IN THE FAIR WORK COMMISSION

Application by the Independent Education Union of Australia

Matter No: (B2023/703)

SUBMISSIONS OF AUSTRALIAN BUSINESS INDUSTRIAL AND NEW SOUTH WALES BUSINESS CHAMBER LTD

A. Introduction

1. On 25 July 2023, the Independent Education Union of Australia (**IEU**) filed an application pursuant to section 248 of the Fair Work Act 2009 (Cth) (**the Act**), for a single interest employer authorisation (**SIEA**).

2. The application has been made in relation to employees of employers in the Catholic education sector in the state of Western Australia who are:

   a) support/operations/general staff employed by the employers listed in the application; and

   b) working in:

      (i) Schools registered pursuant to the School Education Act 1999 (WA); and/or

      (ii) A long day care, occasional care (including those occasional care services not licensed), childcare centres, day-care facilities, out-of-school hours care, kindergartens and preschools, and early childhood intervention programs.

3. The IEU seek one authorisation, which, if granted would permit it to bargain for a single-interest agreement covering ten employers named in the application.

4. These joint submissions of Australian Business Industrial (**ABI**) and New South Wales Business Chamber Ltd (**Business NSW**) are made in response to paragraph three of the Amended Directions of the Fair Work Commission (**the Commission**) on 9 August 2023.

5. These submissions firstly address the basis upon which ABI and Business NSW seek to be heard and have an interest in this matter. Thereafter, the submissions address the legislative provisions which govern the determination of a SIEA.

6. We do not seek to advance a position as to whether the application should be granted. Rather these submission focus on the interpretation of section 249 of the Act.

B. Power of the Commission to inform itself

7. Section 590(1) of the Act provides the Commission with broad discretion to inform itself in relation to any matter before it in such manner as it considers appropriate:

> *"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."*

8. Section 590(2) sets out some of the ways in which the Commission can inform itself including (but not limited to):

   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).

9. The exercise of the Commissions discretion under section 590 whilst broad must be exercised in a manner consistent with section 577, which deals with the manner in which the Commission must perform its functions and exercise its powers.[1]

10. Paragraph three of the Directions of 21 July 2023 and Amended Directions of 9 August 2023 indicates the Commission contemplates that it may which to inform itself in the current proceedings in the manner contemplated by section 590(2)(b) in inviting "any other party or intervenor" to file written submissions.

---

[1] AKN Pty Ltd T/A Aitkin Crane Services [2019] FWC 8338 at [9].

C. Non-party participation in proceedings

11. Whilst the Commission is not limited by, nor bound by judicial principles developed by the courts for hearing from non-parties either by virtue of being joined as an intervener or by being heard as amicus curiae, such cases may nevertheless assist the Commission in its consideration of and application of the discretion afforded to it in section 590.

Participation as an Intervener

12. An applicant to intervene must demonstrate "a substantial affection" of its legal interests.[2] This need not be a direct affectation but does need to rise higher than an indirect or contingent affectation.[3]

13. In *Roadshow Films Pty Ltd and Ors v iiNet Ltd*[4] (iiNet) the High Court, citing the judgment of Brennan CJ in *Levy v Victoria*,[5] held the following regarding applications to intervene in court proceedings:

    a) A non-party whose interests would be directly affected by a decision in the proceedings, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected.

    b) A non-party whose legal interest, for example in other pending litigation, is likely to be affected substantially by the outcome of the proceedings in the Court will satisfy a precondition for leave to intervene.

    c) Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests, merely because of the operation of the principles enunciated in the decision of the Court (or its effect upon future litigation).

    d) Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose.[6]

[2] Laurence Nathan Levy v The State of Victoria & Ors (1997) 189 CLR 579.
[3] Ibid.
[4] [2011] HCA 54.
[5] (1997) 189 CLR 579.
[6] [2011] HCA 54 at [2] and [3].

