employers who may have difficulty bargaining (indistinct) level. For example, those in low paid industries.

PN484

So, the very fact is that section 241, the objects to Division 9 use the phrase, 'low pay'. So, I think, firstly, we'd say is: Just be a little cautious about drawing too much in distinction between low rates of pay and low pay.

PN485

Now, of course, the phrase, 'low pay' has been used by this tribunal for many, many years. If we carry on then, with our submissions, at paragraph 85 of our submission we pick up the matter that my learned friend, Mr Gibian picked up, which is in the aged care case, which was one of the cases under the old low pay bargaining regime. There was a focus on what was said to be people who were paid at the lower award classification levels. And then, of course, as has been discussed by the Bench already today, one moves to the perhaps more contemporary notion of this two-thirds approach.

PN486

The view we've expressed in our submissions is that we believe it's appropriate to adopt the two-thirds approach. We've actually done our analysis on the 'Are you paid at the lower award classifications' or the two-thirds approach. And I'll come to what conclusions we reached. We think it is appropriate to adopt a threshold. We think it's appropriate to adopt a common threshold across the jurisdiction when one is talking about this notion.

PN487

With the utmost respect, we're not particularly attracted to Your Honour's notion or Mr Gibian's notion about a comparative test. And our reasons for that is that if you start to engage in a comparison, I think it begs and invites and requires you to consider why. Why is somebody paid differently to somebody else. And I think that's starting to move you away from that which is necessary. At the end of the day, we don't have to prove that everybody is low paid. It's simply a consideration and I suspect, the way the statute's worded, once you've looked at the prevailing conditions and rates, you're comfortable that they are akin to the sorts of conditions and rates which are persuasive for you to exercise your discretion for these people to bargain together. That's reinforced if some or all of them are low paid. It's reinforced. It's not determinative but it would be something that might reinforce how you exercise your discretion.

PN488

The evidence, in this case, is that the majority of people would meet the two-thirds threshold test and should be properly considered low pay. Most importantly, the principal classification in long day care, being the Certificate III employee, on our analysis, in our submission, falls into that category.

PN489

Now, the fact of the matter is that we have said in our submissions, we don't think the teachers do. That's perhaps not surprising, because the teachers, only a matter of two years ago or thereabouts, were the beneficiaries of a material work value

case increase. And teachers, therefore, don't appear to fall into that category. That's not fatal. I'm not asking you to use that to dissuade yourself against the authorisation. It just happens to be what it is.

PN490

For us, it's more important that we collectively negotiate with three groups of people who work in long day care. The cook, the childcare workers themselves, the educators and the teachers. Because for us, that is the practical approach to adopt, to create an agreement that meets the employers needs that I represent, and their employees. And if we are to engage the Commonwealth, effectively, that's essential to do.

PN491

So the fact that teachers might not be considered low pay, should not dissuade you in any sense from granting the authorisation whatsoever. What we'd ask you to be more thoughtful of is two propositions. The extraordinary commonality of how people are paid, meaning that when we come to confront the pay issue in the negotiations, we will most likely be approaching it from the same perspective as employers. And we would ask you to consider the fact that the primary classification in the industry, being Certificate III, is in fact, on a proper assessment, low pay.

PN492

And we say those are very persuasive factors for why you would grant the authorisation on the basis of exercising your discretion of appropriateness. Let me leave that point.

PN493

Can I then come on to the question of common interests. I've been very particular in saying it in a plural form. I think we've dealt with this. I don't want to deal with it too much more. The sheer grammar of section 243(1)(b)(ii) supports a plural adoption. The legislature could have said 'a common interest', the legislature could have said 'at least one common interest', it's chosen, very particularly, to put what it's put. It is in the plural; it should be taken as being in the plural. And as we've said in our written submissions, for us, it's really a case of you exploring the level and extent of the commonality. And obviously, where there is greater commonality, you're going to be more comfortable in being satisfied it's appropriate that the parties bargain together.

PN494

For our part, our submissions have set out where on the evidence you can draw notions of common interest. If I can briefly take you to those submissions, starting at paragraph 120 of our submissions. I won't read this in great detail but I do just want to summarise them if I can. The first common interest of those I represent have is, is that they are actually providing a particular form of care and service to families in the Australian community. And that is the form of long day care that they actually provide. It's the nature of the service they have in common.

PN495

They're geographically disbursed but they all work under the National Quality Framework. They all work under the National Quality Standards, and they all

work under the national laws and the national regulations. And Your Honour, The Vice President is right, they're not the only ones who do that. But it certainly is common interest of all of the people I represent.

PN496

But it's not just that they exist, it's that the very compliance with those things manifest them operating in a certain way which is done very commonly, as the evidence of Mr Mondo and the others demonstrate.

PN497

They're all licensed providers. So they have a common interest in maintaining services to a level that allows them to obtain and maintain the requisite form of licensing to operate. Uncontroversially, they are all funded by the Commonwealth Government for the childcare subsidy. It's not the fact that they're funded by it, really, that's the common interest. It's how that actually operates, the level at which it provides subsidy. The way it interacts with the fees they charge, that is the common interest that they hold.

PN498

The evidence also shows they share a common interest in how that funding can be improved. To support changes in conditions of employment and bargaining. And that's unquestionably available from the evidence we've filed.

PN499

Sixthly, the evidence demonstrates that they all share a very deep common interest in advancing the education, care and development of pre-school children and they share a deep common interest in the pedagogy underpinning this.

PN500

Seventhly, they all share common interests in providing the high standard of quality care and education possible. And that's a theme which consistently rings through the evidence.

PN501

And lastly, in terms of the nature of people they employ, the professional development that those people need to succeed in their roles, they share a common interest in that. So it's not just a, 'Hey, they all do kind of the same work', it's very much that when you look at the professional development that those people require, all of the people I represent have a common interest in how those people are brought into the industry, and professionally developed. Be they vocational employees or be they university qualified employees.

PN502

So we say that we have met that – I withdraw that – we say that in having regard to the question of common interest, there are common interests of a large number. We've commented in our submissions, as to what 'clearly identifiable' means. We've been able to demonstrate in the evidence that it's easy to objectively establish that the things I've described as common interests are common interests. We didn't have to spend three days poking through some material to try and find them and concoct them to use the phrase, His Honour, The President used earlier. We would say those common interests were almost

obvious. And they don't have to be obvious. But the fact of the matter is that the ones I've articulated are almost of that nature. So there should be no concern that they are common interests and also clearly identifiable.

PN503

And the sheer volume of those, the sheer interrelationship of those, and the nature of them should heavily persuade the Commission as to the appropriateness of exercising its discretion.

PN504

We then come on to the question of manageability - section 243(1)(b)(iii). Can I simply say this: Like Mr Gibian, we think this should be relatively straightforward. Those I represent have appointed two bargaining representatives. We've set out in our submissions a little bit about that. If one contemplates what we're about to move into, hopefully, it's very clear that I bring a certain skillset to that, in terms of industrial relations and negotiations. Mr Mondo brings, not only an exceptional skillset, but a necessary skillset. He has superlative knowledge of the industry and how it operates. But he also has a very deep involvement and connectivity with the Commonwealth and the relevant government departments. Which, at an appropriate time, would be an important issue in the negotiations.

PN505

And in that sense, for those we represent, it should be very, very clear that the employers, by appointing two bargaining representatives of the character they have, will make negotiations entirely manageable. Both in terms of the disposition of negotiations and the likelihood of a successful outcome. Because, as we say in our reply submissions, the notion manageability traverses the breadth of that. And I think my learned friend, Mr Gibian, acknowledged that earlier today.

PN506

Now, I just want to pick up on one point: There's some rancour from the ACTU about me using the word, 'efficiency'. And I think there's an old case from the old days talking about, one doesn't have to look at the notion of efficiency. I'm not going to get drawn too much into that other than to say this: Mr Redford, this morning, made it very clear that one of the reasons they picked the cohort of employers they had, was to get efficiency out of it being long day care. I think he actually went on to say it would cost us some time to navigate, otherwise it would cost us more time to navigate if it was more than a long day care centre involved.

PN507

So, at the end of the day, I don't want to get drawn on whether or not the phrase 'efficiency' is the right phrase or not. I think Mr Gibian used it in some fashion. The bottom line is this, is that in terms of manageability, one, it's the totality of the process. It's not just the negotiations, it might involve the process involved, facilitation of the Commission, and it's also the question of, 'Are you likely to reach a successful outcome?' It's the totality of the process.

PN508

DEPUTY PRESIDENT HAMPTON: Sorry, are we specifically on paragraph (iii)?

PN509

MR WARD: Yes.

PN510

DEPUTY PRESIDENT HAMPTON: I mean, that's only concerned with the number being consistent.

PN511

MR WARD: Well, I think it is. But I'm going to approve Mr Gibian in this sense. The statute says the number, that's true. But contextually, the number and also the character of the number might lead you with a different finding. You could have a situation – and there's no threshold here – it's not as if you say, well, anything over 10 is a problem, anything under 10 is fine.

PN512

It might very well be that you could have a certain number of bargaining reps that have relatively modest experience, and the Commission might have some concerns about manageability or some comfort about manageability. You might have a larger number of bargaining reps, but in the context of who they are and their experience, even though they're a much larger number, you might again say, look, even though that's a much larger number we're actually still quite comfortable it's manageable.

PN513

So I think you have to be a little bit careful just looking at it as a sort of a what is the number exercise, because at the end of the day the nature of the people who are the bargaining reps might have something to do with the manageability as opposed to just the sheer number, just the sheer number. I do accept the statute does say number, I accept that. What we do say though is what is being managed is the totality of the process. It's not just some constrained notion of will they turn up to meetings and bargain in good faith. At the end of the day you're granting an authorisation with this concept in mind. Is it appropriate to allow those people to negotiate together to create an enterprise agreement that meets the employers and employees needs.

PN514

So all we would say is that when you contemplate manageability you have to contemplate it in the context of the full range, that is the negotiation activity and the making of the agreement that meets those needs. But, yes, the statute does direct you at a number, but we don't think it's simply a numeric test. It can't be that. That's the case the Bench could today determine what the threshold would be and we would all know forever, that will be fine. And yet that in a given situation might solve the problem, with respect.

PN515

The point we make is, as the unions have made, manageability in the context to the number of bargaining reps involved, as far as we are aware in this matter

should be uncontroversial that the Commission should be comforted by that, and that should persuade them to exercise their discretion of appropriateness.

PN516

I think we have also said in our written submissions this; you are asked to inquire into the likely number of bargaining reps. I think the Commission is able to draw on its broader experience in bargaining in the jurisdiction to contemplate this proposition, the idea that there are going to be a vast number of employee appointed bargaining reps popping up. I think you can sort of take judicial notice of the fact that that's highly unlikely. It very rarely occurs even in single enterprise bargaining, let alone something of this nature.

PN517

Then if I can in relation to section 243(1)(b)(iv), the other matters, we have identified two. I think the unions have said the same thing. We think it is relevant to consider the fact that these matters are supported by the employers, they're consented to. It's a relevant matter. That consent is not perfunctory, it's quite informed, and it's been evolving over a number of months of dialogue both with the union and appropriately with relevant government players.

PN518

JUSTICE HATCHER: Given that the results of an authorisation is that the employer can't then bargain for a single enterprise agreement it seems to me that consent must necessarily be quite an important factor.

PN519

MR WARD: We would think it would weigh very heavily. It would weigh very heavily. I think if consent isn't given I suspect there's going to be an extraordinary challenge around all sorts of things. But in this case, yes, I think it would weigh very heavily. And certainly in terms of you gaining the requisite level of satisfaction, it's typically in the context of what this is about, it really should enliven that sense of confidence in exercising the discretion.

PN520

We have also said at some length today and we say again just in closing that the other matter you should consider is what we say is the necessity in this matter of utilising section 246 to introduce the Commonwealth into the process at an appropriate time, and as we have already said we also will be inviting the Commission to facilitate what might be very interesting and challenging discussions.

PN521

JUSTICE HATCHER: I mean this is slightly off topic, but given that 246 contemplates the Commission acting of its own initiative what practical steps might the Commission take if it grants an authorisation to keep itself informed as to developments? That is it shouldn't be a case of us necessarily waiting for an invitation - - -

PN522

MR WARD: I have already given you the invitation today.

PN523

JUSTICE HATCHER: Shouldn't we be making our own enquiries of requiring regular reports so we can make our own judgment about that irrespective of what the parties think?

PN524

MR WARD: I would have formed this presumption when you contemplate who this is meant to be for. I wouldn't have thought you'd grant the authorisation and leave them on their own. I think that would be folly, because that seems to be antagonistic to what's actually involved and who's involved, and you could see two levels at which that might operate. You could see the first level being the one you have just described where the Commission might ask the parties to report back, explain where they're up to, understand if there's any deadlocks or any issues where the Commission might assist, and then send them away again.

PN525

The other version might very well be that perhaps on invitation or possibly at an appropriate time the Commission itself sees that actually being more actively involved, possibly playing a chairing role, in the sense of traditional conciliation and mediating between the parties a more active role might be required. In the context of this matter I would have thought we will ultimately see both. That is the Commission most likely should it grant the authorisation might identify a member of the Bench who can play that, shall we say, overseeing role at an appropriate time on invitation or at the Commission's own contemplation intervening, become more active in a facilitation or mediation. And I think that's the natural consequence of why 246 is there. You certainly shouldn't say grant the authorisation and say good luck. That's not the form of bargaining this is about, not at all.

