No. B2023/538

Fair Work Commission

Application by United Workers Union and others

Applicants

Application for a supported bargaining authorisation – Early childhood education and care sector

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OUTLINE OF SUBMISSIONS OF COMMUNITY EARLY LEARNING AUSTRALIA AND COMMUNITY CHILD CARE ASSOCIATION

Introduction

1. On 6 June 2023, the United Workers Union, Australian Education Union (Victorian Branch) and the Independent Education Union of Australia (collectively '**Unions**') applied, pursuant to s 242 of the Fair Work Act (**FW Act**), for a supported bargaining authorisation (**Application**).

2. An amended Application was filed by the Unions on 26 July 2023.

3. The Application seeks the making of an SBA covering the named employers and the employees of those employers performing specified work in the early education and care sector.

4. The Unions contend that the Commission can be satisfied that the requirements for the making of a supported bargaining authorisation (**SBA**) established by ss 242 and 243 of the FW Act have been met and that there are no matters pursuant to 243A of the FW Act which would restrict the making of the SBA.

5. The Application has grouped the employers into four different groups. The groups have been adopted as a convenience to reflect the different bargaining representatives appointed for each of the employers named.

6. Community Early Learning Australia (**CELA**) and Community Child Care Association (**CCC**) are peak bodies for service providers in the early education and care sector. CELA and CCC have been appointed as bargaining representatives for the employers identified by the Application as Group 2 and Group 3 employers (**Group 2/3 Employers**).

7. The Application has been made following amendments to the FW Act brought about by the passing of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP**

Act). It is understood that this is the first application of its type to be considered by the Commission following the passage, and coming into force of, the SJBP Act.

Group 2 and 3 Employers do not oppose the Application

8. The Group 2/3 Employers do not oppose the Application and support the making of a SBA which would cover them.

9. The Group 2/3 Employers rely on the witness statement of Ms Laura Stevens dated 28 July 2023 (**Stevens Statement**) in support of the SBA being made and covering the Group 2/3 Employers.

10. The Group 2/3 Employers also rely upon the statement of agreed facts which the collective parties have prepared to assist the Commission in its determination of the Application.

Statutory Scheme

11. The provisions relevant to the determination of the Application are contained, primarily, within Part 2-4 of Division 9 – Supported Bargaining of the FW Act (**Division 9**).

12. The Application was made after the commencement of the amendments introduced by the SJBP Act. The Commission is required to consider, and determine, the Application consistent with those amendments.

13. The principles of statutory construction are settled. The task begins with the statutory text and may require consideration of the context including the general purpose and policy of the provisions being examined[1]. The modern approach to statutory interpretation insists that context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, uses context in its widest sense to include such things as the existing state of the law and the mischief which one may discern the statute was intended to remedy[2].

14. The Commission is also subject to the statutory mandate to consider, in performing its functions or exercising its powers, the objects of the FW Act and any objects of any part of the FW Act[3] in addition to the other matters specified.

15. It is useful to highlight, before turning to the specific provisions found in Division 9, the effect of the amendments introduced by the SJBP Act to Division 9 of the FW Act. It highlights and reinforces the changed objectives and policy provisions of the amended FW Act and highlights the mischief which the amended statute is intended to remedy.

[1] Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32 [41]
[2] Mondelez Australia Pty Ltd v AMWU [2020] HCA 29 [66]; Gageler J
[3] s 578(1)(a); the Commission is also required to have regard to the matters in s 578(1)(b) and (c)

16. First, the word 'low paid' has been substituted for 'supported bargaining' throughout the Division.

17. Second, the objects of Division 9, as contained in s 241, have been significantly amended to:

    (a) remove from s 241(1) the words '*low paid employees and their employers, who have historically not had the benefits of collective bargaining*' instead substituting '*employees and their employers who require support to bargain*'

    (b) deleted in its entirety what was s 241(b) and not replaced it;

    (c) removed 'low paid' from s 241(c) and (d).

