IN THE FAIR WORK COMMISSION

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

**Matter No: (B2023/538)**

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# OUTLINE OF SUBMISSIONS OF THE ACTU

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## A. INTRODUCTION

1. On 6 June 2023, particular provisions of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**) came into effect. These provisions replaced the previous low paid bargaining stream in the *Fair Work Act 2009* (Cth) (**FW Act**) with a new supported bargaining stream.

2. On 6 June 2023, the United Workers Union (**UWU**), the Australian Education Union (**AEU**) and the Independent Education Union of Australia (**IEUA**) (**Union Parties**) filed an application for a supported bargaining authorisation pursuant to section 242(1) of the FW Act in respect to a proposed agreement to cover 62 employers and their employees in the early childhood education and care (**ECEC**) sector.

3. On 26 July 2023, the Union Parties filed an amended application naming a further two employers, taking the total number of employers to 64 (**Relevant Employers**). The Relevant Employers consent to the making of a supported bargaining authorisation by the Commission.[1]

4. The Union Parties and the Relevant Employers support an Agreed Statement of Facts (**ASOF**) which has been jointly filed by the parties.

5. Peak councils and the Commonwealth have been invited to make submissions in relation to the operation of ss 243 and 244 of the FW Act. The application is set to be the first to be determined under the new provisions and is likely to determine key principles relating to the making of supported bargaining authorisations. It is therefore a matter of interest to the Australian Council of Trade Unions (**ACTU**) and its affiliates. Accordingly, the ACTU makes the following submissions in relation to the application.


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[1] Transcript of Proceedings*, Application by United Workers Union, Australian Education Union and Independent Education Union of Australia,* (Fair Work Commission, B2023/538, President Hatcher, 14 June 2023) at [PN63] and [PN67]; Submissions of the Australian Childcare Alliance Employers (**ACA Submissions**) at [152]; outline of Submissions of Community Early Learning Australia and Community Child Care Association (**CELA and CCC Submissions**) at [8] and [53].

## B. LEGISLATIVE CONTEXT

6. The modern approach to statutory interpretation requires the simultaneous consideration of both ordinary meaning and context. Context is to be considered in its widest sense, including the purposes and object of an Act, surrounding provisions and structure, extrinsic materials, the legislative history, and mischief it is intended to address.[2]

7. Sections 578 (a) and (b) of the FW Act provide that in performing its functions and exercising its powers in relation to a matter, the Commission must take into account the objects of the FW Act (and the objects of the relevant part of the Act), and equity, good conscience and the merits of the matter. Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides that in interpreting a provision of an Act, the interpretation that would best achieve the purpose of the object of the Act is to be preferred to other interpretations. Therefore, the Commission must exercise its powers in a manner which accords with the objects of the FW Act, the objects of the relevant part, and the purpose of the legislative scheme, and to interpret the FW Act in a way that best achieves those objects.[3]

8. The low paid bargaining stream was intended to be a "framework to facilitate bargaining for multi-enterprise agreements for certain types of employees, being low paid employees who either have not historically had access to collective bargaining or who face substantial difficulties in bargaining at the enterprise level."[4] It had been hoped that it would address wage outcomes for low paid workers, and assist in closing the gender pay gap by lifting wages and conditions in feminised sectors, including community services sectors, cleaning and early childhood education and care.[5]

9. However, since the commencement of the FW Act, the low paid bargaining stream was very rarely used. [6] Only four applications were made for a low paid authorisation, with only one application being granted[7] (in the *Aged Care Case*).[8] The low paid authorisation made in that matter did not result in the making of a multi-enterprise agreement, but rather was observed

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[2] *Low Latency Media v. Rossi* [2023] FWCFB 14; *United Voice & Australian Education Union* [2015] FWCFB 8200; *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; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; at [30]; *Pope v WS Walker & Sons Pty Ltd* [2006] VSCA 227; 14 VR 435 at [31].

[3] See *FW Act* s 578; *Acts Interpretation Act 1901* (Cth) s 15AA; *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, *Four Yearly Review of Modern Awards* [2014] FWCFB 1788 at [14]; *Tickner v Bropho* (1993) 114 ALR 409 at [434].

[4] Commonwealth, *Explanatory Memorandum to the Fair Work Bill 2009*, at [992].

[5] Ibid and Department of Employment and Workplace Relations (2022) *Enterprise Bargaining Outcomes from the Australian Jobs and Skills Summit, Regulation Impact Statement* (**Regulation Impact Statement**), page 44

[6] Regulation Impact Statement, page 17.

[7] Ibid.

[8] *United Voice v The Australian Workers' Union of Employees, Queensland* [2011] FWAFB 2633.

to inspire a number of enterprises to reach their own single enterprise agreements and successfully apply to be removed from the authorisation.[9]

10. This has been attributed to the criteria for obtaining a low paid bargaining authorisation being too onerous, and a major barrier to entry.[10] For example:

    a. An application made on behalf of nurses employed in medical centres and general practice clinics (the *Practice Nurses Case*) failed, including on the basis that more efforts should have been made to negotiate single enterprise agreements with each of the employers identified in the application before seeking an authorisation.[11]

    b. An application made on behalf of security guards in the ACT (the *Security Guards Case*) failed, including on the basis that the low wages paid in existing or previous agreements were considered irrelevant to the question of difficulty in bargaining, and the low skill level of the workers concerned was considered irrelevant to the assessment of their bargaining strength. Further, the Commission found that because the security industry as a whole paid at or about the minimum safety net award level, the particular employees identified in the application could not be considered to be disadvantaged.[12]

