IN THE FAIR WORK COMMISSION **B2023/703**

Independent Education Union of Australia **Applicant**

Catholic Education Western Australia Limited & Ors **Respondents**

s.248 – Application for a single interest employer authorisation

SUBMISSIONS OF THE ACTU

1. These submissions are made in response to paragraph 3 of the Directions of the FWC on 21 July 2023. The submissions firstly address the ACTU's interest in this matter and the basis upon which it seeks to be heard. Thereafter, the submissions discuss the novel legislative provisions which govern the determination of the present application and express support for the granting of that application.

About the ACTU

2. The ACTU is a non-profit unincorporated association. Its members are organisations (within the meaning of the *Fair Work Act (2009)* ('FW Act') and the *Fair Work (Registered Organisations) Act 2009)* and State and regional trades labour councils. There are currently 42 such members. The ACTU's member unions represent employees engaged across a broad spectrum of industries and occupations in the public and private sector.

3. The ACTU is governed in accordance with its written constitution, which sets out its objects including *inter alia*, "To take all appropriate measures necessary to grow union membership, and to promote the right of workers to join, have access to, and be represented by their union including through collective bargaining, industrial action and consultation" (emphasis added). The ACTU is a "peak council" within the meaning of s. 12 of the FW Act and the only national confederation of trade unions.

4. The current proceeding is the first application for a single interest employer authorisation to be determined since substantial amendments regulating such applications took effect

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on 6 June 2023. Those amended provisions mark a significant departure from the preceding framework for bargaining across multiple enterprises, and present a great opportunity for the ACTU's member unions to lift the wages and conditions of workers in a more coordinated and supported way. The relevant provisions, as amended, *require* the involvement of a registered organisation of employees in collective bargaining as a condition for the making of a single interest employer authorisation[1]. The proceeding has been referred to a Full Bench, so it follows that the decision in this matter will be final subject only to judicial review. The proceeding clearly engages with the interests and objectives of the ACTU and its members and is novel.

5. For over 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The discretion to hear from non-parties

6. The FW Act confers upon the Fair Work Commission ('FWC') a broad discretion, as set out in s. 590:

> **590 Powers of the FWC to inform itself**
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> (1) The FWC may, except as provided by this Act, inform itself in relation to any matter before it in such manner as it considers appropriate.
>
> (2) Without limiting subsection (1), the FWC may inform itself in the following ways:
> (a) by requiring a person to attend before the FWC;
> (b) by inviting, subject to any terms and conditions determined by the FWC, oral or written submissions;
> (c) by requiring a person to provide copies of documents or records, or to provide any other information to the FWC;
> (d) by taking evidence under oath or affirmation in accordance with the regulations (if any);
> (e) by requiring an FWC Member, a Full Bench or an Expert Panel to prepare a report;
> (f) by conducting inquiries;
> (g) by undertaking or commissioning research;
> (h) by conducting a conference (see section 592);
> (i) by holding a hearing (see section 593).

7. There is no provision of the FW Act applicable to the current proceeding which enlivens the exclusion ("…except as provided by this Act") to the open discretion that s. 590(1) provides. Whilst subsection (2) of section 590 provides some examples of how the FWC may permissibly inform itself pursuant to that discretion, it is explicit that it does so "Without

[1] S. 249(1)(b)(i)

limiting subsection (1)". Nonetheless, paragraph 3 of the Directions of 21 July resemble a conditional invitation of the nature contemplated by paragraph (b) of subsection (2).