18. Third, what was (prior to 6 June 2023) s 243 of the FW Act has been completely repealed with the SJBP Act inserting a fundamentally different s243. The now operative s 243 has streamlined and significantly reduced the matters which the Commission must be satisfied of before making an authorisation, including, but not limited to, removing the public interest criterion (old s 243(1)(b))[4], removing the need for the Commission to take into account productivity and service delivery improvements (old s 243(3(a)), and removing the need for the Commission to consider how an applicant for an authorisation might respond if an employer proposed to bargain for a single enterprise agreement (old s 243(3)(e)[5].

19. The streamlining and significant rewriting of s 243 reflects an intention, clearly and unambiguously stated in the Revised Explanatory Memorandum to the SJBP Act to make access to the supported bargaining stream easier for eligible parties to access than was previously the case with low paid authorisations:

> *The supported bargaining stream is intended to be easier to access than the existing low-paid bargaining stream. The revised criteria for making a supported bargaining authorisation is intended to address the limited take-up of the low-paid bargaining process[6].*

20. In the context of the Application, the Revised Explanatory Memorandum makes it clear that the SJBP Act amendments were designed to ensure that the employees and employers in the industry or sector the subject of the Application could access the supported bargaining stream:[7]

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[4] With the consequence being that the previous jurisprudence of the Commission, for example in the Aged Care Case [2011] FWAFB 2633, in the context of what was s 243 and the public interest test is no longer relevant or applicable to the current s 243.
[5] In fact, if an SBA is made, the employer is prohibited from initiating bargaining, agreeing to bargain, or being required to bargain with employees for any other kind of enterprise agreement: s 172A(7).
[6] Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 at [922].
[7] Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 at [921].

> *the proposed supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low paid industries such as aged care, disability care, and* ***early childhood education and care*** *who may lack the necessary skills, resources, and power to bargain effectively. The supported bargaining stream will also assist employees and employer who may face barriers to bargaining, such as employees with a disability and First Nations employee* (**our emphasis**).

21. Whilst an explanatory memorandum cannot displace the statutory text and cannot be taken to be an infallible and exhaustive guide to the legal operation of a provision[8], they can ordinarily be taken to be reliable guides of the intentions underlying Government sponsored legislation and be ordinarily relied upon by the Courts to explain the legislative design and intended practical operation of the provisions and combinations of provisions[9]. Those intentions are clear from both substantive amendments to Division 9 caused by the SJBP Act and the Revised Explanatory Memorandum. It is plainly intended to be easier for parties to access the supported bargaining stream than the regime which previously applied. That desired intention, reflected in the objects to the Division and the amendments made by the SJBP Act, should guide the Commission in the exercise of its functions within the supported bargaining stream established by Division 9, Part 2-4.

Section 242

22. Section 242 sets out when an application for an SBA can be made by a bargaining representative or a relevant employee organisation and establishes the matters which the application must specify.

23. The Application identifies the employers to be covered by the proposed agreement consistent with s 256A (3). The Application also specifies the employees by class consistent with s 256A (2) when read with s 256A (4) of the FW Act.

24. The Group 2/3 Employers accept that a competent application has been made for the making of the SBA and do not contest that each of the Unions are employee organisations entitled to represent the industrial interests[10] of an employee in relation to work to be performed under the agreement.

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[8] Mondalez v AMWU [2020] HCA 29 [72]
[9] Mondalez v AMWU [2020] HCA 29 [71]; see also [68-73] for a discussion of explanatory memoranda in the context of statutory construction
[10] As to the meaning of 'entitled to represent the industrial interests' see Regional Express Holdings Limited v Australian Federation of Air Pilots [2017] HCA 55.