11. The introduction of the supported bargaining stream by the SJBP Act was intended to remove the barriers and limitations associated with the low paid bargaining stream, and assist employees and employers who require support to bargain.[13]

12. The Revised Explanatory Memorandum states that the supported bargaining stream is intended to:

    a. Be easier to access than the existing low paid bargaining stream with the revised criteria for making a supported bargaining authorisation addressing the limited take up of the low paid bargaining stream; [14]

    b. Increasing access to the renamed supported bargaining stream and assisting workers who require support to bargain – which might include those in low paid occupations, government funded industries and female dominated sectors;[15]

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[9] Regulation Impact Statement, page 27.
[10] Ibid, page 17.
[11] *Application by Australian Nursing Federation* [2013] FWC 511 at [160].
[12] *Application by United Voice* [2014] FWC 6441.
[13] Regulation Impact Statement pages 17 and 45; Commonwealth, *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Revised Explanatory Memorandum**), page iii and page xxiii at [109].
[14] Revised Explanatory Memorandum, page 160 at [922].
[15] Ibid, page xxiii at [109].

c. Assist those employees and employers who may have difficulty bargaining at the single-enterprise level – for example, those in low paid industries such as aged care, disability care and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively;[16] and

d. Assist employees and employers who may face barriers to bargaining, such as employees with a disability, employees who are culturally and linguistically diverse and First Nations employees.[17]

13. These clear intentions, and the deliberate decision by the Parliament to enact a new supported bargaining mechanism to replace the old low paid bargaining mechanism which was not operating effectively, are reflected in the Objects of Division 9 of Part 2-4 of the FW Act, which were amended by the SJBP Act to expand the supported bargaining stream to encompass employees and their employers who require support to bargain.[18]

14. Section 241 of the FW Act states that the objects of the Division are:

a. to assist and encourage employees and their employers who require support to bargain, and to make an enterprise agreement that meets their needs; and

c. to address constraints on the ability of those employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and

b. to enable the FWC to provide assistance to those employees and their employers to facilitate bargaining for enterprise agreements.

15. The emphasis in the new objects of the Division is on assisting employees who require support in bargaining, rather than being limited to low paid employees who have not had the benefits of collective bargaining. Previous considerations regarding improvements to productivity, service delivery and the needs of individual enterprises have been removed.

16. The objects of Part 2-4 of the Act are set out in section 171 of the Act, and include: "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". The object of the FW Act also contains an emphasis on enterprise level collective bargaining in section 3(f).

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[16] Ibid, page xxiii and page 160 at [921].

[17] Ibid.

[18] Ibid, page 168 at [978].

17. However, these provisions do not suggest a hierarchy of bargaining approaches. The extent of the emphasis on enterprise level bargaining, and the extent to which collective bargaining more generally is enabled by the SJBP Act, has clearly shifted. Should a participant in bargaining involving more than one enterprise wish to access any of the means of enabling collective bargaining, additional thresholds must be met to obtain either a single interest employer or a supported bargaining authorisation (that are not required for enterprise level bargaining), hence the emphasis on (but not exclusivity of) enterprise level collective bargaining.

18. The SJBP Act also amended the object of the FW Act, which is to “provide a balanced framework for cooperative and productive relations that promotes national economic prosperity and social inclusion for all Australians”, and to so provide it by particular means. The SJBP Act amended the object to include the promotion of job security and gender equality as means by which its overarching objective is to be delivered.

19. The Revised Explanatory Memorandum stated that the SJBP Act would place these considerations “at the heart of the FWC’s decision making, and support the Government’s priorities of delivering secure, well paid jobs and ensuring women have equal opportunities and equal pay.”[19] It further explains that the reference to ‘promoting job security’ "recognises the importance of employees and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment."[20] The reference to 'promoting gender equality' "recognises the importance of people of all genders having equal rights, opportunities and treatment in the workplace, and in their terms and conditions of employment, including equal pay."[21] The phrase ‘gender equality’ includes both formal and substantive gender equality.[22]

20. In his Second Reading Speech, the Minister emphasised that the amendments contained in the SJBP Act would “place gender equity at the very heart of our Fair Work system,” would “embed gender equity as a central goal of our workplace laws”, and “set a clear expectation that the Fair Work Commission must take into account the need to achieve gender equity when performing all its functions.”[23]

21. The Minister went on to link the achievement of gender equity with the purpose of the supported bargaining stream, observing that “the Bill will rename and remove barriers to access the existing low paid bargaining stream, with the intention of closing the gender pay

[19] Revised Explanatory Memorandum at [330].
[20] Revised Explanatory Memorandum at [334]
[21] Ibid.
[22] Ibid.
[23] Commonwealth, *Hansard (House of Representatives)* (27 October 2022) (**Second Reading Speech**) at page 2177-2178.

gap and improving wages and conditions in sectors such as community services, cleaning, and early childhood education and care, which have not been able to successfully bargain at the enterprise level."[24]

## C. STATUTORY FRAMEWORK

**Application for supported bargaining authorisation – section 242**

22. Section 242 provides that:

*(1) The following persons may apply to the FWC for an authorisation (a supported bargaining authorisation ) under section 243 in relation to a proposed multi-enterprise agreement:*

*(a) a bargaining representative for the agreement;*

*(b) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement.*

*...*

*(2) The application must specify:*

*(a) the employers that will be covered by the agreement; and*

*(b) the employees who will be covered by the agreement.*

*(3) An application under this section must not be made in relation to a proposed greenfields agreement.*

23. An application has been made by the Union Parties who are entitled to represent the industrial interests of employees in relation to work to be performed under the proposed agreement in accordance with s242(1)(a).[25]

24. The application specifies the employers and the employees who will be covered by the agreement in accordance with s242(2) and the application is not in respect of a proposed greenfields agreements in accordance with s242(3).