8. The FWC is not confined to the principles developed by courts for hearing from non-parties such as *intervenors* or *amicus curiae*, which are often circumscribed by rules of court in any event. Nonetheless, the decisions of courts can assist in identifying *some* explicit bases for hearing from non-parties that fall within the broad jurisdiction conferred by section 590, noting that in all matters before it the FWC is bound to perform its functions and exercise its powers in a manner that is fair and just.[2] For example:

   (a) A court's discretion to allow intervention, where not codified in court rules, requires that that the person seeking to be heard has either a legal interest in the proceedings in question, either because they will be bound by the decision or because the decision will be likely to otherwise substantially affect their legal interests.[3] Leave to intervene will not be granted unless the applicant for leave can show the parties might not fully present submissions on a particular issue, being submissions that would assist the court - and even then the intervention may be limited as appropriate to do justice between all parties.[4]

   (b) Rules of court have developed which modify or codify the discretion. Rule 36.32 of the *Federal Court Rules 2011* for example regulates the basis upon which a person may intervene in appellate proceedings in that Court, and does *not* require that such persons demonstrate a legal interest in the outcome of the proceedings. That rule and its predecessors have been sufficiently accommodating to allow non-parties who lack such interests to be heard in Full Court appeals in the public interest, including regulators, professional associations, advocacy groups, trade unions and the ACTU.[5]

   (c) Non-parties may appear as *amicus curiae* at the discretion of the court where the court is of the opinion that it will be significantly assisted.[6] An *amicus curiae* does not need to have a legal interest in the proceeding, nor is there any converse requirement that they have no interest or be neutral or independent.[7]

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[2] FW Act s. 577(1)(a)
[3] *Levy v. Victoria* (1997) 189 CLR 579 at pp601-603.
[4] *Levy v. Victoria* (1997) 189 CLR 579 at p603, *Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 54.
[5] *Sharman Networks v. Universal Music Australia Pty Ltd*. [2006] FCAFC 178, *Bluescope Steel (AIS) Pty Ltd v. Australia Workers Union* [2019] FCAFC 84, *Commonwealth of Australia v. Barker* [2013] FCAFC 83, *Roadshow Films Pty Ltd. V. iiNet Ltd* [2011] FCAFC 23, *Today FM (Sydney) Pty Ltd v. Australian Communications and Media Authority* [2014] FCAFC 22 at [67], .
[6] *Levy v. Victoria* (1997) 189 CLR 579 at pp604-605.
[7] *Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 54, *Priest v. West* [2011] VSCA 186 at [29].

9. The FWC's is, as noted above, not confined to these principles. Indeed, it has acted more permissively. Its appellate jurisdiction provides standing to a "person aggrieved by a decision"[8] to appeal such a decision with permission. This has permitted appeals to be heard where initiated by persons who were not parties to the proceedings at first instance, whose legal interests may not be affected by the decision at first instance but whom nonetheless have an interest in the decision beyond that of an ordinary member of the public.[9] A Full Bench has found, by parity of reasoning, that "If person could, in that sense, be a 'person aggrieved' by a decision in a particular proceeding then it will be open, but not obligatory, for the FWA to grant that person leave to intervene in the proceeding."[10] The context of the Full Bench reaching that view was a successful application for the ACTU to be heard on the issue of the proper construction of "significant harm" to a third party, in the first matter to come before a Full Bench concerning suspension of protected industrial action under s. 426 of the FW Act.

10. The FWC has, in its discretion, agreed to hear from the ACTU in numerous proceedings, including:

    (a) *Australian Industry Group v. ADJ Contracting* [2011] FWAFB 6684, concerning whether terms in an enterprise agreement were "unlawful terms";

    (b) *John Holland Pty Ltd v. AMWU* [2010] FWAFB, concerning the specificity required in questions to be included in a protected action ballot;

    (c) *J.J Richards & Sons Pty Ltd v. TWU* [2010] FWAFB 9963, concerning "genuinely trying to reach agreement" with an employer who refused to bargain.[11]

    (d) *Philmac Pty Ltd* [2011] FWAFB 2668, concerning the intersection between good faith bargaining and genuine agreement;

    (e) *CFMMEU v. Mt Arthur Coal* [2021] FWC 6309, concerning lawful and reasonable directions;

    (f) *Qantas v. Mazzitelli* [2020] FWCFB 2628, concerning payments made in connection with the *JobKeeper* allowance;

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[8] s. 604

[9] *CFMEU v. Woodside Burrup* [2010] FWAFB 6021 at [4]-[5]

[10] *Ibid.*

[11] At [9] it was determined that s. 589 provided a sufficient basis to permit the ACTU and others to be heard.