PN526

In terms of concluding before I just go on to a couple of small points can I just say we concluded in our submissions in-chief at paragraphs 157 to 163 and we rely on those, and also rely on our submissions in reply. I just want to pick up three points that came out of the reply, including the reply from AiG which I don't even know if the Commission is going to receive or not, so bear with me if that sounds unusual. I suspect if you don't receive it, it will probably be read out anyway.

PN527

AiG in the reply submission that hasn't been received, but might, make a comment which I just wanted to go to. I didn't pick this up, but I just want to - it would be folly if I didn't agree with them on something today. In the reply submission they have sought leave to file, which hasn't been granted yet. At paragraph 16 they get into this fascinating discussion about logic and the notion of whether or not the common interest has to be common to all the employers, or whether or not some common interest could apply to some and different common interests apply to others. I have to say that we favour the view that the common interests they were looking for, commonality between the group as a whole that the authorisation is proposed to cover. And that seems to be consistent with the notion of we're looking for reasons why this group should be given permission to sit together at the table to negotiate an enterprise agreement that meets the needs of those employers and those employees.

PN528

JUSTICE HATCHER: So presumably the presence of G8 in the group means that a matter referred to by Mr Redford, that is they were small businesses, is not a common interest on that analysis.

PN529

MR WARD: I think that that will be true to a point, but perhaps not, and I am going to explain why. It might very well be, and I don't need to go into all, I imagine G8 operate quite a number of small centres. And so while the sheer economics of their business might be different, and we have got no evidence about anybody's economics, many of the practical issues that you have in terms of running a 60 placement centre or a 70 placement centre I imagine are the same for G8 to say (indistinct) somebody who might run three 60 placement or 70 placement centres.

PN530

So I would be careful. I think that's more in the characterisation of the fact that G8 are a big business. You're right, you can't say they're all small businesses and we have got one big one. I accept that. But I think if you actually dig down you will find that - and in terms of all the things I have talked about, I didn't talk about size when I talked about common interests, all the things I talked about, I suspect, will apply to G8; the subsidy, the child care subsidy, pedagogy, the nature of the care they're providing, the service they're providing.

PN531

All of those things are going to be as apparent there as they are in those I represent, and I suspect they're also apparent in what class of person Ms Stephens is representing as well. But, yes, you couldn't say a common - I think a common interest will be they're all small business. That's a statement of fact. I think Mr Gibian said something like this, that that's the kind of description. The question then would be what's - - -

PN532

JUSTICE HATCHER: That might translate to a common interest in lacking capacity to bargain.

PN533

MR WARD: It might do.

PN534

JUSTICE HATCHER: But that then, and I will raise the G8 when you come to it, why that would apply to an organisation of 10,000 employees.

PN535

MR WARD: That's obviously a matter for them. We don't identify as a common interest a lack of capacity to bargain. We haven't identified that. We think we have mustered some very clearly identifiable, we suggest, obvious common interests which are entirely appropriate. They're real, they're material, we don't need to go to things like that.

PN536

The second point I want to raise is there's been quite a bit of debate between the peak councils about whether or not in considering common interest at the same time you should consider divergent interests, diversion interests, and I think this arises predominantly in the Australian Industry Group submission, but I think the Australian Chamber of Commerce and Industry dabble with it as well.

PN537

I just want to say two things about that, and we have said this already to some degree. When you're looking at common interest I don't think you're looking at what's not common, you're looking at what's common. When you're looking at the common interest issue you're not then weighing that up against what's different or what's not common. Having said that there could be a case where divergence of interest is a very relevant consideration to take up in any other matter that the Commission considers appropriate, divergence of interest.

PN538

The only thing I wanted to say is this, is that I don't think the Commission should start to qualify a limit what it might say fits any other matter it might see as being appropriate in this case. The bottom line is this, is that to the extent that this notion of diverge of interest has been raised there's nobody as I understand it advocating in this case, certainly those I represent, have such divergent interest, that that's a matter the Commission should take into consideration in exercising its discretion and weigh against exercising its discretion. I don't think that's alive in this case at all.

PN539

The United Workers' Union in their reply at paragraph 17 have a go at the Australian Industry Group talking about micro economic and macro economic matters. Now, we dealt with this in reply on the basis that we said that couldn't be elevated to, in effect, the public interest test that we have to pass, because no such test operates in the Act. But again I just wanted to say this, that - - -

PN540

JUSTICE HATCHER: Sorry, Mr Ward, what part of the AiG's submission are you responding to?

PN541

MR WARD: I am referring to the United Workers' Union, your Honour, sorry, my apologies. It's their reply, in the United Workers' Union reply submission at para 17. I hope I have got that right. I have, yes. I think they're engaging with the Australian Industry Group about - the Australian Industry Group talking about the fact that one might need to consider micro economic or macro economic considerations. In our submission in reply we talk about the fact that that seemed to almost be elevated to a separate test in AiG's eyes. We say you shouldn't do that, it's not in the Act. It's almost akin to a public interest test.

PN542

The only point I wanted to make about that was while we stand by our submissions again in a particular case that might be a relevant consideration in anything else the Commission considers appropriate to take into account. Again I wanted to say this; that's not this case. There's no suggestion here that there are

macro economic or micro economic consequences that would dissuade you in this case from granting the authorisation.

PN543

Then very lastly can I just - it would be remiss if I didn't - I just want to touch on the gender undervaluation issue if I can, and I think I am quite comfortable with where your Honour president ended up on this issue. What we have simply said is this; the Commission should guard against straying into making findings akin to work value reason findings in this matter. I don't think the Commission will do that, but the minute assertions of gender-based undervaluation are put, we would ask the Commission to be very careful that how it approaches those doesn't in any way by express language or implicitly suggest that the Commission is making some finding that the relevant award rates of pay are subject to undervaluation on the base of gender or any other reason.

PN544

I think Your Honour the President said we don't need to do that. I think Your Honour the President said, 'Isn't it enough to say it's female dominated and it's low paid?' Entirely comfortable with that as a proposition. If at another time in another place we find ourselves in a work value case, obviously, we would want to deal with that on its merits, and that's particularly the case given that in the teachings situation, it's only two years ago since they had a material work value increase. So we'd just ask the Commission to approach the language it uses around that, with respect, with some care as so we're not ultimately prejudiced somewhere else.

PN545

If the Commission pleases, for the reasons we've outlined, this is entirely a case where the Commission should not only be satisfied that it's appropriate to exercise its discretion, it should be more than satisfied. It should be comfortable satisfied for the reasons we've outlined, and we ask the Commission to grant the authorisation in the form that ultimately we sought out with the United Workers' Union and the other unions. If the Commission pleases.

PN546

JUSTICE HATCHER: Thank you. Ms Stevens, are you next?

PN547

MS STEVENS: Thank you. I rise today in support of the Community Child Care Association, the Community Early Learning Association, the 22 employers listed as group 2 and 3 employers. I refer to them throughout this submission as CCC and CEALA generally. For the purpose of this hearing, we rely on our submissions as previously filed and the Stevens statement marked as exhibit 4.

PN548

I do wish to make a minor correction to the submission which states at paragraphs 33 that three employers named in the application have expired agreements. I do concur with Mr Redford's earlier statement that there is five employers with expired agreements covered by the application. I also confirm that the group 2/3 employers rely on the statement of agreed facts which the collective parties are prepared to assist the Commission in this matter.

PN549

I will not re-reiterate a lot of the matters that have already been well considered in the submissions so far. However, I do wish to emphasise the views of the group 2/3 employers that we support the making of this application and the support - the making of a supported bargaining authorisation. The group 2/3 employers represented by CC and CEALA share the experience of operating services that are essential to the community while dealing with an - unprecedented workplace shortages, workforce shortages which are the result of low pay and undervaluation in the work of educators and teachers across the early education sector, but, in this case, particularly the long day care sector.

PN550

We see multi-employer bargaining under the supported bargaining stream represents a real and sustainable model for these employers to address this, and I wish to say that we concur with the President's characterisation of having access to the model of bargaining which is multi-employer bargaining actually constituting support for bargaining in and of itself as it does remove several of the barriers to successful bargaining including things like access to expertise, cost and time limitations that, particularly for the employees - employers who are represented by CCC and CEALA, they do encounter in terms of the process of being able to access enterprise-level bargaining.

PN551

As stated in our submissions and in the Stevens statement between paragraphs 22 to 29, the employers represented by CCC and CEALA genuinely require support to bargain, and then a combination of factors has resulted in barriers to successful enterprise bargaining to date. These include lack of time, resources and expertise in enterprise bargaining as well as limited staff knowledge in the process to properly participate. Genuine bargaining involves staff actively participating in that process, and that's a significant factor in this case.

PN552

Seventy-nine per cent of the long day care and the sector more generally, employers operate in just a single service as was mentioned in Mr Redford's opening statements as well, and in the case of 14 of our employers who we're representing today and many of the services across the sector, they're managed by volunteer parent committees. So in that particular case, the level of expertise, capacity and time actually changes on a yearly basis in those services because those volunteer parent committees are regularly renewed and change on an annual basis.

PN553

So where 80 per cent of the sector is unable to establish and maintain successful bargaining regimes to improve wages, this also contributed to a broader stifling of bargaining across the sector. This is because where there's limited market impetus for other larger employers to engage in enterprise bargaining and its result in - which would result in improved wages, where there is little to no prospect that 80 per cent of their competitors will ever be able to offer wages that are higher than the award.

PN554

However, it is the common factor and high reliance on the federal government funding combined with families who access these services with their inelastic demand for these services and limited capacity of pay which represents the greatest barrier to successful bargaining. As the primary funder of long day care sector and with responsibilities to set and enforce the common regulatory regime, the Federal government exercises significant influence in their operation of services and capacities of services to set fees, and I note this was reflected in statements of Mr Ward.

PN555

The assistance available to the parties under supported bargaining stream particularly the capacity for Fair Work Commission to direct third parties under section 246(3) to attend conferences is seen by the group 2/3 employees as a necessary intervention to allow for bargaining to occur. This allows for genuine discussions for sharing of information and the full understanding of the financial implications of any agreement within this very dominant government-funding context.

PN556

Without this assistance, it's the view of the group 2/3 employees that it would be unlikely that agreements at the enterprise level or the multi-enterprise level would be able to be made, and we note this view is also supported in the reply submissions of the ACA employers which states at paragraph 7 that they have not previously considered bargaining as absent the involvement of the Commonwealth, it would be commercially futile to do so and that division 9 now provides a pathway to this.

PN557

Multiple submissions on this matter which I won't go into also point out that the early childhood sector was repeatedly specifically recognised as one of the sectors where assistance to bargain may be necessary in the Secure Jobs Better Pay legislation explanatory memorandum as well as the Minister's second reading speeches.

PN558

I'd also like to specifically address the existence of agreements within the employer group that we represent. CCC and CEALA employers concur with the submissions of the ACA and United Workers' Union, AEU and the ACTU that the existence of a current or historical enterprise agreement should not exclude an employer from being covered by a supported bargaining authorisation.

PN559

We concur with the fact that the - the fact of an employer being a party to an expired enterprise agreement should not act to exclude them from this process as it was in other previous cases prior to the announcement of the Secure Jobs Better Pay Act and especially so given the removal of the previous object found in 191B that the - an aim was the previous low bargaining stream was to assist persons who historically did not have the benefits of collective bargaining.

PN560

We support the contention in the ACA's submission at paragraph 21 in reply which rejects assertion that the existence of an enterprise agreement suggests that the employer does not currently need support to bargain and, therefore, has not reached the requisite level of satisfaction or appropriateness and that this should not be elevated to a separate test or hurdle that employers must pass.

PN561

The objects of the division include to assist and encourage employees in the - and their employers who require support to bargain and to make an enterprise bargaining agreement that meets their needs. It's not just whether they have the capacity to bargain, but also to make an agreement that meets their needs. The existence of an agreement in and of itself is not evidence that employers and employees do not require support to bargain to make an enterprise agreement which meets their needs.

PN562

Agreements are documents that are made at a point in time within a specific circumstance and context. It is reasonable and possible to conceive of many circumstances which might explain why an agreement was being able to be made, but may not be evidence of effective, successful or efficient bargaining or that the employees and employers don't currently require support to bargain. For example, an agreement could have been made, but was completely unable to be renegotiated which was the case of a lot of the agreements that were made applying to our employers.

PN563

Enterprise agreements are, by their design, meant to be renegotiated. That's why they have expiry dates as opposed to rewards which continue. So where there are inabilities for services to renegotiate, there - you know, there's an indication that there's a problem with the capacity of that service of that employer to be able to bargain. An agreement may have been made under a specific set of circumstances which have since changed or no longer exist.

PN564

For example, where funding to support a negotiated outcome was available and was no longer available and that that's a consideration for the ability for those services or those employers and employees to be able to make an agreement has been mentioned by Mr Ward and in my own statements, the reliance on government funding in this sector is particularly relevant to that particular circumstance.

PN565

An agreement may have been able to be made, but barriers to bargaining including low bargaining power, reliance on government funding contribute to the fact that it ultimately does not meet the needs of the employer. For example, it may be possible to make an agreement that applies to a particular class of employee because one of those barriers to bargaining has been removed in that there is extra funding available for that particular class of employee, but not for the rest of the staff who work in the same service at the same time.

PN566

We would imagine that it would be much more efficient for an employer to be able to make an enterprise agreement once which covers all of the relevant staff who work in a team environment rather than having to make separate enterprise agreements across various levels of staff because of a particular barrier to bargaining.

PN567

All of these circumstances apply to the employers who are covered in the enterprise agreements named in the application, and is reiterated in the Stevens statement as outlined in paragraph 27 and 28. The ACA's submission in replay at paragraph 22 suggests the question properly put is whether the employers of - are of a class that fits what division 9 is intended to address which is among other things that they require support to bargain to make an enterprise agreement which meets their needs - and which meets their needs.