**When the Commission must make a supported bargaining authorisation – section 243**

25. Section 243(1) provides that:

*The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:*

*(a) an application for the authorisation has been made; and*

*(b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together, having regard to:*

[24] Ibid at page 2182.

[25] Agreed Statement of Facts (**ASOF**) at [7].

- *(i)* *the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and*
- *(ii)* *whether the employers have clearly identifiable common interests; and*
- *(iii)* *whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and*
- *(iv)* *any other matters the FWC considers appropriate; and*

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

26. If these three criteria have been met, the Commission "must" make a supported bargaining authorisation (subject to the two restrictions contained in section 243A). The matters identified in subsections 243(1)(a) and (c) should usually be straightforward matters of fact. Whilst the assessment of appropriateness pursuant to section 243(1)(b) is a broad task involving some discretion (as discussed below), once the Commission is satisfied of the appropriateness of the parties bargaining together (and the other requirements of section 243(1) are met), then it must make the authorisation.

27. The conditioning of a power on the basis of reaching a state of satisfaction may ordinarily involve some evaluative and subjective judgement on the part of the decision maker which is distinct from findings of fact on a balance of probabilities.[26] A whole range of possible approaches to decision making may be correct in the sense that their adoption would not be an error of law.[27] This does not mean that a finding of fact on a balance of probabilities cannot validly form the basis a state of satisfaction, but it is not necessary.

### Appropriate for the employees and employers to bargain together

28. Consistent with the object of the new provisions being to ensure that the supported bargaining provisions are easier to access than the previous low paid bargaining stream, section 243(1)(b) requires the Commission to form a broad view about whether it is "appropriate" for the employers and employees to bargain together. In considering whether it is satisfied of this, the Commission must have regard to the four matters listed in section 243(1)(b). 'Having regard' to those matters suggests that the Commission is to treat them as of significance in the decision making process.[28]

[26] *Minister for Immigration & Ethnic Affairs v. Wu Shan Liang* [1996] HCA 6, at [37]-[40], [52]-[54]
[27] Ibid.
[28] *Ex Parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at [329]; *National Retail Association v Fair Work Commission* [2014] FCAFC 118; (2014) 225 FCR 154 at [56]; *4 yearly review of modern awards – Award stage – General Retail Industry Award 2020* [2020] FWCFB 6301; (2020) 301 IR 296 at [16].

29. “Appropriateness” has been characterised as a “broad discretionary standard” about which reasonable minds may differ.[29] This is very different to the previous low paid bargaining provisions, which required the Commission to be satisfied that it was in the public interest to make an authorisation. The new wording is designed to be a lower and more accessible threshold so as to improve access to the supported bargaining stream.

30. It is clear that the matters in section 243(1)(b)(i)-(iii) are not intended to be exhaustive, given the inclusion of “any other matters the FWC considers appropriate” at section 243(1)(b)(iv). The Commission therefore has a broad discretion to determine what other matters it considers to be relevant to the determination of appropriateness.

31. The discretion the Commission has in determining appropriateness must be exercised in accordance with the purpose and intent of the supported bargaining provisions and the legislative scheme, including the Objects of the Division.[30]

32. The matters in section 243(1)(b) are also not intended to be prerequisites that each need to be satisfied; rather they are matters to be considered in an overall assessment. For example, if the employers do not have clearly identifiable common interests, or the number of bargaining representatives is not consistent with a manageable bargaining process, this would not be determinative of appropriateness, but rather, by their absence, would not count towards the granting of an authorisation. The Commission can determine appropriateness in light of any appropriate matters, including those specifically mentioned in section 243(1)(b)(i)-(iii) and any other matters pursuant to section 243(1)(b)(iv).

33. Whilst it is not necessary for any or all three matters in section 243(1)(b)(i)-(iii) to be present in order for the Commission to be satisfied of the appropriateness of the parties bargaining together, if several of these matters are present, this should weigh very strongly in favour of a supported bargaining authorisation being granted, regardless of any other matters the Commission considers appropriate pursuant to section 243(1)(b)(iv).

34. Finally, it is clear from both the statutory text and the explanatory material that the Commission does not need to be satisfied that it is appropriate for all of the employers and employees specified in the application to bargain together. If the Commission were to be satisfied that it was appropriate for only some of the employers and/or employees to bargain together, then it can grant an authorisation in respect of those particular employers and/or employees.[31]

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[29] *Tahmoor Coal Pty Ltd re Tahmoor Colliery Enterprise Agreement 2006; Tahmoor Washery Workplace Agreement 2006* [2010] FWA 6468, at [32].
[30] Ibid at [39].
[31] *FW Act* s243(1)(b); Revised Explanatory Memorandum, page 169 at [983].

**Prevailing pay and conditions, and whether low rates of pay prevail in the industry or sector**

35. The prevailing pay and conditions within the relevant industry are the first factor to be taken into account by the Commission when determining whether it is appropriate for the parties to bargain together. This includes consideration of whether low rates of pay prevail. It is the pay and conditions that generally prevail within the industry, rather than only the pay and conditions of the particular employees subject of the application, that are relevant to the Commission's consideration.

36. "Prevailing" should be understood by reference to its ordinary meaning as being "generally current"[32] - that is the generally current pay and conditions within the relevant industry or sector. This does not require that particular pay and conditions are uniform, and does allow for some reasonable variation within pay and conditions as could be expected to occur within industries or sectors.