Section 243

25. Section 243(1) sets out the objective circumstances which must exist for the Commission to make an SBA, namely that:

    (a) an application for the authorisation has been made: s 243(1)(a)

    (b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employees specified in the application) that will be covered by the agreement to bargain together having regard to the matters specified in s 243(1)(b)(i, ii, iii, and iv): s 243(1)(b)

    (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: s 243(1)(c).

Section 243(1)(a)

26. The Group 2/3 employers accept that a valid application for an authorisation has been made by the Unions.

Section 243(1)(b)

27. The Commission is required to be satisfied that it is *appropriate* for the employers and employees that will be covered by the agreement to bargain together having *regard to* the matters identified at (i), (ii), (iii), and (iv).

28. The word 'appropriate' means, relevantly, *'suitable or fitting for a particular purpose*' or '*proper or fitting*'. The test of appropriateness is inherently broad and its application to the relevant facts is left to judgement of the decision maker – perhaps unsurprising given the specialist nature of the Fair Work Commission. But the discretion of the Commission as to whether it is 'appropriate' for the parties to bargain together is not unfettered. It must be informed by the matters specified by the FW Act and the objects and overall legislative purpose of the supported bargaining provisions which is clearly that it is desirable for parties to be collectively bargaining[11] and that the Parliamentary intention was to make the supported bargaining provisions easier for parties to access than what previously applied to enable those groups who need support to collectively bargain to do so.

29. The requirement for the Commission to have '*regard to*' the identified matters requires the Commission to take the identified matters into account and give weight to them as a fundamental element in making its determination[12]. In the absence of any statutory indication as to the weight to be given to the various considerations, it is for the Commission to determine

[11] s 241
[12] R v Hunt; Ex Parte Sean Investments Pty Ltd (1979) 180 CLR 322 at 329, per Mason J

the weight to be given to matters which are required to be considered in exercising statutory power[13].

(i) Section 243(1)(b)(i)

30. The Commission is to have regard to the prevailing pay and conditions within the relevant industry or sector including whether low rates of pay prevail in the industry or sector in determining whether it is appropriate for the employers and employees to bargain together.

31. Whilst the Commission can consider whether low rates apply in the sector or industry as part of its determination of the matters required by s 243(1)(b)(i), the existence or otherwise of low rates is not determinative or a primary consideration as it was prior to the SJBP Act. An authorisation can still be made even in circumstances where low rates do not prevail or, in fact, there are no low rates at all.

32. However, despite there being no requirement for there to be low rates as a mandatory consideration to be satisfied prior to the making of an SBA, the evidence in these proceedings demonstrates that there are in fact low rates generally prevail in the industry. The term 'low paid' was previously defined by the Commission, in the context of the previous version of s 243 as being a person who is paid at or around the award rate of pay and paid at lower classification levels[14]. The statement of agreed facts establishes that the level of wages, and general award dependency in the relevant sector, indicative and supportive that wages are generally low and otherwise largely based on the Award.

33. The Stevens Statement also reinforces that, in the context of the Group 2/3 Employers, the rates of pay and conditions are generally established by the relevant Awards (except for three employers who have expired collective agreements covering the employees subject to the Application although those agreements were largely built on the Award)[15]. This reinforces the conclusion, available to the Commission, that in the context of the Application the prevailing rates of pay and conditions are generally referrable to the same instruments, the rates of pay are low, and that, in the context of whether it is appropriate for the parties to bargain together, the commonality of conditions amongst the employers and their relevant employees means that it is appropriate for bargaining to proceed together.

(ii) Section 243(1)(b)(ii)

34. The Commission would be satisfied that it was appropriate for the Group 2/3 Employers and employees to bargain together having regard to the fact that the Group 2/3 Employers have *clearly identifiable common interests*.

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[13] Ibid; cited with approval in Tas Tafe v United Workers [2023] FWCFB [67]
[14] [2010] FWAFB 2633 [17]; also cited in Application by United Voice [2014] FWC 6441 [21]
[15] 46-53 – Statement of Laura Stevens

35. In determining whether there are clearly identifiable common interests, the Commission is to have regard to the examples cited in s 243(2).