PN568

On the basis of the evidence led on behalf of the employers represented by CCC and CEALA, this threshold is clearly met in all - in the case of all employers. We also support the contention of United Workers' Union in their reply submissions that the Commission should take a broad approach to the question of appropriateness and that the objects of the division should not be misconstrued as an eligibility requirement. United Workers' Union submission in reply notes that there are already specific exclusions included in the provisions of this division including at paragraphs 13, 14 and 15.

PN569

For example, they say that while employees who are covered by a single enterprise agreement that has not passed its expiry date are specifically excluded from the scheme. Employees who are covered by a single enterprise agreement that has passed its nominal expiry date are not specifically excluded by - from this scheme. It is misconceived to suggest that the Commission should be reluctant to name such employees and their employers in a supported bargaining authorisation by reading that into a statute as an additional disqualifier. We concur with their submission that it is a broad consideration and not a exclusionary one.

PN570

While we note that some submissions on points of operation are construction of the provisions of division 9, I ask the Commission to consider the hypothetical impact of the granting of a supported bargaining authorisations. We share the view of the United Workers' Union in its reply submission that caution should be exercised in relation to the extent that the Commission consider these hypothetical scenarios significantly different than that which is before it.

PN571

On the basis of the evidence and submissions on behalf of the applicant respondent employers, there is sufficient material before the Commission to satisfy that the matters that it is required to be satisfied of, and we urge the Commission to make the authorisation in the terms (indistinct).

PN572

JUSTICE HATCHER: Thank you. Ms Pearson.

PN573

MS PEARSON: So, Your Honour, thank you very much. I note your question before about the size of G8. And I do acknowledge that although we are large in size and scope, the nature of what we're talking about today, from an application perspective, we still are aligned. So when you think about common interest, the nature of our workplace, low paid workers, the fact that our team are doing the same as all other team members, and we have centres from five team members up to 35 team members; we believe that our common interests are aligned with the application.

PN574

JUSTICE HATCHER: So what is it that prevents an organisation the size of G8 from entering into an enterprise agreement?

PN575

MS PEARSON: So, from our perspective, we have relied heavily on the Award previously. And that has been the focus of the business. This is, I think, our opportunity is to play a leadership role within the sector and really negotiate or have the government help support an increase in wages for our team.

PN576

JUSTICE HATCHER: In the teachers work value decision, that refers to evidence that G8 – I think it was in 2018 – unilaterally paid a – I think the amount was confidential – a substantial increase to its teachers. Which suggests some capacity, at least at that time, to pay wage increases without the need to become involved in a multi-enterprise process. Do you want to say anything about that?

PN577

MS PEARSON: Yes, Your Honour. So, I commenced with G8 in 2020. However, there are a small number of roles within our organisation that we do pay above award. And those teachers then are included in those roles. Simply that we pay slightly above Award, to be able to attract and retain the teachers that we have. For our ability to continue to run, apply with a quality framework and the ratios required to run our business effectively.

PN578

JUSTICE HATCHER: Right, thank you.

PN579

MS PEARSON: Thank you, Your Honour.

PN580

JUSTICE HATCHER: All right, so which of the interveners would like to go first? We'll start with the ACTU?

PN581

MS PELDOVA-MCCLELLAND: Thank you, Your Honour. Happy to go first.

PN582

We filed outline of submissions on 7 August 2023, and I refer to and rely on that submission. There are many areas of agreement in the submissions of the parties

and the other peak bodies. However there are also some areas of contention in relation to matters of interpretation. I don't intend to repeat the substance of the ACTU's written submissions. But we'll speak to five main areas and attempt to respond to some of the submissions in reply. In saying that, I don't seek to reply to absolutely everything we disagree with in the peak employers submissions. As that has already been done comprehensively by UWU and AEU in their replies, and I don't wish to unnecessarily double up.

PN583

So the first matter I wish to address is around the objects and the role of enterprise level bargaining. The peak employer groups made some submissions about this. For example, the submissions of AiG and ACCI seek to confine the operation of the new supportive bargaining provisions by reference to the objects in section 3(f), section 171 and section 241, and assert that the Fair Work Act preferences enterprise level bargaining over multi-enterprise bargaining. And I can take you to the specific parts of those submissions. So it's ACCI at 3.8 to 3.12 and AiG at 15.

PN584

AiG go on to assert that supportive bargaining is intended to operate in a narrow set of circumstances. They refer to an extract of the Minister's second reading speech in support of that. And conclude, at 19, that the Commission should be satisfied that the cohort of employers and employees to whom a given SBA would apply, are in fact of the nature for whom this new legislative scheme is intended. Before determining that it is appropriate to make an SBA.

PN585

They also say that the assessment of appropriateness must ensure that the operation of the supported bargaining scheme does not circumvent the operation of the single interest bargaining scheme. That's at 20 of their submission.

PN586

Finally, ACCI contends that the test requires the Commission to determine appropriateness in contrast to other available avenues for bargaining. That's at 1.6.

PN587

We disagree with all of these contentions. They're not supported by the explanatory materials nor the statutory text. They're inconsistent with the intention of the new provisions. Being to improve access to the supported bargaining stream, and to ensure it's easier to access than the previous low paid bargaining stream as has been set out in a revised explanatory memorandum at 922 and 982.

PN588

And we submit that these submissions are actually seeking to erect new barriers to the making of supported bargaining authorisation. As has been covered by some other submissions earlier today, the Act does not state a preference for enterprise level bargaining. Nor does it suggest a hierarchy of bargaining approaches. The submission of ACCI, at 1.6, that the Commission has to determine

appropriateness in contrast to other available avenues for bargaining should be rejected. The test is appropriateness, not appropriateness in contrast.

PN589

The characterisation that the AEU reply submissions - at four of those submissions – use, that these streams are complementary rather than competing, should be adopted, in our respectful submission.

PN590

The objects of Part 2(4) of the Act are set out in section 171. And they include, at 171(a), to provide a:

PN591

> *Simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits.*

PN592

It is immediately apparent from that section that there is an object expressed to enable both collective bargaining generally and good faith bargaining. The wording of 'particularly at the enterprise level' in section 171, and the reference to an emphasis on enterprise level collective bargaining in section (3)(f) are both consistent with a statutory scheme which requires additional thresholds to be met to obtain either a single interest employer or a supported bargaining authorisation.

PN593

Clearly, the extent of the emphasis on enterprise level bargaining and the extent to which collective bargaining more generally is enabled, has been enabled by the amendments – sorry, I withdraw that. Clearly, the extent of the emphasis on enterprise level bargaining and the extent to which collective bargaining, more generally, is enabled by the Fair Work Act has significantly shifted as a result of the amendments that have been brought about.

PN594

Those amendments are clearly aimed at improving access to multi-enterprise bargaining with a revised explanatory memorandum stating that the bill will improve the workplace relations framework by removing unnecessary limitations on access to the low paid bargaining scheme and the single interest employer authorisation stream and provide enhanced access to support for employees and their employers who require assistance to bargain.

PN595

Nothing in the Minister's second reading speech changes this interpretation which clearly states the reforms are intended to provide flexible options for reaching agreements at the multi-employer level for employees and employers that have not been able to access the benefits of enterprise level bargaining.

PN596

There is no requirement that the Commission must first be satisfied that the cohort of employees and employers are in fact of the nature for whom supportive bargaining is intended before determining whether it's appropriate to make an

authorisation. In our respectful submission, this introduces an entirely unnecessary pre-condition that just does not exist in the statutory text or the extrinsic materials.

PN597

The task of the Commission is to be satisfied of certain things, including the appropriateness of the parties bargaining together. And it is at this point the Commission would be satisfied that that cohort of employees and employers are of the nature for whom supportive bargaining is intended, not before that exercise is undertaken.

PN598

Neither is there a requirement that the assessment of appropriateness must ensure that the operation of the supportive bargaining scheme does not circumvent the operation of the single interest bargaining scheme. Such as AiG contends at 20 of their submissions.

PN599

Not only is this speculative, it is inconsistent with the new provisions which provide for three express disqualifiers for a supportive bargaining authorisation to be made. Which are where the proposed agreement is a Greenfields agreement where an employee is covered by a single enterprise agreement that hasn't passed its nominal expiry date. And where the proposed agreement would cover employees in relation to general building and construction work.

PN600

The second of those disqualifiers deals with the interaction between enterprise level bargaining and supportive bargaining. And indeed, it includes a protection against enterprise level bargaining being used to undermine supported bargaining, in section 243(a)(iii), by providing that the second disqualifier does not apply where the Commission is satisfied that the employers main intention in making the agreement was to avoid being specified in a supported bargaining authorisation.

PN601

So I'll move on to the second matter of appropriateness. There is, I think, a lot of agreement and consensus amongst the various submissions that section 243(1)(b) involves a broad discretion to determine appropriateness, and that the considerations expressly listed are non-exhaustive. There are several matters arising from the submissions that I'd like to address.

PN602

Firstly, AiG contend, in their outline of submissions at 33 to 35, that if the Commission is not properly informed in relation to the matters identified at section 243(1)(b), it cannot reach the requisite degree of satisfaction required to grant an authorisation. And therefore, any limitation on the Commission's capacity to robustly assess those matters should weigh against the granting of an application.

PN603

We disagree for two main reasons. None of the matters identified at section 243 are intended to be pre-requisites, that each need to be proven. Rather, they are matters to be considered in overall assessment of appropriateness. And we concur with the reply submissions of the AEU at 10, which say it would be wrong to regard these considerations to import notions of an onus or burden of proof.

PN604

If one of the considerations isn't present, this is not determinative of appropriateness. But rather, by its absence, does not count towards the granting of an authorisation.

PN605

Secondly, this submission, in our respectful submission, doesn't make sense, in relation to section 243(1)(b)(iv), as it's difficult to understand how it would be possible to determine on a practical level, whether the Commission had been properly informed in relation to any other matters given the large range of possible matters that could be considered under that factor.

PN606

The second matter I wish to go to in appropriateness is that AiG contend in their submission, which may not yet have been accepted as a reply, but may be in future – which I might just conveniently refer to as AiG's reply submission from hereon in – not as making an assumptions as to whether or not it will be accepted. In that submission, at 10, AiG submit that on its face, the supported bargaining scheme may apply, in a broader range of circumstances, than the previous low paid bargaining scheme. Now, I'm not disagreeing that, but the language is very hesitant and I would like to make the point that – or the submission – that it is indisputable that the supported bargaining scheme applies in a broader range of circumstances. It could not be clearer that the intention of the amendments to the scheme is to expand access to what was previously the low paid bargaining scheme. Both the amendments made to the legislation and the explanatory material make this very plain.

PN607

AiG also submit that the objects of the new provisions would be achieved even if the Commission adopted a more moderate approach than that that is advanced by the ACTU. Because various aspects of that earlier scheme have been removed from the statutory text. We are unclear what a more moderate approach means or what AiG maybe implying about the ACTU's position. However, this is not a reason to adopt the approach of AiG. The Commission needs to adopt the interpretation that best achieves the purpose of the provisions pursuant to section 15AA of the Acts Interpretation Act.

PN608

If the Commission accepts the arguments of AiG, that certain considerations which were deliberately removed from the supported bargaining provisions, should still usually be taken into account, then there is a real risk that the objects of the new provisions won't be achieved, as those considerations could lead to the same barriers in accessing supported bargaining as existed for the previous low paid bargaining stream.

PN609

Indeed, we say AiG, in its submissions, seek to erect more barriers to the supported bargaining stream that simply do not have a foundation in the statutory text or the extrinsic materials.

PN610

This is why the ACTU submitted in its outline of submissions, that the Commission should be cognisant of the factors that were removed from the previous provisions. They are part of the mischief that the legislation was intended to address and they are therefore relevant.

PN611

I will move now to the third matter I wish to address, which is in relation to prevailing rates of pay. Firstly, ACCI contend in their outline of submissions at 3.18 and 3.5 that whilst it is not necessary that prevailing pay and conditions are low, they must however serve as some impairment to the ability of the parties to bargain at the enterprise level, which is necessary to justify this alternative less preferable form of bargaining. We say this submission should not be adopted as it is not only irrelevant to the current application, it would also improperly narrow the scope of the scheme for future applications.

PN612

I have already covered the reasons why the supported bargaining stream should not be construed as a less preferable form of bargaining, and there is no support also for ACCI's submission about pay and conditions needing to be an impairment. The objects of the division in section 241 refer broadly to constraints on bargaining. However, this does not support the interpretation that pay and conditions must be an impairment to the ability to bargain at the enterprise level. There could be many reasons why parties face difficulty bargaining at the enterprise level, and pay and conditions are just as or even more likely to be a symptom of those reasons rather than a cause; for example reliance on government funding being a constraint on capacity to pay, the predominance of small enterprises in the sector, high employee turnover, and so on.

PN613

Secondly AiG contend at 42 of their outline of submissions the absence of low rates of pay would weigh strongly against the granting of an authorisation, and they say again at 43 it would not generally be appropriate to grant an authorisation where payment of low rates of pay in the sector was not a typical or predominant practice. We disagree. There is nothing in the legislative scheme or extrinsic materials that support those submissions. The use of the word 'including' in section 243(1)(b)(i) indicates that low rates of pay are just one example of how prevailing pay and conditions may be relevant to the appropriateness of employees and employers bargaining together. It is in no way determinative of appropriateness.

PN614

Where low rates of pay prevail that would likely weigh in favour of the granting of an authorisation. However, clearly an authorisation could be made in circumstances where low rates of pay do not prevail. This interpretation is supported by the revised explanatory memorandum at 984, which states that:

PN615

The prevailing pay and conditions in the relevant industry is intended to include whether low rates of pay prevail, whether employees in the industry are paid at or close to relevant award rates, et cetera. It is therefore clear that other matters in addition to whether low rates of pay prevail will be relevant.