37. Section 243(1)(b)(i) does not require that low rates of pay have to prevail in order for an authorisation to be made, and is not a determinative consideration as "low paid" was in the previous low paid bargaining stream.

38. This is supported by the Second Reading Speech, where the Minister stated that "unnecessary hurdles to entry in the current low paid stream will be replaced by a broad discretion for the Fair Work Commission to consider the prevailing rates of pay in the industry, including whether the workers in the industry or sector are low paid."[33]

39. The use of the word "including" in the statutory text 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. Where low rates of pay prevail, that would likely weigh in favour of the granting of an authorisation, however an authorisation can be made in circumstances where low rates of pay do not prevail.

40. This interpretation is supported by the Revised Explanatory Memorandum, which states that 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, etc."[34] It is clear that other matters in addition to whether low rates of pay prevail will be relevant in the assessment of prevailing pay and conditions, such as the degree of award reliance in the relevant industry, whether employees are paid at or close to award levels, the commonality or otherwise of pay and conditions across an industry, and so on.

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[32] *Macquarie Dictionary* (online version).
[33] Second Reading Speech, page 2182.
[34] Revised Explanatory Memorandum, page 169 at [984].

### Low rates of pay

41. The expression "low rates of pay" used in the new supported bargaining provisions at section 243(1)(b)(i) differs from the expression "low paid" used in the previous low paid bargaining provisions. The removal of the latter and its replacement with the former is consistent with the intention to "improve access to the supported bargaining stream beyond the scope of the existing low-paid bargaining stream",[35] and also evinces an intention to not adopt the "low pay threshold" used by the Commission in other matters such as the Annual Wage Review.

42. The Commission has adopted a definition where the "low paid" are defined as persons whose ordinary time earnings are below two thirds of median (adult) ordinary time earnings of all full-time employees.[36]

43. This approach is used by the Commission primarily in the context of the minimum wages objective and the modern awards objective which both require the Commission to consider the "relative living standards and the needs of the low paid".[37] This requires that the category of people who are "low paid" is defined with some precision.

44. The same degree of specificity is not required by section 243(1)(b)(i), which does not use the term "low paid," and which requires the Commission to have regard to the prevailing pay and conditions within the relevant industry or sector, including whether low rates of pay prevail. It is both a very different task and statutory context.

45. Cases decided under the previous low paid bargaining provisions are of limited relevance to the meaning to be given to "low rates of pay." One case involving aged care workers (the *Aged Care* case) did not adopt a threshold, but interpreted the phrase "low paid" in previous s243 as a reference to employees who are paid at or around the award rate of pay and who are paid at the lower classification levels", and also gave consideration to the fact that aged care employees were low paid in a relative sense and in general terms.[38] Subsequent cases sought to align this approach with the definition of low paid the Commission had adopted in relation to the modern award and minimum wages objectives, stating that the term low paid used in legislation was intended to have a consistent meaning and should be given the same meaning as was used in Annual Wage Reviews, whilst also observing that " the question of whether an employee is low paid is a question of degree and necessarily involves some imprecision"[39] and the term low paid "cannot be defined by reference to a strict cut-off point."[40]

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[35] Revised Explanatory Memorandum, page 168 at [982].
[36] *Annual Wage Review 2022-23* [2023] FWCFB 3500, [89]; *Re Aged Care Award 2021* [2022] FWCFB 200, [473].
[37] *FW Act* ss134(1)(a) and 284(1)(c).
[38] *United Voice v The Australian Workers' Union of Employees, Queensland* [2011] FWAFB 2633, at [17] – [20].
[39] *Application by United Voice* [2014] FWC 6441 at [20].
[40] Ibid at [30].

46. Therefore, the phrase “low rates of pay” should not be given the same meaning ascribed to the term “low paid” in the former low paid bargaining stream, or interpreted as a low pay threshold that is used in matters involving the minimum wages objective and the modern awards objective. This would be contrary to the clear intentions of Parliament to ensure the supported bargaining stream is easier to access and has a broader application than the previous low paid bargaining stream. There is nothing in the statutory text or explanatory materials which would support the interpretation of “low rates of pay” being intended to be limited to employees falling below the two thirds median measure.

47. It may be that where the pay and conditions of some employees in an industry fall below the two-thirds median threshold, the Commission can consider that as part of its determination as to whether it is appropriate for employers and employees to bargain together. However, it is not a pre-requisite to the making of a supported bargaining authorisation to show that employees are subject to low rates of pay, or are “low paid” within the meaning of that phrase as used elsewhere in the FW Act.

48. “Low rates of pay” should be given a broader meaning than “low paid”, and include consideration of whether employees are paid at or close to award levels.

**Prevailing pay and conditions in the ECEC sector**

49. The ASOF and material before the Commission regarding the prevailing pay and conditions of employees in the ECEC sector support a conclusion that it is appropriate for the parties to bargain together, including the following:

    a. Employees are substantially award reliant or receive rates of pay close to the award – 78.7% are either entirely award dependent or paid less than 10% above the award.[41]

    b. The number of employees who are covered by enterprise agreements is relatively low[42] and employers who are not covered by an enterprise agreement generally pay their employees at or around the levels in the relevant awards.[43]

    c. Many employees would also be considered to be “low paid” – i.e. persons whose ordinary time earnings are below two-thirds of median adult ordinary time earnings of all full time employees.[44]

[41] ASOF at [16].
[42] Ibid at [17].
[43] Ibid at [19].
[44] Ibid at [20-]-[23].

d. The members of some of the Union Parties who work in the ECEC sector have terms and conditions that are less favourable than other members of those Union Parties who work in kindergartens and schools.[45]

e. The Revised Explanatory Memorandum refers to early childhood education and care being a low paid industry.[46]

### Clearly identifiable common interests

50. The second factor to be taken into account by the Commission in determining appropriateness is whether the employers have "clearly identifiable common interests."