(g) *DREA* [2021] FWC 1494, concerning whether an association seeking registration was free from employer influence or control;

(h) *NSW Trains v. Todd James* [2022] FWCFB 55, concerning the circumstances in which a demotion may constitute a termination of employment in the employer's initiative;

(i) *Paris Jolly* [2023] FWCFB 117, concerning withdrawal from amalgamation;

(j) Every annual wage review conducted under the FW Act and most "common issue" modern award review proceedings; and

(k) The first application for a supported bargaining authorisation arising under section 242 of the FW Act (as amended).

11. Each of the above matters has had potentially wide impact across the ACTU's membership and/or has involved the resolution of novel issues. The present proceeding may be characterised likewise, with the ACTU's interests in it certainly rising above those of an ordinary member of the public: The FWC will be required to interpret and apply novel tests which condition the right to bargaining collectively with multiple employers – a central concern of the ACTU and its members - while having resort to the rights and privileges normally associated to date with single enterprise bargaining. In our submission, having regard to this and the matters raised at paragraph 2 to 5 above, there is compelling case for the ACTU to be heard.

Single interest employer authorisations in context

12. As set out in the Applicant's submissions and in paragraphs 39 to 40 below, there is a clear and uncomplicated pathway for the present application to be expeditiously determined in the terms applied for. However, we additionally wish to impress upon the FWC the significance of the single interest employer authorisations and how the amended provisions regulating their availability ought to be construed harmoniously with the FW Act as a whole.

13. In construing the legislative provisions that apply to the present matter, we adopt the principles conveniently summarised by the Full Bench in *Low Latency Media v. Rossi*[12]:

> "Ascertaining the meaning….necessarily begins with the ordinary and grammatical meaning of the words used. These words must be read in context by reference to the language of the Act as a whole and to the legislative purpose. Section 578(a) also

[12] [2023] FWCFB 14

directs attention to the objects of the Act. Of course it must be borne in mind that the purpose or object of the Act is to be gleaned from a consideration of all the relevant provisions of the Act. Section 15AA of the Acts Interpretation Act 1901 (Cth) requires that a construction that would promote the purposes or object of the Act is to be preferred to one that would not promote that object or purpose. The purpose or object of the Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the purposes of object of the Act, and another does, the latter interpretation is to be preferred. Section 15AA requires us to construe the Act in light of its purpose, not to re-write it." (footnotes omitted).

14. To similar effect is the discussion at [41]-[49] of *United Voice & Australian Education Union*[13], which additionally highlights:

    (a) the role of the legislative history, existing state of the law and the mischief the legislative provision was intended to remedy as relevant context; and

    (b) the requirement that provisions be read together- which may require a provision to be read more narrowly that it would if it stood alone.

    This modern approach to statutory interpretation demands that both the ordinary meaning of words used in the statute and their context in its widest sense be considered simultaneously, rather than the latter only being permissible to resolve an ambiguity.[14]

15. The availability of a single interest employer authorisation is dealt with in Division 10 of Part 2-4 of the Act. The relevant provisions were introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay*) *Act 2022* ('SJSP Act'). The objects of Part 2-4 of the Act are set out in section 171 of the Act, as follows:

> **171 Objects of this Part**
>
> The objects of this Part are:
>
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and

[13] [2015] FWCFB 8200

[14] *SZTAL v. Minister for Immigration and Border Protection* [2017] HCA 34 at [14]; *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

(ii) dealing with disputes where the bargaining representatives request assistance; and

(iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

16. It is immediately apparent that the there is an object expressed to *enable* both collective bargaining generally and good faith bargaining. To *enable*, as defined in the Macquarie Dictionary, relevantly includes "to make able; give power, means or ability to; to make competent; authorise; to make possible or easy"[15]. A recent Full Bench in *CEPU v. Nilsen*[16] observed of the word "enable" that "The plain meaning of that term is to give the ability or means to do something, or to make something possible"[17]. More generally, the Act explicitly sets out at s.3 a composite objective that is "..to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians…" and so provide that framework "by" numerous means identified in the 7 enumerated paragraphs of s. 3. It is important to underscore that "cooperative" workplace relations is one of the ultimate objectives that these various means are enlisted to support. Those means relevantly include:

(a) "enabling fairness and representation at work at the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms"[18] (emphasis added); and

(b) "achieving productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action"[19] (emphasis added)

17. Both freedom of association and the system of collective bargaining rights and obligations are thus identified as necessary foundations for the FW Act to achieve its object of cooperative workplace relations. It is appropriate to therefore turn to how each of those foundations are structured.

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[15] Macquarie Dictionary online, accessed 27 July 2023.
[16] [2023] FWCFB 134
[17] at [58]
[18] *FW Act* s. 3(e).
[19] *FW Act* s.3 (f).

Recognising the right to freedom of association in the FW Act

18. The right to freedom of association is protected in multiple ways in the FW Act, generally structured around its recognition of "industrial associations" and "organisations" of employers and employees. An "industrial association" is defined in the FW Act as follows:

> ***industrial association*** means:
>
> > (a) an association of employees or independent contractors, or both, or an association of employers, that is registered or recognised as such an association (however described) under a workplace law; or
> >
> > (b) an association of employees, or independent contractors, or both (whether formed formally or informally), a purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors (as the case may be); or
> >
> > (c) an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors;
>
> and includes:
>
> > (d) a branch of such an association; and
> >
> > (e) an organisation; and
> >
> > (f) a branch of an organisation.

19. The term "association" is not defined for the purposes of the FW Act, but its ordinary usage is broad enough to encompass "connection or combination"[20] or a "group of people organised for a joint purpose"[21]. Such ordinary usage continues to reflect to its mid 16th century Latin root (associatio) meaning "uniting in a common purpose".[22] Legal formality or structure is not a precondition for status either as an association in common usage, or as an "industrial association" under either paragraphs (b) or (c) of the definition in the FW Act. Formality and structure *is* necessary in order meet the definition under paragraph (a). It is to be noted that an industrial association includes "organisation". "Organisation" is defined an organisation registered under the *Fair Work (Registered Organisations) Act 2009*.

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[20] Macquarie Dictionary online, accessed 31 July 2023.
[21] Oxford Dictionary of English, Oxford University Press 2022.
[22] *Ibid.*

20. As to the specific rights and protections afforded to industrial associations (and therefore also organisations) in the FW Act, they include, *inter alia*, protection, rights and remedies in respect of adverse action[23] taken because a person:

    (a) is or was a member or officer of an industrial association;[24]

    (b) has become involved in establishing an industrial association;[25]

    (c) organises or promotes a lawful activity for, or on behalf of an industrial association;[26]

    (d) encourages or participates in a lawful activity organised or promoted by an industrial association;[27]

    (e) complies with a lawful request made by an industrial association;[28]

    (f) represents or advances the views, claims or interests of an industrial association;[29] or

    (g) seeks to be represented by an industrial association[30]

21. These rights, protections and remedies are contained in Part 3-1 of the FW Act, the stated objects of which include:

> "..to protect freedom of association by ensuring that persons are:
>
> (i) free to become, nor not become, members of industrial associations;
>
> (ii) free to be represented, or not represented, by industrial associations;
>
> (iii) free to participate, or not participate, in lawful industrial activities…
>
> …the protections are provided to a person (whether an employee, and employer or otherwise)."[31]

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[23] "Adverse action" may be comprised of (for example) dismal of or discrimination against and employee, or taking industrial action (other than protected industrial action) against an employer: See s. 342.
[24] S. 346(a), s.545-547.
[25] S. 346(b), 347(b)(i), s.545-547.
[26] S. 346(b), 347(b)(ii), s.545-547.
[27] S. 346(b), 347(b)(iii), s.545-547.
[28] S. 346(b), 347(b)(iv), s.545-547
[29] S. 346(b), 347(b)(v), s.545-547
[30] S. 346(b), 347(b)(vii), s.545-547
[31] S. 336