PN616

AiG's interpretation is also inconsistent with the intended purpose of the new provisions, which are to expand access to supported bargaining and which has specifically taken out the requirement for employees to be low paid in order to gain access to the scheme.

PN617

I wish to move briefly to the question of low rates of pay and the difference between that phrase and the phrase 'low paid'. Your Honour asked a question earlier about how to delineate if some measure is not used, which has been addressed by both my friend from UWU and my learned friend from the AEU. I concur with those submissions, and I also say that they find support in some of the principles expressed in previous low paid bargaining cases. And although those cases are of limited relevance to the meaning to be given to low rates of pay they did make some interesting observations in interpreting the phrase 'low paid'.

PN618

The aged care case for example did not adopt a threshold. It interpreted the phrase 'low paid' as a reference to employees who are paid at or around the award rate of pay and are paid at the lower classification levels. It also gave consideration to the fact that aged care employees were low paid in a relative sense and in general terms.

PN619

Subsequent cases, while seeking to align this approach with the definition of low paid the Commission had adopted in relation to the modern award and minimum wages objectives, also observed that the question of whether an employee is low paid is a question of degree and necessarily involves some imprecision, and that the term 'low paid' cannot be defined by a reference to a strict cut off point. That's application by United Voice [2014] at 20 and 30.

PN620

These observations support what was said earlier today about the term 'low rates of pay' not referring to an absolute or economy-wide measure, but as also encompassing comparative or relative assessments such as comparisons to other employees doing similar work.

PN621

I might move now to the fourth matter I wish to address, being common interests. So firstly AiG take issue with the ACTU's submission that it is enough for some employers to share some interests, rather than all employers needing to share all interests. AiG contend instead in their reply submission that only the interests common to all of the employers will be relevant.

PN622

We say there is nothing in the legislative scheme or extrinsic material that support AiG's submission. And the ACTU's submission is supported by the definition of common in the Macquarie dictionary, which we do outline in our written submission, as belonging equally to or shared alike by two or more or all in question. The section requires the Commission to consider whether the employers have common interests, but it does not require the Commission to find that they all have exactly the same common interests.

PN623

AiG's submission would require a level of homogeneity which is unrealistic to expect, especially where there is a large cohort of employers involved. It would be a significant limitation on these provisions to require every single employer to share all of exactly the same common interests. For example if the majority of employers were in one geographic location and therefore shared that as a common interest, but if few employers were in different locations yet shared other common interests with the larger group that should not be a basis for excluding them from an authorisation. The provisions should not require that employers be identical. Rather it is sufficient that there is commonality of interest across the group of employers.

PN624

Secondly, this wonderful issue of the plural versus singular. ACCI contends in its outline at 3.22 that the noun and the expression 'common interest' is in its plural form and therefore employers have to share more than one clearly identifiable common interest, and we've heard similar submissions from my friend at ACA today.

PN625

Whether or not common interest refers to plural interests or can also include a single common interest is not relevant to the present application, and is not necessarily something the Commission needs to deal with as part of this matter. However, if the Commission is minded to express a view we say as follows. Firstly, that the submissions of my learned friend from the AEU about what is meant by common interest are compelling. That is that the examples called out are objective features of an employer's operations that may give rise to common interests.

PN626

Secondly, it is unnecessary for there to be multiple common interests that employers share. One interest shared between some employers would necessarily be referred to as the interests of those employers. That is I have an interest, you have an interest, together we have interests plural. It's a collective expression.

PN627

Thirdly, there is no contrary intention to the rule in section 23B of the Acts Interpretation Act, which is that words in the singular number include the plural, and words in the plural number include the singular.

PN628

Fourth - I think it's up to number 4 - the statutory text does not support ACCI's characterisation at 3.28 of their submission regarding the pluralisation of the

phrase 'in the supported bargaining provisions being a deliberate and careful choice.' We note that sections 243(1)(b)(ii), section 249(3)(a) and section 216DC(3)(a) all use the same phrase, 'clearly identifiable common interests.' The slightly different wording used in section 243(2), examples of common interests employers may have, compared to the wording used in section 216DC(3)(a) and 249(3)(a), matters that may be relevant to determining whether the employers have a common interest, does not impact on the meaning to be ascribed to common interests and whether that is plural or singular, especially given the phrase 'clearly identifiable common interests' is used elsewhere in all three sections.

PN629

Finally, it is entirely possible that a single common interest in a particular case may favour a conclusion that is appropriate for the parties to bargain together. To require parties to identify and lead extensive evidence on tertiary common interests merely to show the presence of multiple clearly identifiable common interests would be contrary to section 577 of the Fair Work Act, in that it would introduce unnecessary technicality, undue delay and formality.

PN630

Moving on to the interpretation of clearly identifiable. ACCI makes submissions in relation to this at 3.38 to 3.41 of their outline, which we say use speculative and hypothetical examples that are irrelevant to the present application. To the extent the Commission is minded to consider those submissions however we say in response to ACCI's submission at 3.41 that just because there are arguable or rival contentions as to the identifiability of the common interests that will not mean it is not appropriate for the parties to bargain together. It is reasonable to expect that the views of employers and employee organisations will differ on this point, particularly where employers are not supportive of an authorisation being made.

PN631

Whether or not there are clearly identifiable common interests is a matter of fact to be determined by the Commission. Where employers are supportive of the authorisation being made and articulate reasons for their support this is likely to be demonstrative of there being common interests.

PN632

We concur with the reply submissions of the AEU at 21 of their outline, that having clearly identifiable common interest does not present a high threshold and means that they arise from sufficiently, apparent or ascertainable features of the employer's operations. We do not agree that clearly identifiable means that common interests need to be obvious, and there are some submissions of the ACA which we dealt with in our written submissions where we disagree with some of their characterisation of this phrase. And we say that just because something is complex or requires some work to understand or identify does not mean that it is not then able to be clearly perceived or identified.

PN633

Moving on to the fifth matter I wish to address, which is manageable bargaining process. It may well be that I have more to say on this than anyone else, but let's see. As outlined in our written submissions we disagree with ACA's

characterisation of a manageable bargaining process - this is at 133 of their outline - as orderly, constructive and efficient leading to a successful outcome.

PN634

At 25 of ACA's reply submission they rely on the definition of manage as to bring something about or accomplish something. They do not rely on the definition of manageable. We submit that it is more appropriate in this context to rely on the definition of manageable, which we set out at 64 of our written submissions as meaning able to be managed, contrivable, tractable.

PN635

The concept of a manageable process is separate to the outcome of that process. There will be many, many factors that influence whether or not a bargaining process results in a successful outcome. For example whether or not parties can reach agreement on terms, noting of course that the good faith bargaining requirements in section 228 do not require the parties to make concessions or to reach agreement; the outcome of any protected industrial action, whether or not employees vote for the agreement, the ability of the outcome to be funded and so on.

PN636

Trying to predict the outcome of a bargaining process with all of these variables is a speculative exercise which has no bearing on whether or not the process itself is manageable. Whilst it may be that a manageable bargaining process is more likely to lead to a successful outcome, that is not what the Commission is required to consider. It is required to consider whether the number of representatives is consistent with a manageable process.

PN637

This interpretation is supported by the security guard case here the Commission found that in circumstances where there were nine employee bargaining representatives plus the union, there was no evidence this led to unmanageability other than a suggestion that some employees raised an objection to the approval of the agreement. The Commission found this does not speak to the manageability of bargaining, and, in any event, the objection taken arose after bargaining had concluded.

PN638

This is also a direct response to ACU's submission at 3.47 that the object of ensuring that applications to the Commission for approval of enterprise agreements are dealt with without delay should discourage the Commission from making authorisations that have the propensity to lead to the lodging of application which receive a significant number of diverse views from unaligned employee organisations, employees and employers.

PN639

We also say a bargaining process doesn't necessarily have to be efficient, orderly or constructive and certainly not at all times in order to be manageable, nor do negotiations have to be simple or flexible, as submitted by ACCI at 3.46 of its outline. Anyone who has been involved in a bargaining process know that these are not pre-requisites for a manageable process or even a successful outcome, and

this much was recognised in the practice nurse case where the Commission said the process may be manageable but still be inefficient.

PN640

I'd like to briefly touch on a point Your Honour raised earlier about the possibility that any number of employees may nominate to be a bargaining representative. This was considered in some of the previous low-paid bargaining cases which we addressed in our written submissions at 68 to 69. In the aged care case, the Full Bench observed that viewed from the employee perspective, we have no reason to doubt that one or two unions would take the lead in the negotiations and would devote sufficient resources to the task.

PN641

There is always the possibility of a multiplicity of bargaining representatives being appointed as there sometimes are in bargaining for enterprise agreements involving large employers operating in more than one state. Whatever issues of these kind do arise, we're confident that solutions can be found if all representatives are committed to reaching a positive outcome. The tribunal also has the ability to assist.

PN642

In the security guard case, the Commission found that although it was to be anticipated that other employees may wish to become involved in bargaining through the appointment of one or more representatives, that would not on its own result in the unmanageability of bargaining, and any difficulties that might be encountered could be dealt with in accordance with the Fair Work Act.

PN643

These observations support the submission made by the ACTU in our written submissions at 63 and 66 to 67 and the submissions made by my learned friend at the AEU earlier that there is no particular number which is relevant, and the Commission should have regard to the number of bargaining representatives in the relevant context such as the particular bargaining process, the industry and the parties involved. There may be a history of successful bargaining with a large number of representatives or some or many of those representatives may be aligned in their positions during bargaining meaning the number itself, even if it is very large, would not make the process unmanageable.

PN644

Whilst the experience or competence of particular bargaining representatives may be a relevant consideration, just because some or all parties may lack experience or competence should not lead to a conclusion the process is unmanageable, particularly in a legislative context where it's anticipated that some of the parties may not have had much exposure to bargaining. However, if there are some bargaining representatives who do have experience such as unions or employer representatives, that is a relevant consideration as it's likely to contribute to a manageable process.

PN645

The last matter, I believe, I wish to address is any other matters the Commission considers appropriate, that is, section 243(1)(b)(iv). AiG take issue in their reply

submissions with the ACTU's submission that the Commission should be cognisant of the matters that were deliberately not retained from the low-paid bargaining provisions. They contend at 56 of their outline that it will typically, if not always, be appropriate for the Commission to take certain matters into account including the views of the employers and any history of bargaining.

PN646

ACCI make similar submissions at 3.49 of their outline regarding views of the parties and potential harm to competition or productivity. I've touched on this in my submissions regarding the objects, but just to emphasise the point that many matters previously relevant to the granting of a low-paid authorisation have been removed from the supportive bargaining provisions including the history of bargaining, the views of employers and employees and improvements to productivity and service delivery. Some of those matters have also been removed from the objects of the division in section 241.

PN647

The criteria for making an authorisation have, therefore, been significantly revised in order to overcome the barriers associated with the previous low-paid bargaining stream that resulted in its very limited take up. The Commission in interpreting the new supported bargaining provisions should be cognisant of the matters that were deliberately not retained from the low-paid bargaining provisions to ensure the purpose of the new legislative scheme can be properly realised.

PN648

It is not that these matters could never conceivably be relevant to the making of an authorisation. However, we do say they should be approached with significant caution so that the same barriers which impede access to the low-paid bargaining stream do not also impede access to the supported bargaining stream and, therefore, defeat the intention of the new provisions.

PN649

Section 243(1)(b)(iv) should not be used to smuggle in by default considerations that have been deliberately removed from the legislation for good reason. The examples given in our written submissions regarding previous references to access to and history of bargaining are illustrative of the way in which the Commission could be cognisant of these maters and exercise a cautious approach. In previous decisions of the Commission, it was unpersuaded of the need of support - for support where some bargaining had taken place in the past even where agreements had expired or ultimately failed the better off overall test.

PN650

There was also inconsistency between decisions as to whether access to bargaining was a practical assessment of employees' capacity to advance their interest through their bargaining framework or a mere assessment of whether the formal legal right to bargain existed. The removal of these criteria, we say, signals a clear intention by Parliament that having access to or some previous history or benefit from single enterprise bargaining should not weigh against the granting of an authorisation.

PN651

This is also - no. Sorry. I withdraw that. If any - if in any given matter regard is to be had to the history of bargaining, it will also be relevant to consider whether past enterprise bargaining failed to produce outcomes which depart significantly from award conditions as this may suggest that constraints exist on the ability of employees and employers to bargain effectively at an enterprise level.

PN652

This is the reason the ACTU refers in its written submissions to a holistic assessment of whether employees have been able to achieve substantive gains or benefits as a result of bargaining. This is not speculation, as contended by AiG at 22 of their reply. It is consistent with well-accepted principles of statutory interpretation that the mischief the legislation is intended to address is relevant to its interpretation.

PN653

As I've said on many occasions, it's plain that the intent of the supported bargaining provisions was that they be easier to access than the previous low-paid bargaining provisions and remove the barriers that previously existed. It's not necessary for the explanatory materials to detail why every single change was made. Rather, it's clear from a comparison of the previous and the new provisions and the clearly expressed intent of the supported bargaining scheme that the limitations of the previous scheme should not be replicated.

PN654

To specifically address ACCU's submissions regarding the potential harm to competition or productivity, and they refer to the statutory objects of promoting productivity and the special circumstances of small and medium-sized business, we say that these matters have no relevance to the current application, and there is no reason for the Commission to consider them.