51. Section 243(2) sets out examples of common interests that employers may have, including geographic location, the nature of the enterprises, terms and conditions of employment, and being substantially funded by government (whether directly or indirectly). The use of the word "includes" indicates that this is a non-exhaustive list of examples. Employers will likely have other common interests that demonstrate the appropriateness of them bargaining together. What these common interests are will depend on the facts and circumstances of each application.

52. Given that section 243(2) uses non-exhaustive examples, there is no requirement for the Commission to find that the examples of common interests given are present. They are not pre-requisites for the identification of common interests, only examples of the kinds of common interests employers may have.

53. In light of the above and the broader statutory context and purpose, the phrase "clearly identifiable common interests" should be interpreted broadly, and should not be construed too narrowly, or as presenting a high threshold to overcome.

54. The term "clearly identifiable common interest" is also used in the new single interest bargaining provisions contained in Division 10 of Part 2-4 of the FW Act. When considering whether to grant a single interest authorisation, the Commission is to consider whether the employers have clearly identifiable common interests. Sections 216DC(3A) and 249(3A) also contain examples of common interests that employers may have, including geographical location, the regulatory regime, the nature of the enterprises and the terms and conditions of employment in those enterprises.

55. Section 249(3A) provides some further guidance as to what might be considered to be 'common interests': as a matter of general principle, words that are used consistently in

[45] See Outline of Submissions of the Australian Education Union (**AEU Submissions**), page 16, at [49](c) and Outline of submissions for the Independent Education Union of Australia (**IEU Submissions**), page 4, at [18]-[19].

[46] Revised Explanatory Memorandum at [921] and [979].

legislation should be given the same meaning consistently[47] unless there is reason to do otherwise.[48] The ACTU therefore submits that the existence of a regulatory regime or framework is an example of a common interest that employers may have.

56. "Identifiable" means "able to be identified; discernible, recognisable."[49] "Clear" in this context means "distinctly perceptible to the eye, ear, or mind; easily seen, heard or understood; distinct; evident; plain."[50] The ACTU agrees with the characterisation in the Submissions of the Australian Childcare Alliance Employers (**ACA**) of something being "clearly identifiable" if it is capable of being clearly or distinctly perceived or understood,[51] but does not agree that it has to have "such an appearance to an ordinary observer as to be transparent and conclusive"[52] and "would ward against finding common interests that involve undue enquiry or work to uncover, or ones that require complex explanation or justification."[53] These characterisations are not consistent with the ordinary meaning of the words. Just because something is complex, or requires some work to understand or identify, does not mean it is not then able to be clearly perceived or identified.

57. "Common" should be given its ordinary meaning as "belonging equally to, or shared alike, by two or more or all in question."[54] This suggests that it will be enough for some employers to share some interests, rather than all employers needing to share all interests. Different employers may share different interests – where some interests are shared amongst at least some employers, that will be sufficient.

58. The ACTU concurs with the submissions of the AEU and the ACA as to the meaning of "interest" in this context meaning "something that is of importance to a person"[55] or "something that a person's attention is engaged with",[56] rather than "a more commercial notion of shared property or undertaking."[57]

59. The ACTU also concurs with the submissions of the AEU that the examples used in section 243(2) suggest that the focus of the provision is on objective features of the employer, rather than their subjective views and assertions at the time of the application regarding their

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[47] *Tabcorp Holdings Limited v Victoria* [2016] HCA 4, [65];
[48] *Application by United Voice* [2014] FWC 6441 at [20]; *Registrar of Titles (WA) v Franzon* [1975] HCA 41; (1975) 132 CLR 611 at [687].
[49] *Macquarie Dictionary* (online version)
[50] Ibid.
[51] ACA Submissions, page 26, at [116].
[52] Ibid, page 26, at [117].
[53] Ibid, page 26-27, at [18].
[54] *Macquarie Dictionary* (online version).
[55] AEU Submissions, page 6, at [23].
[56] ACA Submissions, page 27, at [97].
[57] Ibid, page 27, at [97]-[98].

approach to bargaining, which may well be self-serving.[58] However, in circumstances where employers are consenting or not opposing the granting of a supported bargaining authorisation, this will likely be demonstrative of a common interest – i.e. a common interest in bargaining together.

60. The reasons of employers to want to bargain together will also be demonstrative of common interests – for example, to bring funders to the table to support improvements to wages and conditions, or to address workforce challenges. If employers express an interest or desire to collectively bargain and are able to articulate the basis of their common interest as they perceive it, this should carry significant weight.

61. The Commission is required to consider whether employers have common interests, and is not required to consider the ways in which the interests of employers may differ. Nor is it required to balance 'common interests' with divergent interests – only to assess whether common interests exist.