22. Outside of Part 3-1, the FW Act also relevantly provides:

    (a) Industrial associations and organisations with standing to bring proceedings to enforce the above protections (and others) which affect persons they are entitled to represent (including their members)[32];

    (b) Industrial associations with standing to seek the resolution of disputes concerning the dismissal of employees they are entitled to represent, where it alleged the above protections (and some others) have been contravened[33];

    (c) Officers and employees of employee organisations with a right to seek an entry permit, providing them access to workplaces and records affecting their members or potential members in particular circumstances including where there is suspected contravention of the protections referred to above[34];

    (d) Organisations of employees having a qualified right to prevent a proposed multi-enterprise agreement being (or variation thereof) being put to a vote[35];

    (e) The default representation of employees in bargaining by the organisation of which they are a member, in most circumstances[36].

23. Collectively, the provisions demonstrate the legislature placing significant value on employees or employers associating to protect and promote their interests in matters concerning employment.

Collective bargaining in the FW Act

24. Paragraph (f) of the objective of the Act at section 3, referred to above, speaks of "…an emphasis on enterprise-level collective bargaining, underpinned by simple good faith bargaining obligations and clear rules governing industrial action". This is largely given effect to by Part 2-4 of the Act, the objects of which were extracted at paragraph 15 above. The mechanisms for achieving those particular objects include, *inter alia*:

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[32] S. 539-540
[33] s. 365, s. 773
[34] See Part 3-4
[35] s. 240A, s. 240B
[36] s. 176(1)(b)(i), s. 176 (1)(b(ii) , s. 176 (2)-(3)

(a) a system for permitting representation of employees and employers during bargaining, including by organisations and industrial associations;[37]

(b) a jurisdiction for the FWC to resolve disputes that may arise during bargaining[38];

(c) a jurisdiction for the FWC to determine, through an "intractable bargaining workplace determination", matters unresolved in bargaining where they remain unresolved notwithstanding the utilisation of the above jurisdiction;[39] and

(d) good faith bargaining rules, and means to enforce them[40].

25. The third of these mechanisms is new, having been introduced by the SJSP Act. Each of the mechanisms have in common a pre-condition for their availability: They may be accessed (subject to their individual additional requirements) when bargaining is occurring between a single enterprise and its employees. Such bargaining may be commenced either by the employer(s) in the single enterprise initiating bargaining, or agreeing to bargain, or being compelled to do so by either operation of a determination of the FWC that a majority of the employees wish to do so[41]; or in some circumstances by the service of a notice in relating to bargaining for of an agreement to replace an extant agreement[42]. In particular:

(a) The FWC jurisdiction to resolve disputes in bargaining may be activated by a bargaining representative without the consent of any other bargaining representative, where single enterprise bargaining has commenced.[43]

(b) The FWC jurisdiction relating to the making of an "Intractable Bargaining Workplace Determination" can be validly invoked by the making of an application by a bargaining representative for a proposed single enterprise agreement, subject to a minimum bargaining period having elapsed;[44]

[37] s. 176-178A.
[38] s. 240
[39] s. 234-235A, s. 269-275.
[40] s. 229 - 233
[41] s. 173(2), s. 236-237
[42] s. 173(2A)
[43] s.240(2)
[44] S. 235(1)(c), 235(5)-(6).

(c) The good faith bargaining requirements may be enforced by a bargaining representative for a single enterprise agreement, provided that bargaining for such an agreement has actually commenced or is deemed to have commenced.[45]

26. However, should a participant in bargaining involving more than one enterprise wish to access any of these means of *enabling* collective bargaining, additional thresholds must met - therein lies the *emphasis* on (but not exclusivity of) enterprise level collective bargaining, of which the objects of the Act set out a section 3 speak. The additional thresholds involve obtaining the authorisation for bargaining beyond the single enterprise level – either a single interest employer authorisation (as is sought in this case) or a supported bargaining authorisation. The presence of either authorisation places a bargaining representative seeking to avail themselves of any of these options on an equal footing as a bargaining representative for a single enterprise agreement where bargaining has commenced.