Participation as Amicus Curiae

14. Alternatively, as was endorsed by the High Court in iiNet at [4], Brennan CJ in Levy an amicus curiae may be heard on a different basis:

> *The hearing of an amicus curiae is entirely in the Court's discretion. That discretion is exercised on a different basis from that which governs the allowance of intervention. The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted.*
>
> ...
>
> *It is not possible to identify in advance the situations in which the Court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an amicus who is willing to offer assistance. All that can be said is that an amicus will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected.*[7]

15. As was further expressed by Full bench of the Supreme Court in Priest v West [2011] VSCA 186:

> *The role of a friend of the court is to provide assistance – on a matter of law or fact – which the court would not otherwise receive. In contradistinction to the position of a person seeking leave to intervene as a party, a person seeking leave to appear as a friend of the court does not need to demonstrate that his or her interests may be affected by the outcome of the proceeding. Typically, a friend of the court will be independent of the parties and neutral about the outcome of the proceeding, although neither independence nor neutrality is a prerequisite to the grant of leave*

D. Basis upon which Business NSW and ABI seek to be heard

16. Business NSW is the peak business origination in the State of New South Wales, with more than 50,000 member businesses across NSW.

17. Business NSW is registered under the Industrial Relations Act 1996 (NSW) and is a State registered association recognised pursuant to Schedule 2 of the Fair Work (Registered Organisations) Act 2009.

---

[7] [2011] HCA 54 at [4].

18. Business NSW advocates for business interests across areas such as innovation, infrastructure, local government and planning, regulation and taxation, regional affairs, tourism, workforce skills, workplace health and safety and workplace relations.

19. ABI is registered under the Fair Work (Registered Organisations) Act 2009. ABI has some 2,200 members.

20. In the present case, ABI and Business NSW submit there are two reasons why they should be heard.

21. **First**, ABI and Business NSW intend to make submissions with respect to matters not raised, which will assist the Commission in a way which the Commission would not otherwise be given and accordingly will have the benefit of a larger view of the matter than it would otherwise have.

22. In particular, our submissions seek to deal with the important matter of how the reputable presumptions work and should be handled by the Commission, a matter not dealt with in any sufficient detail to date by any of the submissions filed in the proceedings.

23. In addition, the Commission should be minded in this respect to the fact that the Respondent Employers in the current proceeding have chosen to make no submissions addressing the requirements of section 248, section 249 and related provisions of the Act and the application, beyond the agreed statement of facts.[8]

24. It may therefore be in the interests of the administration of justice that the Commission have the benefit of a larger view of the matter before it than the parties are able or willing to offer.

25. **Second**, ABI and Business NSW have more than a mere academic or theoretical interest in these proceedings.

26. The current application for consideration before the Commission is the first for a SIEA to be determined since the bargaining stream was significantly amended and subsequently commenced operation, as a result of the passing of the Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022. This reformed bargaining stream is a significant departure from the previous single-interest bargaining framework and presents both real challenges and opportunities for employers.

---

[8] Correspondence from Michael Jensen to Deputy President Hampton on behalf of the Respondent Employers dated 3 August 2023.

27. ABI and Business NSW therefore seeks to be heard in these proceedings because it engages with matters of statutory construction which are novel and will going forward both condition and impact the interests and rights of its employer members when it comes to enterprise bargaining.

28. In light of the above, ABI and Business NSW submit that it is appropriate in the current circumstances that they be allowed to be heard.

E. Single-Interest employer Authorisation Statutory Framework

29. Chapter 2, Part 2-4, Division 10, ss 248 to 252 of the Act permits an application to be made seeking a SIEA to allow two or more employers that are not single interest employers to bargain for a single-enterprise agreement.