### Common interests of the Relevant Employers

62. The Relevant Employers have a number of common interests that support a conclusion that it is appropriate for them to bargain together, including:

    a. The nature of the enterprises conducted have a high degree of commonality as they relate to the provision of early education and care services in a long day care setting, and the operational requirements employers must comply with result in a high degree of commonality in the nature of the services provided;[59]

    b. There is significant commonality in the terms and conditions of employment in the enterprises of the Relevant Employers. Many employees in the ECEC sector are award reliant and receive pay and conditions in accordance with or close to the relevant modern awards;[60]

    c. Employers operating in a long day care setting in the ECEC sector are substantially funded by the Commonwealth Government through the Child Care Subsidy;[61]

    d. The employers in the ECEC sector are subject to common regulatory regimes, including the National Quality Framework which applies to all employers in the ECEC sector delivering centre based care;[62]

[58] AEU Submissions, page 7, at [25].
[59] ASOF at [29].
[60] Ibid at [16]-[17].
[61] Ibid at [34]-[44].
[62] Ibid at [24]-[33].

e. The Relevant Employers have expressed an interest or desire to bargain together and therefore have a common interest in making a multi-employer bargaining agreement together;[63]

f. The Relevant Employers have expressed common reasons for their interest in bargaining together, including how funding can be improved to support changes to conditions of employment in bargaining, address difficulties faced in single enterprise bargaining and to address workforce challenges[64] – thereby demonstrating they have additional common interests;

g. The reliance of employers on Commonwealth Government funding affects their capacity to agree to improvements in wages and conditions and to deliver those improvements, and they therefore have a common interest in having the funder connected to the bargaining process;[65]

h. The Relevant Employers have expressed common interests in working to advance the education, care and development of pre-school children; providing this to the highest standard of quality; and in the work performed by employees, including their professional development and career progression.[66]

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[63]Transcript of Proceedings*, Application by United Workers Union, Australian Education Union and Independent Education Union of Australia,* (Fair Work Commission, B2023/538, President Hatcher, 14 June 2023) at [PN63] and [PN67]; ACA Submissions at [152]; CELA and CCC Submissions at [8] and [53].

[64] See ACA submissions, page 27, at [125]; Statement of J Atkinson at [5]; Statement of J Barr at [5]; Statement of AM Chemello at [5]; Statement of S Chemello at [5]; Statement of L Connolly at [5]; Statement of R Donovan at [5]; Statement of M Fitzsimmons at [5]; Statement of J Fraser at [5]; Statement of A Hands at [5]; Statement of N Hutchinson at [5]; Statement of P Mondo at [60]; Statement of T Quinn at [5]; Statement of L Thomas at [5]; Statement of R Totino at [5]; Statement of T Tran at [7]; Statement of E Wilson at [5]; Statement of L Stevens at [29], [53]-[54], [58], [60]; Statement of T Pearson at [10], [23]-[26].

[65] See CELA and CCC Submissions, page 9, at [46]; ACA Submissions, page 27, at [125]; Statement of J Atkinson at [5]; Statement of J Barr at [5]; Statement of AM Chemello at [5]; Statement of S Chemello at [5]; Statement of L Connolly at [5]; Statement of R Donovan at [5]; Statement of M Fitzsimmons at [5]; Statement of J Fraser at [5]; Statement of A Hands at [5]; Statement of N Hutchinson at [5]; Statement of P Mondo at [60]; Statement of T Quinn at [5]; Statement of L Thomas at [5]; Statement of R Totino at [5]; Statement of T Tran at [7]; Statement of E Wilson at [5]; Statement of L Stevens at [29], [53]-[54], [58], [60]; Statement of T Pearson at [26].

[66] See ACA Submissions, page 27, at [128]; Statement of J Atkinson at [6]; Statement of J Barr at [6]; Statement of AM Chemello at [6]; Statement of S Chemello at [6]; Statement of L Connolly at [6]; Statement of R Donovan at [6]; Statement of M Fitzsimmons at [6]; Statement of J Fraser at [6]; Statement of A Hands at [6]; Statement of N Hutchinson at [6]; Statement of T Quinn at [6]; Statement of L Thomas at [6]; Statement of R Totino at [6]; Statement of T Tran at [8]; Statement of E Wilson at [6].

Number of bargaining representatives is consistent with a manageable collective bargaining process

63. The third factor the Commission is required to have regard to in assessing appropriateness is whether the likely number of bargaining representatives would be consistent with a manageable collective bargaining process. This cannot be assessed in the abstract and must instead be considered in the context of the proposed bargaining, and in light of the Commission's experience with bargaining generally.

64. "Manageable" means "able to be managed; contrivable; tractable."[67] The ACTU does not concur with ACA's characterisation of a manageable bargaining process as being "orderly, constructive and efficient leading to a successful outcome."[68] These considerations are separate matters to manageable – a bargaining process does not necessarily have to be efficient, orderly or constructive (and certainly, not at all times), in order to be manageable. This much was recognised in the *Practice Nurse Case* where the Commission recognised that the process may be manageable but still be inefficient.[69]

65. Further, there are many factors in bargaining which will determine whether a successful outcome is reached, and just because such an outcome is not reached does not necessarily mean that the bargaining process itself was unmanageable. This interpretation is supported by the *Security Guard Case*, where the Commission found that in circumstances where there were nine employee bargaining representatives plus the union involved in a bargaining process, there was no evidence that this led to unmanageability other than a suggestion that some employees raised an objection to the approval of the agreement. However, "this does not speak to the manageability of bargaining, and in any event, the objection taken arose after bargaining had concluded."[70]

66. The presence of a number of bargaining representatives does not mean that the bargaining process will be unmanageable, and is only one factor impacting on whether a bargaining process is manageable. 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 bargaining representatives, or some or many bargaining representatives may be likely to be aligned in their positions during bargaining, meaning the number itself would not make the process unmanageable.

[67] *Macquarie Dictionary* (online version).
[68] ACA Submissions, page 28, at [133].
[69] *Application by Australian Nursing Federation* [2013] FWC 511, at [138].
[70] *Application by United Voice* [2014] FWC 6441 at [113].