27. This *emphasis* on enabling particular forms of bargaining is similarly reflected in the "clear rules governing industrial action" contained in Part 3-3 of the Act: such action can only lawfully be taken in the context of single enterprise level bargaining unless the wider level of bargaining has itself been authorised by either a single interest employer authorisation or a supported bargaining authorisation.[46]

The history and mischief

28. The structural features of the legislative scheme for enabling bargaining - assistance from FWC by way of bargaining orders, the resolution of bargaining disputes by FWC at the request of one party and the availability of protected industrial action - pre-date the SJSP Act. So too does their availability being at least in part conditioned by the level of bargaining. None were available beyond single enterprise bargaining absent the FWC's authorisation, either by way of a "low-paid bargaining authorisation"[47] or a "single interest employer authorisation"[48]. The relevant provisions concerning "single interest employer authorisations" prior to the SJSP Act in effect deemed employers who were specified in

[45] The requirements at section 230(2) are identical to those set out at section 173(2) for identifying a "notification time".
[46] See section 413(2) and the definition of "cooperative workplace agreement" at section 12.
[47] S. 242-243, pre SJSP Act.
[48] S. 247-250. Pre SJSP Act.

an authorisation to be engaged in bargaining for a single enterprise agreement[49], which had the legal effect of making these enabling features available[50].

29. However, outside of franchise arrangements, single interest employer authorisations could not be issued by the FWC absent a declaration by the Minister[51] . Critically, neither a Ministerial declaration nor the single interest employer authorisation could be sought by anybody other than the employers who proposed that they be permitted to bargain together.

30. The Explanatory Memorandum for the SJSP Bill leaves no doubt as to the conscious desire to make the provisions regarding single interest employer authorisations more permissive. In an overview of the relevant amendments, it states:

> "1004. Existing division 10 of Part 2-4 of the FW Act provides for two or more employers that will be covered by a proposed enterprise agreement to apply for a single interest employer authorisation. A single interest employer authorisation permits certain employers to bargain together for a single-enterprise agreement (see section 172).
>
> 1005. Employers who may apply under existing Division 10 of Part 2-4 for a single interest employer authorisation are franchisees, and employees who have obtained a Ministerial declaration based on meeting specified criteria regarding their common interests. Employers with common interests may include schools in a common education system or public entities providing health services.
>
> 1006. Part 21 of Schedule 1 to the Bill would amend Division 10 of Part 2-4 of the FW Act to remove unnecessary limits on access to single interest employer authorisations and simplify the process for obtaining them, and facilitating bargaining by:
>
> · removing the requirement for two or more employers with common interests who are not franchisees to obtain a Ministerial declaration before applying a single interest employer authorisation;

[49] S. 172(2), s. 172(5) Pre SJSP Act.
[50] S. 413(2), s. 229(2) Pre-SJSP Act (nb. as per the note above, the proposed agreement was termed a single enterprise agreement rather than a multi enterprise agreement as a result of the single interest authorisation being issued), s. 240(2)(a) (unchanged pre-post SJSP Act).
[51] S. 247, 248(3) Pre-SJSP Act.

> · providing for employee bargaining representatives to apply for a single interest employer authorisation to cover two or more employers, subject to majority support of the relevant employees;
>
> · permitting employers and employee bargaining representatives to apply to vary a single interest employer authorisation to add or remove the name of an employer from the authorisation, subject to meeting specified requirements; and
>
> · inserting new Subdivision AD—Variation of single interest employer agreement to add employer and employees, into Division 7 of Part 2-4 of the FW Act to permit employers and employee organisations to apply to the FWC for approval of a variation to extend coverage of an existing single interest employer agreement to a new employer and its employees, subject to meeting specified requirements." (emphasis added)[52]

31. More generally, the outline at the commencement of the Explanatory Memorandum states that the amendments contained in the SJSP Bill would "Remove unnecessary limitations on access to the low-paid bargaining stream (and rename it the supported bargaining stream) and the single-interest employer authorisation stream; and provide enhanced access to FWC support for employees and their employers who require support to bargain"[53].