PN655

However, if the Commission is minded to engage with these submissions we say as follows, considerations relating to productivity and the needs of individual enterprises that formed part of the objects of the previous low-paid bargaining stream have now been removed from those objects as well as being removed from some of the individual considerations that the Commission had to previously take into account.

PN656

In relation to competition, if supported bargaining was not to be accessible where there is competition between employers, it would quickly become redundant, and, finally, at the time of making the authorisation, no one knows what the content of the agreement will be, and therefore what the potential impacts on productivity, flexibility or competition may be. It is impossible to know, for example, how much flexibility an agreement may give an employer or the improvements to productivity that may result from an agreement. These considerations are entirely speculative, and the Commission cannot meaningfully consider these matters.

PN657

This last point is also true for other considerations that AiG contend to be relevant at 58 of their outline such as potential implications for customers, clients or users

of the employers' products or services, implications for other employers and employers in - employees in the supply chain or any potential distortion of the labour market. Again, the outcome of the bargaining process and its impact on any of those matters cannot be predicted, and the Commission cannot be expected to take into account speculative matters such as these.

PN658

To go to another contention of AiG in its reply submission at 18, AiG agree with the ACTU's submission that consideration of whether the employers have common interests does not require the Commission to consider the ways in which the interests of employers differ. They do assert that diversion interests can be taken into account pursuant to the any other matters provision and that such matters may weigh against the grant of an authorisation.

PN659

We say that the any other matters provision is confined in that it directs the Commission to consider any other matters it considers appropriate when determining whether it's appropriate for the parties to bargain together. It is not an invitation to the Commission to identify all of the ways in which employers are different or have divergent interests or to have regard to speculative matters or any other matters that anyone may think of on the day.

PN660

The matters are confined to those factors that directly bear on the question of whether it's appropriate for the parties to bargain together within the subject matter, scope and purpose of the legislation. Unless I can assist the Commission further, those are the submissions of the ACTU.

PN661

JUSTICE HATCHER: All right. Thank you. Mr Izzo and Ms Bhatt, unless you tell us you're going to take five minutes each, I think we'll adjourn now and resume at 10 am in the morning.

PN662

MR IZZO: I think if that's - may it please, I think I was anticipating being about 30/35 minutes, Your Honour.

PN663

JUSTICE HATCHER: All right.

PN664

MR WARD: Sorry. I can just dispose of the question Your Honour asked me about cooks, if I could.

PN665

JUSTICE HATCHER: Yes, yes.

PN666

MR WARD: My apologies. I think I've misled the Commission slightly. I've spoken to Mr Redford about this. The unqualified cook - because that's non-cert III cook which is predominantly the case - is covered by the Children Services

Award, and they'll be support worker 1 or 2, 1 when - on entry and then 2. The qualified chef, the Certificate III, would covered by the miscellaneous award.

PN667

JUSTICE HATCHER: Sorry, with the what?

PN668

MR WARD: Miscellaneous award.

PN669

JUSTICE HATCHER: Well, maybe that's something that requires rectification.

PN670

MR WARD: It might do. It surprised me, but that's the case.

PN671

JUSTICE HATCHER: Yes. All right.

PN672

MR WARD: If the Commission pleases.

PN673

JUSTICE HATCHER: All right. Well, we'll now adjourn. We'll resume at 10 am in the morning.

ADJOURNED UNTIL THURSDAY, 17 AUGUST 2023 [4.02 PM]

RESUMED ON THURSDAY, 17 AUGUST 2023 [10.00 AM]

PN674

JUSTICE HATCHER: Are you next, Mr Izzo?

PN675

MR IZZO: Yes, your Honour. Yes.

PN676

MR GIBIAN: So, there was just a question that, were we going to supplement the material to answer. Your Honour, the President, asked a question about the data that's recorded or referred to at paragraph 20 of the statement of agreed facts, which refers to the medium weekly fulltime earnings for child carers based on - - -

PN677

JUSTICE HATCHER: Yes.

PN678

MR GIBIAN: ABS earnings and hours data. I can confirm that the child carers does not include teachers and in those circumstances we thought it appropriate from the same data source to supplement the material to set out the relevant data.

PN679

Can I just hand up a document, and we can obviously provide this and a number of copies if anyone wants – we obviously provide this electronically, as well. I mean, it's summarised in the points that are on the short note of it on the first page, but to summarise it very briefly, there's the second annexure actually, Annexure B, has the relevant figure for the category of Early Childhood (Pre Primary School) Teachers, the weekly figure being 1666.

PN680

And obviously that's higher than the two thirds figure which is referred to in the annual wage review. We have also provided in Annexure A, the equivalent data for the category of Primary School Teacher to support the propositions that we advanced yesterday in relation to the comparison between pre primary and school teachers, the figure for primary school teachers being 1984, so something a bit over $300 a week higher than for pre primary school teachers.

PN681

To be clear on our primary submission that would be relevant to whether those employees could be regarded as having low rates of pay. The alternative, we'd say, whatever the resolution of that question, it is clearly a matter which would be relevant on appropriateness, at least on the other matters the Commission should consider appropriate in the context of considering past employment outcomes under a conventional bargaining arrangement.

PN682

JUSTICE HATCHER: Right, I might mark that as an exhibit if there's no objection. So, the applicant's short note dated 17 August 2022 will be marked exhibit 23.

EXHIBIT #23 APPLICANT'S' SHORT NOTE DATED 17/08/2023

PN683

MR GIBIAN: May it please.

PN684

JUSTICE HATCHER: Mr Izzo?

PN685

MR IZZO: Thank you, your Honour. Your Honours, what I'd like to do is address five subjects today, five subject matters pertaining to the proceedings, and they are in order. Firstly, the prioritisation of enterprise level bargaining in the Fair Work Act, and the role that this should play in the exercise of your function as part of these proceedings.

PN686

Secondly, how the assessment of appropriateness is to be conducted within the meaning of Section 243 of the Act; thirdly, there's been considerable debate over the meaning of, 'low rates of pay' and how that should be understood and I would like to address that. Fourthly, I'd like to talk about how the factor about clearly identifiable common interest works; and then fifthly, I'd briefly deal with the other factors.

PN687

What I intend to do is reply to the various parties that have made submissions on each subject matter as we go, so I'll intersperse replies. For the purposes of facilitating the submissions I obviously rely on the written submissions ACCI has filed and it's perhaps helpful to have them handy.

PN688

Can I confirm that your Honours have access to three cases that I provided Justice Hatcher's associate. I provided them during the last couple of days, if you can just have access to them.

PN689

JUSTICE HATCHER: Sorry, we're having some difficulties, Mr Izzo, because our server has gone down, so those of us who have gone electronic are (indistinct).

PN690

VICE PRESIDENT ASBURY: So, you don't have highlighted copies of the Full Bench (indistinct)?

PN691

MR IZZO: I can give you my copies, your Honour. I'm happy to try and deal with that subject to those constraints.

PN692

JUSTICE HATCHER: We'll try and arrange for them. You go ahead and as soon as (indistinct) we'll try to get some paper copies organised.

PN693

MR IZZO: If you could that would be greatly appreciated because there's some important points I'd like to draw your attention to. The next document that I would hope you'd have handy is the AEU electronic bundle. We've got that separately. Thank you. It seems that the AEU may be assisting.

PN694

MR GIBIAN: If we need to share resources we can do that.

PN695

JUSTICE HATCHER: Thank you.

PN696

MR IZZO: Thank you. So, they're the paper based documents that I tender to refer to at various points. If I could start with the prioritisation of enterprise level bargaining. There's been some interesting, one, debate, and two, nuance placed on it. I note that some of the unions talk about it being an emphasis as opposed to a preference.

PN697

I'd just like to explain why we say there is a preference, there is a prioritisation, and explain how we say that works. The starting point – there's three elements or objects in the Act that we would like to take you to. The first is obviously going to be well known to you. It is subsection 3(f) in the objects of the Act, and subsection 3(f) talks about an object being to achieve productivity and fairness through an emphasis on enterprise level collective bargaining, underpinned by simply good faith bargaining obligations.

PN698

So, we talk about an emphasis on enterprise level bargaining. That's the first yardstick or marker in terms of influencing your discretion that I'd like you to have regard to. The next one is in section 171, different language is used. So, subsection 171 is in relation to the objects of the part about enterprise bargaining.

PN699

And it talks about providing a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level. So, what we have here now is enabling, particularly at the enterprise level, so that's the second consideration.

PN700

JUSTICE HATCHER: So, am I right in saying that 171 wasn't altered by the secure jobs, better pay legislation?

PN701

MR IZZO: Yes, that's my understanding, yes. Then the third point of reference are the objects to division 9, itself, and in division 9, each of subsections (a), (c) and (d) provide guidance here. The first is, the object of a division is to assist and encourage employees and their employers who require support to bargain and to make an EA that meets their needs. So, we're talking about this division as about those who require support.

PN702

And then (c) and (d) continue to focus on this concept. Because (c) talks about the division addressing constraints on the ability of those employees and employers. So, not all employees and employers, just those who require support, and the same is said at (d), 'to enable the FWC to provide assistance to those employees and their employers to facilitate bargaining for an enterprise agreement.'

PN703

So, the whole focus of the division is of those who require support. And what we say is that there is in each of these, an overarching sense that there is an emphasis on enterprise level bargaining, but division 9 is about helping those who might not be able to achieve it.

PN704

Now, put against us, one of the various constraints put against us, the Australian Childcare Association employers have described the way these objects operate at paragraph 42 of their submissions, and they assert there is a tension between the objects of 3(f) and section 241. And they assert that this tension exists because 3(f) talks about productivity and enterprise level bargaining which is not mentioned at 241.

PN705

Then they rely on that tension to say that there isn't a hierarchy involved, and it almost disavowed this concept of preference towards enterprise level bargaining. Now, we reject this approach and the reason we do is because of the starting point of the traditional principles of statutory construction.

PN706

So, if I can just briefly take you to Project Blue Sky, which is one of the authorities, one that's no doubt well known to you. When they talk about statutory interpretation at paragraph 70 of the judgment on page 381, they talk about a legislative instrument must be construed on a prima face basis, that it's provisions are intended to give effect to harmonious goals.

PN707

So, the case then goes on to talk about when conflict arises and that you need to try and resolve conflict in the language. But before they get to that, and often there's a lot of cases that talk about resolving conflicts between language and statues, but before they get to that, they say you start off with the presumption that the legislation gives rise to the harmonious goals.

PN708

And what we say is that there is harm in these three sets of provisions, and the way that harm works is that 3(f) and 171 talk about facilitating enterprise level bargaining. And what 241 does is it identifies scenarios where there might be difficulty in enterprise level bargaining or constraints on it, and so it says supported bargaining will alleviate this concern.

PN709

So, what it actually does, instead of there being a tension or conflict, it's not that at all. It's plugging a gap because the access – we want enterprise level bargaining as a preference, we want to facilitate it, but where it can't happen and where it's going to be difficult with these constraints, we need to plug that hole with support. And that is the holistic framework.

PN710

And so, to the union parties and others that have talked about how these provisions work, we say that there shouldn't be a rejection of some level of preference. There is a clear preference in the Act but that doesn't mean support and bargaining is not available. It's there to assist where enterprise level is going to struggle. And this, in fact, is precisely what is confirmed in the extrinsic materials.

PN711

So, if I could briefly take you to the AEU bundle, at page 172 of the AEU bundle there, if I could take you to paragraph – this is the explanatory memorandum and it's part of the statement of compatibility with human rights – at paragraph 37 where it introduced supported bargaining the explanatory memorandum says, 'The supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining and the single enterprise level.'

PN712

So, again, helping those who can't otherwise do it. And that exact paragraph, I think, just to give you in a horse pointing south(?), is repeated at paragraph 921 and 979, so it's clearly a matter of prominence for it to have been mentioned three times.

PN713

It's then confirmed in the second reading speech by the minister, so if I can take you to page 167 of the PDF, at 167 – this is page 2180 of the relevant Hansard of Thursday, 17 October 2022 – the fourth paragraph or fifth paragraph down the minister says:

PN714

> *Bargaining at the enterprise level delivers strong productivity benefits and is intended to remain the primary and preferred type of agreement making.*

PN715

So, we're not just talking about emphasis here, he say it's the preferred type.

PN716

> *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.*

PN717

And what I say the minister has said there is entirely consistent with how we put the way the scheme works. And what I would say is that it appears that we're on the same page as the UWU on this.

PN718

In their reply submissions in paragraph 9 they indicate that they are broadly in agreement with this point. They say that the provisions can work in harmony, and should be read that way. They, like us, (indistinct) any suggestion of disharmony, although they probably don't quite characterise the preference of enterprise bargaining the way we do.

PN719

In response, the ACTU and AEU assert that there is no hierarchy of bargaining and the ACTU at paragraph 17 of the submissions in particular, say that the emphasis of enterprise level bargaining – what I understand from their submissions is that you have these additional thresholds on supported and single interest bargaining streams, and that's effectively the boundary of the preference.

PN720

That is, you have enterprise level but to access these others you need to meet these additional queries or criteria, and then there's no further consideration. We say that's not so. We say given the repeated focus of the objects on the Act of facilitating enterprise level bargaining, and that supported bargaining in particular is limited to just providing support to those who need it, then when you exercise your functions, that is when you consider what's appropriate, it will be relevant.

PN721

The question of whether enterprise bargaining will be allowed to proliferate or whether it's difficult or inaccessible, that is something that is relevant to whether it's appropriate, and the reason we say that is because subsection 578 of the Fair Work Act binds the Fair Work Commission to consider the objects of the Act and the objects of each part of the Act when it exercises its functions.