67. Whilst the experience or competence of particular bargaining representatives may be a relevant consideration,[71] just because some or all parties may lack experience or competence should not lead to a conclusion that the process is unmanageable – particularly in a legislative context where it is anticipated that 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 is likely to contribute to a manageable bargaining process, including where there are a large number of bargaining representatives.

68. Previous cases under the low paid bargaining provisions support this interpretation. 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. 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 this kind do arise, we are confident that solutions can be found if all representatives are committed to reaching a positive outcome. The tribunal also has the ability to assist. From the employer perspective, the degree of coordination between employers exhibited during these proceedings is encouraging. Video-conferencing and web-based communications can be used to reduce travel and other costs.*[72]

69. In the *Security Guard Case*, the Commission found that it although it was to be anticipated that other employees may wish to become involved in bargaining through the appointment of one or more bargaining 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 FW Act.[73]

70. In the *Aged Care Case*, the Commission stated:

> *This matter also involves a prediction. It requires some assessment of the likely behaviour of many employers and employees in a bargaining process spread, potentially, across many enterprises in a number of States and Territories*.[74]

71. If the Commission's assessment of whether bargaining would be manageable is based on the mere assertions of parties (such as employers) as to how many bargaining representatives would be appointed, it would be open to parties to seek to influence the Commission's

[71] See ACA Submissions, pages 28-29, at [134]-[139].
[72] *United Voice v The Australian Workers' Union of Employees, Queensland* [2011] FWAFB 2633, at [31].
[73] *Application by United Voice* [2014] FWC 6441 at [112].
[74] *United Voice v The Australian Workers' Union of Employees, Queensland* [2011] FWAFB 2633, at [31].

assessment by asserting that multiple bargaining representatives must or will be appointed. Therefore, the Commission should not base its assessment only on the assertions of parties, but will also need to form a view as to whether multiple bargaining representatives for each party is necessary or reasonably likely in the context of the proposed bargaining, or merely a tactic to try and defeat an application for a supported bargaining authorisation.

72. This interpretation is supported by the Revised Explanatory Memorandum which states that "for example, employers may need to form bargaining units; this consideration is not intended to allow employers to try to opt out by encouraging employees to appoint individual bargaining representatives".[75]

### Number of bargaining representatives in this application

73. It is likely that there will be eight bargaining representatives involved in bargaining for the proposed agreement. There is no suggestion in any of the material before the Commission that this number of bargaining representatives would cause the bargaining process to be unmanageable; indeed, the submissions of all parties indicate that the proposed number is consistent with a manageable collective bargaining process.

74. The Commission could also have regard to additional factors, such as:

    a. The parties have already provided evidence of constructive engagement and their support for the making of the supported bargaining authorisation;

    b. The employees are represented by unions;

    c. Different groups of the Relevant Employers have appointed common bargaining representatives;

    d. Many if not all of the bargaining representatives have relevant experience;

    e. The ability of the Commission to assist and deal with any difficulties that might be encountered in accordance with the FW Act;

    f. Whilst it is possible (although unlikely) that additional bargaining representatives may be appointed once bargaining commences, this would not be inconsistent with a manageable collective bargaining process given the above considerations and the findings in the *Aged Care Case* and *Security Guard Case*.

### Any other matters the Commission considers appropriate

75. The final factor to which the Commission is to have regard is "any other matters the Commission considers appropriate." The inclusion of this factor gives the Commission a broad discretion in assessing whether it is appropriate for employers and employees to bargain

[75] Revised Explanatory Memorandum, page 169 at [984].

together, as it allows the Commission to have regard to any matter it considers appropriate within the subject matter, scope and purpose of the legislation.[76]

76. Such matters could include a very large number of considerations, which will vary depending on the circumstances of each case. Without seeking in any way to limit the matters that the Commission may consider to be appropriate, the ACTU submits that in the context of this specific application, such matters include the following:

   a. Any difficulties the employees in the relevant industry or sector may have had in bargaining at the enterprise level – the relatively high rates of award reliance and low rates of enterprise agreement coverage in the ECEC sector suggest employees have had difficulty bargaining at the single enterprise level.

   b. Whether any relevant employee organisations, employers and/or bargaining representatives support the making of an authorisation, and their reasons for supporting or not supporting it as the case may be[77] – the Union Parties and the employer representatives all support the making of an authorisation and have articulated their reasons for supporting it.

   c. Whether the employees are in a female dominated industry or occupation which has historically not benefited in a holistic way from collective bargaining – 92% of ECEC workers are women,[78] and enterprise agreement coverage is low.

   d. Whether the work performed by the employees may be affected by gender-based undervaluation – it is highly likely that gender based assumptions in relation to the value or the work and skills involved in the ECEC sector have contributed to the undervaluation of work in the sector,[79] and are unlikely to be effectively addressed in single enterprise bargaining. Improving pay and conditions in the ECEC sector will help to address the gender pay gap.

   e. The need to improve terms and conditions of employment to address workforce challenges in the relevant industry – the ECEC sector faces significant challenges in attracting and retaining staff,[80] and improving conditions for ECEC employees is likely to help address those challenges.

   f. How the supported bargaining powers of the Commission may assist the parties to overcome barriers to bargaining – for example, the ability to direct people not specified in the authorisation to attend a conference. Given the ECEC sector is

[76] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at [39]-[40].
[77] Revised Explanatory Memorandum, page 169 at [983]-[984].
[78] Agreed Statement of Facts at [12].
[79] Statement of C Nightingale at [34]-[35].
[80] Ibid at [12]-[15].

heavily reliant on Commonwealth Government funding, this assistance is likely to be very beneficial if not essential to effective bargaining, as acknowledged by all of the parties to the application.

g. The role and function of the industry in the broader economy and community. The ECEC sector is of fundamental importance to the care, development and education of children, and also has significant effects on female workforce participation and gender equality more broadly.[81]

77. Employees in the ECEC sector have also specifically been identified as the kind of workers who it was intended should benefit from supported bargaining.[82] The above matters support a conclusion that it is appropriate for the employers and the employees to bargain together.