30. The present application is consented to by the respondent employers;[9] therefore, these proceedings currently concern the making of a SIEA which is predicated on:

a) (s 248(1)(a) and (b)) An application being made for the SIEA in relation to a proposed agreement which will cover two or more employers, can be made by those employers concerned or a bargaining representative of an employee who will be covered by the agreement.

b) (s 248(2)(a) to (c)) The application for the SIEA must specify the employers and employees who will be covered by the agreement and the person (if any), nominated by the employers to make applications under the FW Act if the authorisation is made.

c) (s 249(1)(a) and (b)) Once an application has been made in accordance with section 248, the Commission is obliged to make the SIEA upon satisfaction of the following matters:

    (i) (s 249(1)(b)(i)) at least some of the employees that will be covered by the proposed agreement are represented by an employee organisation; and

    (ii) (s 249(1)(b)(ii)) the employers and the employee bargaining representatives have had the opportunity to express their views (if any) on the authorisation; and

    (iii) (s 249(1)(b)(v); s 249(3)(a)) the employers that are to be covered by the

[9] Fair Work Commission, Transcript of Proceeding B2023/703, Initial directions conference on 20 July 2023. Accordingly the Commission need not be satisfied of the matters set out in s 249(1B) as the employers have consented to the application.

proposed agreement are either franchisees of a relevant kind or have clearly identifiable ‘common interests’. Matters that may be relevant to determining whether employers have clearly identifiable ‘common interests’ are provided at section 249(3A). Section 249(3AB) establishes a rebuttable presumption that this requirement is satisfied in respect of an employer who has more than 50 employees at the time an application is made unless the contrary is proved; and

(iv) (s 249(1)(b)(v); s 249(3)(b)): it is not contrary to the public interest to make the authorisation. Section 249(3AB) establishes a rebuttable presumption that this is satisfied in respect of an employer who has more than 50 employees at the time an application is made unless the contrary is proved; and

(v) (s 249(1)(b)(vi)): that in the case of ‘common interest employers, where it is not contrary to the public interest to make the authorisation, the employers’ that are to be covered by the proposed agreement operations and business activities are ‘reasonably comparable’ with those of the other employers that will be covered by the agreement. Section 249(1AA) establishes a rebuttable presumption where the application is made by a bargaining representative, that this is satisfied in respect of any employer who has more than 50 employees at the time an application is made unless the contrary is proved; and

(vi) (s 249A): the authorisation is not in relation to a proposed enterprise agreement that would cover employees in relation to general building and construction work.

31. (s 249(3AC)) In calculating whether an employer has the requisite number of employees, all employees of the employer at the time the application for the authorisation was made are counted, except for casuals who are not regular casuals. Associated entities of an employer are taken to be one entity.

F. The Interpretation of Section 249

32. We here deal with various elements of section 249 of the Act that apply in the current proceedings.

33. For the avoidance of doubt, where a requirement of section 249 does not apply in the

current proceedings, for example because the application was not made by two or more employers, ABI and Business NSW have refrained from addressing it for lack of relevance, as they are not matters for consideration by the Commission in the current proceedings.

Requisite Satisfaction

34. As set out above, the Commission's power to make a SIEA is not enlived unless it is satisfied of certain matters set out in s 249(b)(i) to (vi).

35. As the High Court plurality explained in *Coal and Allied Operations v Australian Industrial Relations Commission*,[10] the Commission can only genuinely be 'satisfied' if its decision is based on relevant considerations and the evidence:

> *There is well established authority to the effect that a tribunal's or public officer's 'satisfaction' in such a context must not be capricious. The Commission may only be satisfied if its decision to that effect is based upon relevant considerations and the evidence.*[11]

36. Accordingly, being satisfied will therefore require the Commission to do more than just rubber stamp an application, it must engage in an evaluative judgement to meet the necessary state of 'satisfaction' in the context of the matter and the evidence before it. In doing this it must also exercise its power in accordance with the nature and purpose of its powers and the intent of the Act.

Representation

37. The Commission must be satisfied before being able to grant the authorisation "*that at least some of the employees who will be covered by the agreement are represented by an employee organisation*".[12]

38. The term "some" means at least one, possibly all.[13]

39. Practically speaking therefore, this requirement signifies that the Commission is not empowered to grant a supported bargaining authorisation unless a union is a party to a proposed agreement, as a bargaining representative for at least one of the employees who will be covered by it.