36. The Commission is not required to be satisfied of each of the examples to be satisfied of there being clearly identifiable common interests. The Commission could be satisfied of one (or any combination) of the examples which would be sufficient to ground a finding that there was a clearly identifiable common interest. The Commission could also be satisfied of none of the cited examples but consider other matters relevant to determine whether a clearly identifiable common interest exists. However, as the Group 2/3 Employers satisfy the examples of common interest cited in the statutory provision as submitted below, it is not necessary to further speculate or make submissions about this.

37. The Group 2/3 Employers submit that s 243(2)(b) and (c) are satisfied in the context of the Application for the reasons set out below.

S 243(2)(b) - Clearly identifiable common interests – nature of the enterprises to which the agreement will relate

38. Section 243(2)(b) provides an example of a common interest that employers may have which includes the nature of the enterprise to which the agreement will relate.

39. The statement of Ms Stevens establishes that in the context of the nature of the enterprises to which the agreement will relate:

(a) the Group 2/3 Employers are long day care service providers[16] with the term long day care being commonly understood within the industry as being a childcare establishment which usually provides services over a period of approximately eight hours or more each day for approximately 48 weeks or more during the year[17].

(b) The Group 2/3 Employers have their centres open for a minimum of 48 weeks per year, are licenced to accept enrolments of children aged between 6 weeks to 6 years, are licenced to provide long day care services over a period of 8 hours or more per day[18];

(c) employ persons covered by either the Childrens Award or the EST Award[19];

(d) are community managed, not for profit, or for profit service providers with the common and unifying feature being that they are generally small providers consistent with the make up of the industry as reflected in ACECQA data which confirms that across the ECEC sector 79% of approved providers are characterised as ‘small providers’ operating one service,

[16] [33] Statement of Laura Stevens
[17] [32] Statement of Laura Stevens
[18] [33] Statement of Laura Stevens
[19] [34] Statement of Laura Stevens

20% are characterised as 'medium providers' operating between 2-24 services, and 1% are 'large providers' operating more than one service[20].

(e) the Group 2/3 Employers are approved and must operate their services in accordance with the Education and Care Services National Law and the Education and Care Services National Regulations. The National Law and Regulations establish the National Quality Standards which impose uniform obligations on each of the Group 2/3 Employers concerning the minimum ratio of staff, and their qualifications[21].

(f) the Group 2/3 Employers derive the majority of their funding through the operation of the Child Care Subsidy[22].

40. The Commission would be comfortably satisfied that there is a clearly identifiable common interests amongst the Group 2/3 Employers as it concerns the nature of their enterprises given the clearly common characteristics of operations, service and regulation.

s 243(2)(b) - Clearly identifiable common interests – terms and conditions of employment in those enterprises to which the agreement will relate

41. Section 243(2)(b) provides an example of common interest that employers have that includes the terms and conditions of employment in those enterprises.

42. The Stevens Statement establishes that in the context of the terms and conditions of employment of the Group 2/3 Employers, the Childrens Award and the EST Award act as the common underpinning instruments even in circumstances where there might be an expired enterprise agreement (applicable to three of the Group 2/3 Employers). There are variances in pay. That is to be expected. That is not a barrier to a Group 2/3 Employers being covered by the SBA. There is no requirement for there to be uniformity in the sense that the terms and conditions must be the *same* amongst the relevant employers. The search is for identifiable common interest which, in this instance, is comfortably provided by the underpinning Awards.

43. The Commission would be satisfied that there are clearly identifiable common interest amongst the Group 2/3 Employers as it concerns the terms and conditions of employment within those enterprises.

s 243(2)(c) Clearly identifiable common interests – funding

[20] ACECQA, May 2023: NQF Quarterly Snapshot Q1 2023. https://www.acecqa.gov.au/sites/default/files/2023-05/NQF%20Snapshot%20Q1%202023%20FINAL.PDF
[21] [39-44] Statement of Laura Stevens
[22] [45] [54-58] Statement of Laura Stevens

44. Both the statement of agreed facts and the Stevens Statement provide a sufficient basis for the Commission to conclude that there is a clearly identifiable common interest amongst the Group 2/3 Employers having regard to the criteria in s 243(1)(2)(c).