PN722

Finally, both the ACA - - -

PN723

JUSTICE HATCHER: Mr Izzo, I'm just trying to work out what the practical implications of this submission is. Is it no more than this, that in coming to assess what is appropriate we take into account whether or not what you call the primary method of enterprise bargaining has been able to be accessed in the relevant stream of employment or not?

PN724

MR IZZO: Precisely, and I would just add - - -

PN725

JUSTICE HATCHER: Is that – I mean - - -

PN726

MR IZZO: I think it is.

PN727

JUSTICE HATCHER: I mean, the applicants say on the basis of their evidence and submissions that enterprise bargaining had not succeeded in this sector and

that's self apparent from the small number of agreements and the level of award reliance.

PN728

MR IZZO: So, on the facts of this case I don't think there's a huge level of contest, but I do think it is put by the unions that this isn't necessarily a consideration, or one of significant influence in the consideration of appropriateness. And we say it is important in the consideration of appropriateness.

PN729

And the only thing I would add to the statement that your Honour made, which I agree entirely with, is that just to expand on it, if it is apparent that enterprise bargaining has not been possible and there are constraints on it, that is a matter that would support rating the authorisation, but if there aren't such constraints, there appears to be an ability to do it, that would not weigh in favour, or I should say would weigh against granting the organisation, and I would add that (indistinct) to your statement. But putting those two phrases together, that's how we say it operates.

PN730

Now, just to conclude on this point, the ACAAU do say that the effect of ACCI's submissions at various parts, they call out paragraph 3(12) in particular, is the effect of it is to impose a new test or erect new barriers. That's not the effect of the submissions we put in. What we're saying is when you exercise your functions, the parties are capable of bargaining, it's a discretionary factor, as I said, that in that case would weigh against the organisation in the manner I've just explained to the presiding member.

PN731

So, that's what we would say about how the scheme of the various streams operate. Your Honour, Justice Hatcher, raised the question about what is the actual support being provided. You did raise that to Mr Ward. We would say the structure of the scheme of supported bargaining is very different to traditional single bargaining that we see with it. It allows employers to band together, and different groups of employees to be collectively represented across workplaces.

PN732

And we say that structure in and of itself actually provides support. And so when the Act talks about supported bargaining, yes, it may be through subsection 2, or 6, I believe it is, there's some specific measures of assistance you can offer, but I think it's actually the structure of the scheme itself that is supportive or considered to be supportive, and we would say that would be part of the way in which support is often provided.

PN733

And just to help with this a little, I think I gleaned that inference from the second reading speech. It's somewhat subtle but at 167 of the PDF of the AEU bundle of priorities, the same passage I read from the minister earlier, the minister says:

PN734

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 a multi employer level.

PN735

I think implicit in that is that the multi employer level is a more flexible option for bargaining, i.e., it's been difficult at enterprise level, multi may help you. It is a little bit ambiguous but that seems to be the sense, that the actual factor you can multi bargain itself, is supportive. That's, at least, how we understand it to work.

PN736

That takes me to the second subject matter which is the assessment of the appropriateness test. I think I'd need to make a point of clarification on this. The ACTU have put that we are contending that the test is whether it is appropriate to bargain in contrast to other bargaining streams.

PN737

They raised that concern in relation to paragraph 1.6 of our submissions, and AEU have said something similar, that they've read paragraph 3.6 of our submissions and suggesting that this is an exercise in contrast. We don't put that as being the relevant test. We say, and we say this is what our submissions say, is that the question is a broad whether it's appropriate to bargain.

PN738

The question of contrast, that is, can you bargain in another stream whether it's enterprise level or otherwise, that may well be relevant to the consideration of what's appropriate but the test is not, is it more appropriate to bargain in these stream or another? The test is not, you have to not be able to bargain in one of the other streams before you can access this stream. We don't put it that high. And so, I think that should alleviate the ACTU and AEU concerns in that regard.

PN739

What we do endorse is what was said by Mr Redford yesterday, is that the test is a broad, evaluative one. Mr Redford said that the factors underneath the test are broad. I agree with all of that. There's a very broad range of considerations that can be taken into account, both in favour of granting the authorisation, and against granting the authorisation.

PN740

What we would like to urge caution about are a couple of principles that are identified in the ACTU submissions. At paragraph 32 of the ACTU submissions the statement is made that 'if a factor is not present, this would not be determinative of appropriateness but rather by their absence would not count towards the granting of an authorisation.' We don't agree with that on various grounds.

PN741

One, if a factor is not present, in any case it may be a compelling factor, or depending on the facts, the most compelling factor against granting authorisation. But equally, it's not that it simply doesn't count towards the authorisation. If the fact is not present it may weigh against the granting of the

authorisation. So, I think the way the test is applied in that submission should not be adopted.

PN742

Then the second statement that follows at paragraph 33, the ACTU say, 'If several factors are present this should weigh very strongly in favour of a supporting bargaining authorisation being granted regardless of any other matters the Commission may consider appropriate.

PN743

Well, again, I think it's very dangerous to jump to that type of conclusion. The problem with that submission is it's made in a vacuum. Whether it is appropriate is going to depend on the circumstances of each and every case. You're going to make an evaluative exercise in each and every case, and so we think it's unhelpful to be putting forward these general principles that actually may not apply in any particular scenario, and so we caution the Commission against doing that.

PN744

Finally, on the appropriateness test, the UWU stated, and perhaps others have, as well, but I know the UWU said this, that the views of the employer should not carry much weight. We'd certainly contest this. The views of the employees may be very important to the success of the outcome of the supported bargaining process. And additionally, again, this is the type of submission that's made in a vacuum.

PN745

I mean, why is it that the employers don't support in any particular case? What impact are the views of the employers going to have on the bargaining in that scenario? I mean, these are all questions you would explore if there is, indeed, opposition by employers.

PN746

It is, we say, dangerous to be saying, oh, you're just not going to give them much weight as part of this scheme, particularly in the absence of knowing why they oppose. That's what we would say on the appropriateness test.

PN747

The third subject matter is about the prevailing pay and conditions, and the first question is about my rates of pay and how that expression should be understood. The phrase, 'low rates of pay', we say, is a cognate expression to the phrase, 'low pay', and I'm going to come to this concept of cognate expression and I want to spend some time on it. And it's going to have some important weight because it's going to be relevant again when we deal with the concept of prevail, and prevailing.

PN748

So, a cognate expression is one that derives from the same word or that has a related word or the same etymology, and what I'd like to do is just identify how the courts have dealt with cognate expressions previously. Can I check now whether your Honours have access to the decision of *Klein v Official Secretary of the Governor General & Anor?*

PN749

JUSTICE HATCHER: Yes.

PN750

MR IZZO: I notice Deputy President Asbury doesn't, but - - -

PN751

VICE PRESIDENT ASBURY: I'll just catch up.

PN752

MR IZZO: Okay. So, this decision concerns just by way of background, a lady by the name of Karen Klein appeared to nominate someone for the Order of Australia, and what happened was that it appears that that was unsuccessful and as you may do, having been unsuccessful, she then put in an FOI request on the Governor General to find out why the Order of Australia request was unsuccessful. She was clearly very passionate about the topic.

PN753

Then in dealing with the FIO request which was rejected at the Federal Court level, it goes to the High Court. And the relevant reasoning that I'd like to take you to starts at page 656, and paragraph 18 of the judgment. The High court, and I note because it will be relegated at the Bench, it's a majority of French, Crennan, Kiefel and Bell, they say that the crucial provision for the purpose of the FIO proceedings was section 6(a) subsection 60, which said that the Act does not apply to any request for access to a document of the official sanctity(?) of the Governor General.

PN754

And then this is the important part, 'unless the document relates to matters of an administrative nature.' And that was the key issue. Then the court goes on to look at other areas of the Act that talk this. So, at sections (5) and (6) they talk of Federal Court of a specified tribunal is also excluded from the FIO Act.

PN755

As an aside I might say that a check of the prescribed tribunals include the Australian Industrial Relations Commission and Australian Fair Pay Commission, so no mention of the Fair Work Commission, but in any event it says that you can act – effectively they're not prescribed 'unless the document relates to matters of an administrative nature', that's the same phrase, again.

PN756

But then in Schedule 1 to the FIO Act it says, 'Courts and Tribunals exempt in respect of non administrative matters', so a slightly different phrase. So, that's the relevant provisions. And then further on in the judgment at paragraph 32 on 659, the High Court comes to considering this phrase, 'administrative nature.'

PN757

And they say, '(indistinct) construction should be adopted', unsurprisingly, and then they say at the end of the paragraph, 'Further, cognate expressions in a statue should be given the same meaning unless the context requires a different result.'

PN758

And then what they do in the rest of the judgment is they talk about administrative nature and they talk about the provisions about the courts and tribunals, and they arrive at the conclusion that access to the document should be granted. But they treat everything on the same basis. And it appears, in line with the principle that these cognate expressions should be given the same meaning unless the context a different result. Now, the phrase, 'cognate expression' is not necessarily a common one, so I did look for where else we might find it. And that's where, just to give an example, the third case I've handed up, which is Wong v Commonwealth of Australia & Anor.

PN759

A very similarly constituted Bench of the High Court, similar period of time, it's not all exactly the same judges, but a number of the ones that I mentioned, Crennan and Kiefel, for instance, are in this one. And if I can take you to the judgment of Crennan, Kiefel and Hayne, at paragraph 1 - apologies, paragraph 172, which appears at page 55 of the PDF. Sorry, I might have the wrong - yes, 172, sorry, page 54. They're dealing with this concept of conscription, and what they say at 172, they're talking about the reference to civil conscription in The Constitution. They go on to say:

PN760

Consideration of aspects of history of events leading to the amendment of the constitution, coupled with the consideration of some earlier usages of the cognate expression, 'industrial conscription' does assist, however -

PN761

MR IZZO: And they go on to make a point. So there they align civil conscription as a cognate expression to industrial conscription. And then at 192, at page 60, again, they adopt this phrase. What they say at paragraph 192 that they talk about conscription evidently involving an element of compulsion. And then they say later on in the paragraph:

PN762

It's apparent, during World War II, that directions requiring persons to place themselves at the disposal of the Commonwealth, like the centre of the notion conveyed by the expression, 'industrial conscription', and the cognate expression, 'civil conscription'.

PN763

So I've just given you an example because it's certainly a phrase I wasn't particularly aware of before these proceedings. Effectively, we're talking about phrases, as I said, that derive from the same word or broadly relate to the same concept. In this scenario the cognate expression we are dealing with is low rates of pay, or the low pay. And what we say is that the very same principle should apply, that is, unless the context indicates otherwise, they should be given the same meaning. And the decision in - - -

PN764

JUSTICE HATCHER: But that begs the question; why do you say they're cognate expressions?

PN765

MR IZZO: Why?

PN766

JUSTICE HATCHER: Mm hmm.

PN767

MR IZZO: Because low - - -

PN768

JUSTICE HATCHER: Just because they've got the word 'low' in them?

PN769

MR IZZO: And pay. Low-paid and low rates of pay are basically alternative formulations of the same words. And so unless there is - - -

PN770

JUSTICE HATCHER: That's one way of looking at it. The other way of looking at it is if the legislation deliberately used a different form of words to distinguish it from the existing provisions.

PN771

MR IZZO: Well, we would say - I mean, if there was context to support that conclusion then I would agree with that as a position, but for reasons I'll come to, I don't think there's a contextual consideration that would warrant a different meaning being applied.

PN772

For instance, firstly, we say the concept of - the low-paid are axiomatically people who would receive low rates of pay. They're almost intrinsically linked. And so we would say there's no reason that you would form a view that they would have different meanings, for that reason.

PN773

JUSTICE HATCHER: Well, they're referring to two different things. The low-paid are people who receive, if you like, here's an old-fashioned expression, a pay cheque which is low, that is, the total rate of earnings. The rate of pay is a different concept. It refers to the hourly rate or the weekly rate but not necessarily the total amount of earnings.

PN774

MR IZZO: Well, I don't dispute that concept; I agree with that. But I'd say two things about that. 1) there's still, I mean, obviously the low rate of pay would still - well, I suppose it's possession you could have a low rate of pay and work so many hours that you might have a higher total payment, that's possible. But I think, broadly speaking, the two are inherently linked, one would lead to the other. But the second thing is that if you're going to - if the Bench was to adopt a different approach to how the phrase should be construed, there's some difficulties with doing that.

PN775

For instance, if we were to adopt this suggestion that I think was raised yesterday that it's about some kind of comparative exercise, then the question is, 'Well, who do we compare to?' 'Are we comparing to other industries?' Certainly can't be within the industry because the test is low rates of pay in the industry or sector. So it cannot be intra-industry or sector rates that we're comparing. So it is a macro exercise that's conducted across a broad range, which exactly the same in the Annual Wage Review. There's a low-paid - there's analysis at an economic level as to who is low-paid. This, it's still at a macro-economic level, it's just taken down to the industry or sector.

PN776

But if we were to take a different approach we're left in a scenario that there's no guidance in the statute or explanatory materials as to who we're comparing - how the comparative exercise is to be conducted. It's left to a high degree of subjectivity.

PN777

VICE PRESIDENT ASBURY: Mr Izzo, the same explanatory memorandum that you took us to, at paragraph 38 and thereabouts, makes it pretty clear that the intention was to amend the existing low-paid bargaining process.

PN778

MR IZZO: Yes.

PN779

VICE PRESIDENT ASBURY: To broaden it. And arguably, a different formulation has been used, being the provisions that have been place into this section. It's not low-paid, it's low rate of pay, and it's prevailing in the industry. So why wouldn't that include having regard to an industry where, predominantly, employees doing a particular job or series of jobs are paid only at the award rate and haven't been able to access bargaining, for whatever reason?