---

[10] [2000] HCA 47 (31 August 2000).
[11] Ibid, 48; citing Coal & Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union Print P8382 (AIRCFB, Giudice J, Munro J, Larkin C, 29 January 1998) [(1998) 80 IR 14] 17.
[12] Section 249(1)(b)(i).
[13] Macquarie Dictionary (8th ed, 2020) 'some' 1451.

Opportunity to be heard

40. The Commission must be satisfied that the employers and bargaining representatives have had the opportunity to express to the Commission their views on the authorisation (if any).[14]

41. This accords with the existing obligation already placed on the Commission to act 'judicially' in the sense that it is obliged to provide procedural fairness and an opportunity for all parties to put their case.[15]

The rebuttable presumptions

42. Section 249 contains the following rebuttable presumptions with respect to matters which the Commission must be satisfied of in the current proceeding as the application for the SIEA was made by a bargaining representative:

a) where an employer that will be covered by the agreement employed more than 50 employees at the time the application was made, it is to be presumed that the employers that are to be covered by the proposed agreement have clearly identifiable 'common interests' unless the contrary is proved;[16]

b) where an employer that will be covered by the agreement employed more than 50 employees at the time the application was made, it is to be presumed that it is not contrary to the 'public interest' to make the authorisation unless the contrary is proved;[17] and

c) where an employer that will be covered by the agreement employed more than 50 employees at the time the application was made, it is to be presumed that the employer's operations and business activities are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved.[18]

43. Presumptions of law such as these operates so that when a fact—the 'basic fact'—is proved, it must, in the absence of further evidence, lead to a conclusion that another fact—the 'presumed fact'—exists.[19]

44. In other words, a presumption that a fact exists will arise on proof of a basic fact.

[14] Section 249(1)(b)(ii).
[15] Fair Work Commission Practice note: Fair hearings.
[16] Section 249(1)(b)(v); section 249(3)(a); section 249(3AB).
[17] Section 249(1)(b)(v); section 249(3)(b); section 249(3AB).
[18] Section 249(1)(b)(vi); section 249 (1AA).
[19] J D Heydon, Lexis Nexis, Cross on Evidence Vol 1 (at Service 164) at [7240] and [7260].

45. The presumption will then operate unless rebutted by evidence to the contrary.[20]

46. To this end, the Commission is required to be 'satisfied' that the evidence produced provides that the requisite fact exists, namely that the employers each employ more than 50 employees, in order for the presumption to operate. The persuasive onus of proof of this fact lies on the Applicant.[21]

47. In the current proceedings the rebuttable presumptions are relied upon by the parties who have adduced evidence as to the existence of the fact (every employer specified in the application employing more than 50 employees).

48. Each of the presumptions shall only stand until 'some' evidence to the contrary is given, at which point it is displaced. Once this occurs, the presumption has no inherent superadded weight.[22] It is then the role of the Commission to be satisfied of the underlying requirement that it must be satisfied of, without the presumption having any force or weight.

49. In the current proceedings no such evidence has been adduced by any party to date.

50. Accordingly, unless or until the Commission is not satisfied with the evidence that the fact exists or a party provides contrary evidence to displace the presumption, it remains unnecessary for ABI and Business NSW to make submissions in relation to the operation of the tests of 'common interests', 'public interest' and 'reasonable comparability' for a SIEA in the context of the current proceedings.

51. Further, this being the case, respectfully, it is unnecessary for the Commission to consider such matters on a hypothetical or theoretical basis.

Filed for and on behalf of Australian Business Industrial and New South Wales Business Chamber

Nigel Ward

CEO + Director

Australian Business Lawyers & Advisors

Tamsin Lawrence

Senior Associate

Australian Business Lawyers & Advisors

[20] Ibid at [7265].
[21] Ibid at [7010].
[22] Ibid at [7280].