45. The statement of agreed facts establishes that the Group 2/3 Employers are substantially funded by the Commonwealth through the operation of the Child Care Subsidy. The Stevens Statements supplements this, in the context of the Group 2/3 Employers, to highlight and identify the overwhelming reliance that each of the Group 2/3 Employers has on funding from the Commonwealth to be able to provide their services and meet their obligations as employers to their employees.

46. Commonwealth funding plays a critical and dominant role for the Group 2/3 Employers. Inevitably, given the reliance that the Group 2/3 Employers have on funding, and certainty of funding, it plays a key role in the setting of wages and conditions in relation to the employees the subject of the Application. That conclusion is simply one of common sense although the Stevens Statements reinforces it.

47. The dominant role of Commonwealth Government[23] funding means it is a factor in favour of the making of the SBA[24]. Should the Commission be satisfied of this then it follows it would be satisfied that there is a clearly identifiable common interest amongst the Group 2/3 Employers and, as outlined above, this would be sufficient, on its own, for the Commission be satisfied of the requirements set by s 243(b)(ii).

Commission can be satisfied of clearly identifiable common interest

48. The Commission would be satisfied that there was a clearly identifiable common interest amongst the Group 2/3 Employer having regard to the fact that they all are substantially funded by the Commonwealth alone. That finding would be sufficient for the Commission to conclude that s 243(1)(b)(ii) is satisfied. However, in the context of this case, there are other additional clearly identifiable common interests when regard is had to the nature of the enterprises and the terms and conditions of those enterprises.

49. The Commission would be satisfied that there is a clearly identifiable common interest amongst the Group 2/3 Employers.

Section 243(1)(b)(iii)

50. Although the Commission must make its own judgment as to the whether the number of bargaining representatives would be consistent with a manageable collective bargaining

[23] SOAF
[24] Aged Care Case [2011] FWAFB 2633 [33]

process, the Commission should be comfortably satisfied of this requirement, given that all the parties to the proposed SBA support the making of it and have endorsed the making of it.

51. The employees are represented by well-resourced and sophisticated Unions. The Group 2/3 Employers have appointed common bargaining representatives with a view to facilitating and assisting in the negotiation of a multi-employer bargaining agreement. All of the parties are committed to working towards a positive outcome meaning that the Commission can comfortably conclude that the number of bargaining representatives would be consistent with a manageable collective bargaining process.

Section 243(1)(b)(iv)

52. The Commission is entitled to consider other matters it considers appropriate.

53. It is not necessary or desirable for the Group 2/3 Employers to speculate as to what those matters might be in an exhaustive way other than to note, and reinforce, that at least as it concerns the Group 2/3 Employers and the Unions, the application is by consent. Whilst the Commission is not a rubber stamp and is required to discharge its statutory functions regardless of consent, the fact of support and consent should mean that, to the extent that s 243(1)(b)(iv) confers some discretion on the Commission, it should be exercised in favour of making the SBA and granting the Application especially having regard to the fact that the evidence overwhelmingly supports a conclusion that this group requires support to bargain.

Section 243(c)

54. It is not in contest that the employees who will be covered by the agreement are represented by employee organisations.

Section 243A

55. There are no matters within s 243A which would restrict the making of the SBA.

Conclusion

56. The statutory criteria has been met for the making of the SBA and in the circumstances the Commission should issue an SBA covering the employees, the Group 2/3 employers, and if the Commission is also satisfied those other employers identified in the Application.

Laura Stevens

Community Early Learning Australia and Community Child Care Association

28 July 2023