PN780

MR IZZO: Well, the reason I have difficulty with saying they're paid predominantly the award rate is we're then applying a different meaning to low rate of pay to that which the Commission has traditionally adopted in relation to the Annual Wage Review for instance. So I accept the phrases are slightly differently formulated, but in terms of your point, Vice President, in relation to the - there's clearly a desire to open up low-paid bargaining, or to open up access to this area and they've used a different formulation of words.

PN781

What I would say is the opening up of this area has been affected by the way in which the tests are actually set up. So if we look at how low-paid authorisations usually worked there was an obligation to take into account a series of things, and in relation to low-paid, it was whether the granting would assist them who've not access to collective bargaining, or who face substantial difficulty bargaining at an enterprise level. A lot of that language has been paired back. And there's other tests that have been paired back as well. The reference to, I think - there's a range of references, as we know, that have been removed, things about bargaining strength, so on and so forth.

PN782

And so I think you can still form a level of satisfaction that the test has been opened up without needing to draw the conclusion that they've deliberately changed the meaning of low rates of pay, low-paid, as part of this opening up exercise.

PN783

JUSTICE HATCHER: Well, in the context of the Annual Wage Review, you're looking at the needs of the low-paid. In the context of this consider, you're looking at the prevailing rates in the industry. And it only includes consideration of whether they're low rates. It's not required that they are; it could just be that - - -

PN784

MR IZZO: Well, I agree with that.

PN785

JUSTICE HATCHER: - - - people have been unable to bargain and the explanatory memorandum that talks about matters that may have prevented it and in paragraph 39, it raises the fact that a third party who has control over the terms and conditions - - -

PN786

MR IZZO: I agree.

PN787

JUSTICE HATCHER: - - - can be one of the factors that could be considered.

PN788

MR IZZO: I certainly agree that it's not mandatory; that you can't make a supported bargaining authorisation if that factors (indistinct), so I agree with that, it's not mandatory to have it; you're simply having regard to it. But as a Bench, you're still going to have to form a view as to factually, what is a low rate of pay. Because that's the only way you can work out whether the factor applies. So you're going to have to form a view and even in the explanatory materials, when they talk about this factor, they talk about it helping the low-paid. So there's elements of the explanatory memorandum itself, for instance, at paragraph 37 they say:

PN789

For example, those in low-paid industries, such as aged care, disability care, early childhood.

PN790

And so they clearly are using the word, 'low-paid' interchangeably with the concept of low rates of pay. And so I don't necessarily discern from the EM(?) that there is an intention to change the meaning of this phrase. I certainly agree they're opening up supported bargaining, and I also agree that you don't have to satisfy this factor to necessarily get through the net.

PN791

But where I fall short is I don't think there is a contextual indicator to suggest that there's a deliberate intention to change the meaning of that cognate expression. And that's how I would respond to that, if that addresses your question, Vice President.

PN792

VICE PRESIDENT ASBURY: Well, low-paid isn't defined, is it? I mean, in the annual wage review there's just been a measure that's been adopted.

PN793

MR IZZO: I agree with that as well. So - - -

PN794

VICE PRESIDENT ASBURY: That we look at to decide whether the needs of the low-paid are being met.

PN795

MR IZZO: If the Commission was to change it's approach as to how it approached low-paid, the meaning of that phrase, then that should apply uniformly. I accept that. I'm not saying there's any specific definition I'm urging upon you factually, what I'm suggesting is that the act would ordinarily - you would ordinarily presume that the same approach would be conducted as to what is meant by low-paid and low rates of pay.

PN796

VICE PRESIDENT ASBURY: So you're saying we should adopt the measure that is found in the Annual Wage Review?

PN797

MR IZZO: Yes.

PN798

VICE PRESIDENT ASBURY: To assess whether people in a particular sector making an application for supported bargain are low-paid, as per that definition that's been adopted.

PN799

MR IZZO: Yes.

PN800

JUSTICE HATCHER: But two-thirds of medium earnings is not a rate of pay. It's a measure of earnings.

PN801

MR IZZO: It's not; but it - one could readily identify a rate of pay from that, with a variety of formulations, there's no exact way you go about it, but you could readily identify a rate of pay from that type of measure. Once you get a weekly rate, that's your starting point to then ascertain what the rate of pay might be that gives effect to that earning.

PN802

JUSTICE HATCHER: Why isn't anybody - I mean, if award rates are prevalent, why aren't they low rates of pay, since by definition, an award rate of pay is the lowest amount you can legally pay somebody?

PN803

MR IZZO: Because there's different rates of pay within an award, for starters.

PN804

JUSTICE HATCHER: Well, there's only one rate applicable to a person at a given time.

PN805

MR IZZO: That's right.

PN806

JUSTICE HATCHER: That is the lowest lawful rate you can pay to that person.

PN807

MR IZZO: But in the award itself, the rates range. They start of at C14 level, if we use the terminology from manufacturing, they go all the way up to C2 and C1 - or C2, I think. And once you get to the higher levels, particularly in some awards, the rates of pay probably would not objectively considered live. And that's before you then have work-value cases that are added on top, whether it's equal remuneration orders in some awards, you shouldn't necessarily conclude, or assume, that all award rates of pay are low rates of pay. We wouldn't accept that. Particularly in some industries, as you'd know, your Honour.

PN808

JUSTICE HATCHER: Well, if you're paid the award rate, you can't get any lower.

PN809

MR IZZO: Well, that I can't disagree with, but that does not necessarily mean that the award rate itself is a low rate of pay.

PN810

Now, I think for the sake of completeness, just on the authority I gave you in terms of cognate expressions, it was just referred to with approval in another High Court case I'll just give you the reference for, which was Tabcorp Holdings Limited v Victoria [2016] HCA 4 at 65, just a more recent reference to that concept.

PN811

I think I've dealt with the caution we have about the comparative exercise as an alternative formulation. And the only other thing I'd say is there's been some reference to the approach taken in the previous cases, I just urge the Bench to be aware that that approach did evolve. So in the more recent low-paid authorisation cases they did start looking at two-thirds of median adult ordinary time. Now, it's a different phraseology so I don't want to make too much of it, but those cases are application by United Voice [2014] FWCFB 3500 at paragraph 28.

PN812

And application by Australian Nursing Federation, this one is in the AEU bundle of authorities, it's [2013] FWC 511 at paragraph 94, and that's at AEU PDF page 20. Sorry, I've just (indistinct). But I don't think that helps us particularly, given that the focus is on the different phraseology.

PN813

The next question as part of this test is the meaning of 'prevail'. We say that to prevail is something that's predominant. It's to gain ascendancy or dominate. Particularly in this context. The union parties – and I think it was also echoed by the ACA – have used the phrase, 'generally current'. Now, I don't accept that that phrase, 'generally current' is in fact the appropriate one to use. In this context, what we say is you should be looking, really, for either the common rates of pay, the dominant rates of pay or the majority. And to make good that proposition, again, we should be having focused, how the word or its cognate expressions are used elsewhere in the Act.

PN814

And so, I'm going to take you to one spot, but it's all used in the same fashion. So at section 29 of the Act, it's the first place 'prevail' is used. Twenty-nine subsection 1 says:

PN815

A modern Award or enterprise agreement travails over a law or state or territory to the extent of any inconsistency.

PN816

So it obviously over-rides or dominates in that context. The same usage is given to the word, 'prevails', and I'm just going to give you all the references. It's section 40(1) of the Act. Section 796(2), section 30, section 610, which is the note. I've just realised these aren't in numerical order. But forgive me. Section 618 and section 620(4). They are, to the best of our knowledge, all the places 'prevail' appear in the Act. And in every context, it is suggested, over-rides, effectively.

PN817

Now, we're not saying that in this context – I mean, over-ride is a perhaps too emphatic gloss to place it on this context, but what we say is the use of 'prevail, prevails, prevailing' all these cognate expressions, should be given similar meaning, which is really to be the ascendant or dominant, or in this context, most common rate of pay. Now, again, I don't think that's in contest here, factually. But what I do take issue with, is the suggestion it should be generally current. I just don't think that ascribes quite right meaning to the phrase, 'prevail', in this context.

PN818

The next subject matter is whether the – sorry, there are clearly identifiable common interests. There's a lot of controversy about whether this is the singular or the plural. We press that, in weighing this factor, you're required to consider whether there are clearly identifiable common interests, plural. And we say that for a number of reasons. One part of our submissions, 3.27, we say that the test

would really have very little work to do otherwise. Because you could almost always find a singular common interest, whether it's size, location, industry. I think the breadth of the matters you could consider, being a broad test, as the UWU identified, means that you almost would have very little work to do as a factor. Which is why we say the context would suggest that it is intended to be plural.

PN819

We say, more broadly, as a question of appropriateness, the more commonality there is, the more likely you are to be persuaded about the need – not the need but the appropriateness of support a bargaining authorisation. The AEU have cited section 249(3)(a) as a reason why we should adopt a different approach. It shows that reasonable minds may differ, because I think the section they refer to actually supports our contention.

PN820

So if you look at 249, this is the single interest employer stream, the requirements of that subsection are met if the employers have clearly identifiable common interests, plural. And then the section that AEU would have you have regard to is subsection 3(a). And that says, 'for the purposes of subsection 3, matters that may be relevant to determining whether employers have a common interest' singular, 'include the following: geographical location, regulatory regime' and so on. I think that works perfectly well with understanding it as being the plural. Because you need to find common interests, plural. And then the subsection explains all the different types of individual interest that might exist, when you're trying to work out whether there are interests, plural.

PN821

So I think the formulation in 3(a) actually is supportive of there being a distinction. And our submission is that the difference between the singular and the plural in three and three is actually quite conspicuous. That distinction is noticeable and we say, it actually makes more sense. That what it's saying is, you have individual types of interest that you need to combine to get common interests. And that's how we see the provisions work.

PN822

I must say, I do agree with a comment of Mr Gibian more broadly. That the factors – although they're actually described as interests – geographical location, regulatory regime – I'm not satisfied that they are, of themselves, interest. They appear to be matters of fact that would generate an interest. And I know that doesn't perhaps align with the literal wording in the Act, but it seems to be the only practical way it can operate. I think that's the application you should give it.

PN823

What I disagree with is that that then leads to some conclusion that interest is meant to be plural versus singular. I don't think the two are linked. I don't think it weighs either way on that consideration. But I do think that we shouldn't necessarily assume that geographical location is an interest.

PN824

And to further the point, while I'm on it, there is a submission by (indistinct) v CCC at paragraph 42. That if you're subject to the same underpinning Award, that is a common interest. I disagree. I think now that's a search for common features. Again, common matters of fact. You need to demonstrate – we're not looking for commonality at large, you need to demonstrate something about the operations of a business that mean you have mutual or common interests. It may be something in industrial instrument coverage generates a common interest, or it may not. There's lots of businesses the subject to the same Award that probably don't have many common interests at all.

PN825

And, again, I think that all endorses Mr Gibian's comments that these are really factual matters or features that would generate an interest and that's how we would put the test.

PN826

There's been a lot of discussion about what 'clearly identifiable' means. I can identify the grounds of agreement on this or consensus. We do agree with a number of the parties. So we talk about the interest being distinctly and plainly ascertainable without obscurity. That's at paragraph 3.35 of our submissions. The ACTU talks of the interest being clearly or distinctly perceived or understood. And they pick up the notion of an interest being distinct, evident or plain at paragraph 56. And we would endorse all of those elements of the ACTU submission.

PN827

The ACA talk about the interest being transparent and conclusive, at paragraph 117, and we would endorse that as well. So I think all of those phrases broadly give effect to the provisions.

PN828

But then we have the AEU, and the AEU have said it's simply interests which are apparent or ascertainable. That does not go far enough. It does not give effect to the deliberate phrase 'clearly identifiable'. It just – as Your Honour pointed out yesterday – it probably works with 'identifiable', but it just doesn't give the word 'clearly' any work to do. And so we reject that approach.

PN829

DEPUTY PRESIDENT HAMPTON: Well, I mean, it's like looking for gold, you might have to do some digging, but once you find it, it's clearly identifiable.

PN830

MR IZZO: That's possible in some scenarios, Your Honour. It might still be. But there will be areas where it might be ambiguous or they might be quite controversial, contentious and then it's not so clearly identifiable.

PN831

Now, the ACTU say, at paragraph 57 of their submissions, that it's enough for some to share interests and not all. We don't agree with that. We say a plain reading of section 243(1)(b) is that the employers – and that must be the employers that are subject to the authorisation – we say it doesn't say 'some of

them', have clearly identifiable common interests, and we say it's between them as a whole. And if it was intended otherwise, it would have been spelt out.

PN832

But the problem with the ACTU's approach is you end up with the possibility of a chain of employers. So you can have employers one and two with common interests, then two and three have common interests, then three and four. And by the time you get to the end of the chain, the last link on the chain bears no resemblance to the first. And that's entirely possible on the ACTU's construction and that does not seem to accord with the purpose of the scheme.

PN833

The last subject matter I'd like to deal with is the other factors. The ACTU, at paragraph 82 of their submissions, and this was repeated by the AEU yesterday, has said that the history of bargaining should not weigh against granting of the authorisation. And it's not a relevant factor. We do not agree with this. History of bargaining is a relevant factor in the exercise of the discretion for two reasons. One: Particularly having regard to the objects of the Act and what I said at the beginning of these submissions. And two: It's clearly another matter, that the FWC may consider appropriate.