78. Many matters that were previously relevant to the granting of a low paid authorisation have been removed from the supported bargaining provisions, including the following:

a. Whether granting the authorisation would assist low paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;

b. The history of bargaining in the industry in which the employees who will be covered by the agreement work;

c. The relative bargaining strength of the employers and employees who will be covered by the agreement;

d. Whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;

e. The views of the employers and the employees who will be covered by the agreement.

79. These matters were removed and the criteria for making an authorisation revised in order to overcome the barriers associated with the previous low paid bargaining stream that resulted in its very limited take up.[83] 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 that the purpose of the new legislative scheme can be properly realised.

80. The removal of references to employees being low paid presumably stems in part from the Commission's adoption through its jurisprudence in annual wage reviews of a benchmark for

[81] Ibid at [7]-[10].

[82] Revised Explanatory Memorandum at page xxiii and page 160 at [921].

[83] Revised Explanatory Memorandum, page 160 at [922].

the assessment of those who are low paid at two thirds of median full-time earnings, and the reluctance of the Commission to assess low pay through cross industry comparisons under the previous provisions. The removal of this phrase and its replacement with "prevailing pay and conditions, including whether low rates of pay prevail" signals a clear intention that the Commission consider pay and conditions in a much broader context, and consider things such as the degree of award reliance in the relevant industry, whether employees are paid at or close to award levels, the commonality of pay and conditions across an industry, and so on.

81. The removal of references to access to and history of bargaining is likely due to previous decisions of the Commission in which it was unpersuaded of the need for support where some bargaining had taken place in the past, even where agreements had expired or ultimately failed the better off overall test,[84] and inconsistency between decisions as to whether "access to bargaining" was a practical assessment of employees' capacity to advance their interests through the bargaining framework versus a mere assessment of whether the formal legal right to bargain existed.[85]

82. The removal of these criteria signals a clear intention by the Parliament that having some history of or benefit from bargaining should not weigh against the granting of an authorisation. Rather, the emphasis should be, as submitted above, on a holistic assessment of whether employees in the industry or sector have not been able to achieve substantive gains as a result of bargaining, and any difficulties they may have faced bargaining at the enterprise level – which may include factors like the ineffectiveness of bargaining at the enterprise level for improved wages where the sector is largely reliant on government funding.

83. The removal of references to the views of the employers and employees is likely due to the difficulties in establishing employee support and the ease of demonstrating employer opposition in previous cases.[86]

## D. CONCLUSION

84. As the ASOF and the material before the Commission demonstrate, the application meets the requirements for the making of a supported bargaining authorisation. The Commission can be satisfied that:

    a. An application for the authorisation has been made by the Union Parties in accordance with section 243(1)(a) which meets the requirements of section 242;

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[84] For example, see *Application by United Voice* [2014] FWC 6441 at [55]

[85] See *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [104], [106]; *Application by United Voice* [2014] FWC 6441 at [53],

[86] *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511 at [114], [139]-[141]; *Application by United Voice* [2014] FWC 6441 at [115]-[118].

b. It is appropriate for all of the employers and employees specified in the application that will be covered by the proposed agreement to bargain together in accordance with section 243(1)(b), because:

    i. The evidence regarding the prevailing pay and conditions in the sector demonstrates that employees in the ECEC sector are substantially award reliant or are paid close to award rates of pay; enterprise agreement coverage is low; many employees are "low paid"; and ECEC employees are paid less than employees in other parts of the education sector;

    ii. The employers have a number of clearly identifiable common interests, including: a high degree of commonality in the nature of their enterprises and services provided; significant commonality in the terms and conditions of employment; being substantially funded by the Commonwealth Government; being subject to common regulatory regimes; having expressed a desire to bargain together and shared reasons for wanting to do so; having a reliance on funding and therefore having an interest in the funder being connected to bargaining; and interests in advancing he education of children, providing high quality services, and the work of their employees;

    iii. The likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and

    iv. There are other matters which make it appropriate for the parties to bargain together, including that ECEC employees have had difficulty bargaining at the enterprise level; the parties support the making of an authorisation; the ECEC sector is a female dominated industry which has not historically benefited in a holistic way from collective bargaining; the work performed by ECEC employees is affected by gender based undervaluation which is unlikely to be addressed at the single enterprise level; improving the conditions of ECEC employees is likely to address workforce challenges in the ECEC sector; the ability of the Commission to use its powers to assist parties to overcome barriers to bargaining is likely to be of significant assistance to an effective bargaining process; the ECEC sector is of fundamental importance to the care, development and education of children, and also has significant effects on female workforce participation and gender equality more broadly.

c. At least some of the employees who will be covered by the agreement are represented by the Union Parties in accordance with section 243(1)(c);[87]

d. The restrictions in section 243A do not apply – the authorisation would not cover an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date,[88] and the proposed agreement does not cover employees in relation to general building and construction work.[89]

85. Accordingly, the Commission should make the supported bargaining authorisation as sought.

Filed on behalf of the Australian Council of Trade Unions

Dated: 7 August 2023

[87] ASOF at [9].
[88] Ibid at [4].
[89] Ibid at [6].