32. Similarly, the Explanatory Memorandum's Statement of Compatibility with Human Rights states that Part 21 of Schedule 1 of the Bill (which introduced the reforms to single interest employer authorisations) would "…remove unnecessary limitations on access to single interest employer agreements"[54] and that "..the amendments are intended to make it easier to obtain a single-interest employer authorisation"[55] and "..support and promote the right to freedom of association".[56]

33. Elsewhere, in the Explanatory Memorandum's Regulation Impact Statement, it is revealed that on average only five applications for Ministerial Declarations and ten applications for

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[52] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022,* at p 173.
[53] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022,* at p iii.
[54] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022,* at p xii.
[55] *Ibid.*
[56] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022,* at p xliv.

single interest employer authorisations are made per year.[57] Collectively, the statements in the Explanatory Memorandum concerning Part 21 of the Bill should leave the FWC in no doubt that the restrictiveness of the regime for obtaining a single interest employer authorisation – a key gateway to multi-employer bargaining - was the problem that those amendments were designed to fix. So much is equally obvious from the Minister's Second reading speech for the SJSB Bill, which relevantly includes the following:

> "Reforms will remove unnecessary limitations from the existing framework. Multi-employer bargaining is already contemplated by the act through three streams—single interest, multi-employer and low paid. The problem is it isn't working.
>
> We're not creating new streams of bargaining; we are varying the existing streams to make them work and to get wages moving. "[58]

34. Neither the objects of the FW Act set out at section 3 thereof nor the objects of Part 2-4 were amended by Part 21 of the SJSP Bill. However, whilst the emphasis on enterprise level collective bargaining remains, it is undeniable that the extent of that emphasis- and the extent to which collective bargaining more generally is enabled - was deliberately altered by the those amendments.

Single interest employer authorisation- specific requirements

35. The present application is consented to, which renders it subject to fewer requirements than would otherwise be the case. The relevant merit requirements in this case, as set out in in section 249 of the FW Act, are met if the FWC is satisfied that:

    (a) at least some of the employees that will be covered by the agreement are represented by an employee bargaining representative (s. 249(1)(b)(i));

    (b) the employers and the bargaining representatives of the employees of those employers have had the opportunity to express their view (if any) on the authorisation (s. 249(1)(b)(ii));

    (c) the employers that are to be covered by the proposed agreement have clearly identifiable common interests (s. 249(1)b(v), s. 249(3)(a));

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[57] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022,*Regulation Impact Statement at p 26, 44

[58] Commonwealth, Parliamentary Debates, House of Representatives, 27 October 2022, at p 2181 (Tony Burke, Minister for Employment and Workplace Relations) (emphasis added).

(d) the operations and business activities of each of the employers are reasonably comparable (s.249(1)(b)(vi)); and

(e) it is not contrary to the public interest to make the authorisation (s. 249(1)b(v), s. 249(3)(b)).

36. If the FWC is so satisfied, it *must* make an authorisation.[59] It is important to note that the conditioning of a power on the basis of reaching a state of satisfaction ordinarily involves some evaluative, and subjective, judgement on the part of the decision maker which is distinct from a findings of fact on a balance of probabilities.[60] A range of possible approaches to decision making may be correct in the sense that their adoption would not be an error of law.[61] That is not to say that a finding of fact on a balance of probabilities cannot validly form the basis of a relevant state of satisfaction, but merely that it is not a necessity.