PN834

Obviously, it's going to go to whether enterprise level bargaining is something that's available or not. And so it should be looked at. There's a classic case of perhaps wanting to have one's cake and eat it too, in the case of the ACTU. Because some 20 paragraphs earlier, in their submissions, at paragraph 66, they say the history of bargaining and whether it was efficient last time should be relevant in terms of looking at the manageability of a bargaining process. And that you should have regard to the history of bargaining for that purpose. But no, don't have regard otherwise, in the appropriateness test. It simply – I think there's a conflict in their submission there. They're trying to take the history where it's advantageous to their cause but not otherwise. And that's another reason why that submission should not be accepted.

PN835

I'd like to endorse a submission in terms of other factors that's made by the Australian Industry Group. At paragraph 28 of their submissions, they talk about the scope of the parties who would be covered. And they talk about the scope being a relevant matter that it might have some impact on the economy. I don't think they call out productivity, but productivity, specific sectors, members of the community. This is something relevant to consider. And they also say you should consider the impact on employers that might be left out. And it's possible you might have a scope that, for some reason or other, intentionally excludes some employers that could have some deleterious impact. All of these matters are matters that might be relevant in a particular scenario. It goes to the Deputy President's question yesterday in relation to gaining of the system.

PN836

I'm not saying any of that's present here today, obviously. But these are all matters that we agree are relevant. The AEU and UWU both say that you – in terms of the AEU, their reply submissions at 26 – they say you shouldn't assume

there'll be impacts on productivity, competition, labour markets. The UWU, at 16, caution against speculating about the scope of an authorisation on competition productivity.

PN837

I do not think the Commission should say that these matters are not relevant. Where you should land is that if there is a likely scope that's clear, that there is a – it's either clear what the scope is, or it's likely, or you have an understanding as to what's foreseeable, and you consider that there are deleterious impacts associated with that, of course that's a matter that you would take into account. And that would be the only - - -

PN838

DEPUTY PRESIDENT HAMPTON: Doesn't that require speculation about the outcome of the bargaining?

PN839

MR IZZO: It will require different levels of speculation. So, if, for instance, it is a highly speculative exercise, then there is no doubt, less weight or perhaps no weight, that you may give to it. But if, for instance, you have a clear scope in front of you; it's apparent from the unions involved, the employers involved, you have a reasonable understanding of foreseeability as to who the parties are going to be at the end of it; if there's a concern that there may be impacts associated with that, you would take that into account. I'll give you a more extreme example. In the supermarket retailing sector, there's very few big players. If all of a sudden, they were to combine together, it would not take long for people to form concerns about some matters associated with competition, associated potentially with productivity, arising from whatever bargain is reached. And in that scenario, it may be very quickly that you form a view that the scope does raise broader concerns.

PN840

Now, that probably would not be a highly speculative exercise. In another industry, it might be completely hypothetical as to what the impact might be and then that's something you pay much less regard to. It will depend on the circumstances. I think that's the difficulty I have with a number of the union submissions, is they're trying to urge the Commission to rule things out or apply principles in a vacuum. It's a broad test. You apply the facts of the day. They are our submissions, unless there were any further questions.

PN841

JUSTICE HATCHER: No, thank you. Ms Bhatt.

PN842

MS BHATT: Thank you, your Honour, and members of the Full Bench. The Australian Industry Group has filed two written submissions in this matter, the first dated 7 August and the latter dated 14 August. I think before I proceed I should seek to clarify whether the latter submission has been or will be received by the Commission?

PN843

JUSTICE HATCHER: It's on the web page, so - - -

PN844

MR IZZO: Half of which has been quoted already.

PN845

JUSTICE HATCHER: If it's not accepted as a written submission you can always do the classic trick of reading it out loud and making it an oral submission.

PN846

MS BHATT: I'm pleased to not have to do so. Given that our written submissions deal with various issues in some detail, I don't propose to seek to summarise or repeat any of that. Instead, I'll deal with four issues that have emerged from the submissions in reply. The first of those is the relevance of the objects of Division 9 of Part 2-4 of the Act. There appears to be a degree of consensus between the parties that as a matter of principle and approach that the objects of Division 9 are relevant to the task of interpreting section 243 of the Act. Those objects, as the Commission knows, are set out at 241 and that provision clearly articulates that Division 9 is directed towards a specific class of employers and employees, that class being those who require support to bargain.

PN847

Despite this, in its reply submission the UWU at paragraph 11 says as follows, and I'll just read part of the paragraph:

PN848

> *The appropriateness consideration should not be framed as one simply about whether a group of employers and their employees need support to bargain. Constructions such as these are inconsistent with the notion that the appropriateness consideration is a broad one, as well as parliament's deliberate decision to remove considerations relevant to the previous low-paid bargaining stream.*

PN849

Then they go on to say that: 'The underlying aim of Division 9 should not be misconstrued as an eligibility requirement'. I think similar submissions were made by Mr Redford yesterday. Of course we acknowledge the proposition that the group of employers needs support to bargain. Employers and employees need support to bargain. It is not an express requirement under the Act. It's not expressed as a condition precedent but we say that the Commission should exercise its discretion in a way that is stated with this clearly-stated policy intent. Of course, that policy intent is not just seen in the objects of the Division. It's also seen in its very design and this is an issue that arose I think in some detail in an exchange between the Commission and Mr Ward yesterday.

PN850

One of the distinguishing features of this part of the Act is that it enables the Commission of its own motion to provide assistance to the relevant parties once a supported bargaining authorisation has been made. That is not a feature of any of the other bargaining streams and that too we say colours the way in which section 243 should be interpreted and applied in practice.

PN851

JUSTICE HATCHER: Section 246 is essentially the same as it was before, isn't it?

PN852

MS BHATT: That's my understanding, out of a previous low-paid bargaining scheme. The second issue we seek to deal with is the relevance of the potential consequences of issuing a supported bargaining authorisation which has been dealt with to some degree by Mr Izzo this morning. Various parties I think have taken issue with our submission that the Commission should take into account the potential consequences of issuing a supportive bargaining authorisation. As a general proposition in our submission making a supportive bargaining authorisation is a significant step and it's one that therefore warrants a cautious and nuanced approach.

PN853

We've sought to make these arguments in the context of our written submissions by reference to the scheme of the Act and the implications that flow on to the Act once a supported bargaining authorisation has been made. But in more practical terms, the Commission can of course take into account any matter that it considers appropriate under section 243(1)(b)(iv). So of course, parties in the context of a particular matter may seek to argue that any number of matters are relevant and that could include the implications that might flow if a particular authorisation is made. Now, of course one of the submissions that's then made in response is that that might be speculative, and it's an issue that your Honour has raised this morning.

PN854

To some extent, yes, those sorts of matters will necessarily be speculative. But of course it's not unusual for the Commission to turn its mind to the potential implications that might flow from the way in which it might exercise its discretion in other contexts. I mean, where the Commission is considering a potential variation to an award, where it's considering a potential increase to minimum wages in the annual wage review, it's asked to undertake a similar task or to take similar sorts of matters into account: what might flow if it exercises its discretion in a particular way. I accept, of course, that ultimately this might be a matter for weight. I think the degree to which the Commission is able to take such matters into account will be a matter of weight that it affords to any such matters might turn on the submissions and indeed the evidence that is led by the parties in the relevant matter.

PN855

However, it's our submission that wherever appropriate and relevant, the Commission can and should take such matters into account. The third issue relates to the policy preference for enterprise bargaining under the Act, relative to multi-enterprise bargaining. On the first occasion that the former low-paid bargaining scheme under the Fair Work Act was considered in 2011, a Full Bench of Fair Work Australia, as it then was, made the following observations – I won't take the Bench to it but this is at page 64 of the AEU bundle of authorities. The citation is [2011] FWAFB 2633 at paragraph 11. The Full Bench said:

PN856

When the provisions as a whole are considered it is apparent that the legislative policy of underpaying the low-paid bargaining authorisation provisions is that while bargaining on a single enterprise basis is the preferred approach, multi-enterprise bargaining is permitted to assist and encourage low-paid employees to make an enterprise agreement that meets their needs.

PN857

It's our submission that despite the various amendments recently made to the Act in relation to multi-enterprise bargaining, that legislative policy remains the same. So much was expressly put by the Minister in his second reading speech, extracted at paragraph 17 of our first submission. He described enterprise-level bargaining as the primary and preferred type of agreement-making. Of course this is reflected in various other parts of the extrinsic material that other parties have taken you to.

PN858

It's also consistent with the objects of the Act and the objects of Part 2-4 of the Act, neither of which were amended – neither of which were relevantly amended by the Secure Jobs, Better Pay reforms. Lastly, the issue of the significance of the availability of single-interest employer authorisations. We've made some submissions about this at paragraph 20 of our first submission and in response the AEU argues that the supported bargaining stream should not, in effect, be read down or constrained by the single-interest scheme. The thrust of our submission in relation to this matter is simply this: the supported bargaining stream and the single-interest stream and separate and distinct schemes that are related to the making of multi-enterprise agreements. They each apply where their own legislative requirements are met.

PN859

They're designed for different purposes and they operate in different ways. The practical operation of section 243 shouldn't result in the parameters of Division 9 being cast so broadly that it in effect enables parties to obtain a supported bargaining authorisation in circumstances where Division 10 would be the more appropriate vehicle for them to utilise. For example, in circumstances where parties, for example, do not require support to bargain, which we say it is critical to the way in which Division 9 should be read and this is particularly so given the various specific thresholds and requirements that must be met in the context of Division 10. We simply say that this is a matter that is relevant and should temper the way in which the Commission exercises its discretion in relation to appropriateness. Unless there are any questions, those are the submissions. Thank you.

PN860

JUSTICE HATCHER: Thank you. To the extent that any of the interveners' submissions may affect the consideration of this particular application, do any parties wish to apply to anything said by the interveners? I make it clear I don't want to hear any more general submissions but just insofar as they may affect the determination of this application.

PN861

MR REDFORD: Can I make some immensely short comment?

PN862

JUSTICE HATCHER: Yes.

PN863

MR REDFORD: I think to the extent that those on my left have suggested that Division 9 is intended for a particular class of employer and employees, I dealt with that at length yesterday, why those I represent are absolutely clearly the class of employers and their employees that Division 9 was intended to accommodate so in that context, I just simply want to say that if the Bench, your Honour, attracted that proposition, we've answered that and we meet that requirement.

PN864

JUSTICE HATCHER: Mr Gibian.

PN865

MR GIBIAN: Given your Honour's comments there was only one thing I was going to raise and that is at the start of the hearing today we handed up a document which reflected the data for the ABS employee earnings and hours data equivalent for primary school and pre-school-age teachers, equivalent to that dealt with in paragraph 20 of the agreed statement of facts. We hadn't overnight managed to track down the equivalent data for that set out in paragraph 21, namely the ABS characteristics of employment data. If we could have leave just to provide that equivalent I can tell the Commission what the numbers are but it might be better if we put it in a document and provide it, if that's - - -

PN866

JUSTICE HATCHER: I'm just trying to find the agreed statements of facts.

PN867

MR GIBIAN: Two data sources were provided as to median weekly earnings for the child carer class of employees.

PN868

JUSTICE HATCHER: So it's paragraph 21?

PN869

MR GIBIAN: Yes. The document I handed up at the commencement today was the equivalent data from the same source as that set out at paragraph 20.

PN870

JUSTICE HATCHER: I see – the COE data. Yes, okay.

PN871

MR GIBIAN: There is an alternative data source. I mean, it perhaps doesn't advance the argument too much but if we could have leave just to – as I say, I can tell you what the - - -

PN872

JUSTICE HATCHER: Well, leave is granted for you to file an equivalent document. Unless anyone objects, I'll mark that exhibit 24 when it's received.

PN873

MR GIBIAN: That was the only matter that would stray outside the general observations.

PN874

JUSTICE HATCHER: Yes. Mr Redford, do you want to say anything?

PN875

MR REDFORD: Your Honour, I had a couple of comments to make that went more to the submissions that were made yesterday, not in relation to anything that arose this morning. There were only two comments that we would make to your Honour: the first was just to clarify one aspect of our submissions, which was the subject of an exchange between Mr Ward and the Bench yesterday. I apologise for this. The submission that we made must have been put in a confusing way because I think it's been misinterpreted. That's likely to be entirely my fault. But there was an exchange between the Bench and Mr Ward about the issue of common interest and what arose were submissions that I made for the UWU in relation to the predominance of small business in the early education and care sector.

PN876

I made that submission in relation to section 243(1)(b)(iv), which is the, 'any other matters', consideration. I didn't suggest that the size of the employers that are the subject of this application is a matter of common interest. The submission we made was that section 243(1)(b)(iv) should be considered including with regards to the objects of the Act, and the Act at section 241 speaks of constraints on parties' access to single enterprise bargaining, and in our outline of submissions, we make the point that that is, indeed, a feature of this sector.

PN877

There are a number of matters which the Commission in past decisions has considered to be constraints on parties' access to single enterprise bargaining, and one of those matters is where there's a predominance of a small business in the sector. So that's how we put the submission, a sector of which G8, for example, which is not a small business, is a part. So we don't say that that matter - that the size of the enterprises in this matter is a common interest. We don't put it that way.

PN878

The only other matter I wanted to raise was just for completeness because I didn't say anything about it yesterday, and that is there's a requirement in the Act for the Commission to be satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation. That's section 243(1)(c). I just - I must admit, Your Honour - I just forgot to mention it in my submissions yesterday that that is the case. It is a matter of fact. It's at paragraph 9 of the statement of agreed facts. If Your Honour pleases.

PN879

JUSTICE HATCHER: All right. Well, thank you. If there's nothing further, we thank everyone for their submissions, and we reserve our decision.

ADJOURNED INDEFINITELY **[11.21 AM]**

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #23 APPLICANT'S' SHORT NOTE DATED 17/08/2023.....PN682