37. In our view, the evaluative exercise must be approached, consistent with section 578 and the matters referred to in paragraphs 13-34 above, on the basis that the FW Act values and recognises a right to freedom of association and seeks to enable collective bargaining in good faith, including at levels beyond the single enterprise. In the present matter, the FWC is presented with an industrial association that is an organisation of employees wanting to collectively bargain with a group of employers in respect of particular employees, and a group of employers wanting to collectively bargain with that organisation in respect of those employees. The common purpose of that group of employers - their association - in seeking to collectively bargain with that organisation in respect of those employees plainly bespeaks of a commonality of interest between them. Both parties are indicating a willingness to submit to the various mechanisms for *enabling* collective bargaining that are a corollary of the issuing of the authorisation which they seek. They are in this respect exemplars of the cooperative workplace relations that the FW Act seeks to promote, and the same parties whom were granted authorisation to bargain together under former provisions which are now considered by the legislature to have been unnecessarily restrictive. These matters suggest that the FWC can readily be satisfied that it would not be contrary to the public interest to make the authorisation.[62]

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[59] S. 249(1).
[60] *Minister for Immigration & Ethnic Affairs v. Wu Shan Liang* [1996] HCA 6, at [37]-[40], [52]-[54], *CFMEU v. One Key Workforce* [2017] FCA 1266 at [42]-[46].
[61] *Ibid.*
[62] See *CEPU v. Aurizon Operations* [2015] FCAFC 126 at [40]-[41].

38. Moreover, whilst reaching a state of satisfaction concerning employers' common interests may in some cases turn on the consideration of objective facts (as indicated in the non-exhaustive list of "matters that may be relevant" contained in section 249(3A)), recognising the right to freedom association requires that the FWC place some weight on any united view of a group of employers that they share a common interest and purpose and their expressed desire to advance those interests through collective bargaining. There is no requirement that the employers have identical interests in all matters, let alone an identical interest in or a common position on the matters that are permitted to be included in an enterprise agreement – all that is required is that such common interests that they do have be "clearly identifiable". If employers are able to articulate the basis of their common interest or common purpose as they perceive it, this should in our submission carry significant weight in the evaluative exercise.

A clear pathway

39. In this particular matter, the FWC is, on the basis of paragraph 4 of the Agreed Statement of Facts (concerning the number of employees employed by each relevant employer), effectively *bound* by sections 249(1AA) and 249(3AB) to be satisfied that the employers concerned have clearly identifiable common interests, that it is not contrary to the public interest to make the determination and that the operations and business activities of the employers are reasonably comparable. This arises in the following way:

    (a) Section 249(1)(b)(v) requires in this case that the FWC be satisfied that the requirements of section 249(3) are met. Section 249(3) contains two such requirements that the FWC must be satisfied of: that the employers have clearly identifiable common interests (paragraph (a)) and that it is not contrary to the public interest to make the authorisation (paragraph (b)). Section 249(3AB) specifies that in the present circumstances of each employer employing 50 employees or more[63], "it is presumed that that the requirements of subsection (3) are met" in relation to each employer "unless the contrary is proved". Section 249(3AB) makes no distinction between the two separate requirements specified in section 249(3).

    (b) Section 249(1)(b)(vi) requires in this case that the FWC be satisfied that "the operations and business activities" of the relevant employers are "reasonably comparable". Section 249(1AA) specifies that in the present circumstances of each

[63] As determined pursuant to subsection 249(3AC)

employer employing 50 employees or more[64], "it is presumed" that those operations and activities are reasonably comparable "unless the contrary is proved".

(c) The requirement for "the contrary to be proved" both in section 249(3AB) and 234(1AA) creates an onus on an opposing party in cases where the 50 employee threshold is crossed, which is not present where there are fewer employees. The FWC may either reach or not reach the required state of satisfaction without applying an onus or standard of proof in the conventional sense where the 50 employee threshold is not crossed.

40. In the circumstances of the present matter, the parties have provided far in excess of what is strictly necessary to satisfy the FWC that an authorisation should be made.

Australian Council of Trade Unions

[64] As determined pursuant to subsection 249(3AC)