IN THE FAIR WORK COMMISSION

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

Matter No: (B2023/538)

REPLY SUBMISSION OF THE FIRST TO FORTY FIRST RESPONDENTS IN THESE SUBMISSIONS REFERRED TO AS THE AUSTRALIAN CHILDCARE ALLIANCE EMPLOYERS (ACA Employers)

Introduction

1. These reply submissions deal with:

   a) general matters;
   b) submissions of AiG, ACCI and ACTU; and
   c) submissions of the Applicants.

General

2. It is clear from all of the materials filed that no party opposes the making of the Supported Bargaining Authorisation (**SBA**) as sought by the Applicants. The Application is either supported or appears not to be opposed.

3. In considering all of the evidence and submissions filed on behalf the employers identified in the Application it should be apparent that they all share the clearly identifiable common interests set out in the submissions previously filed by the ACA Employers.

AiG

4. AiG submission at paragraph 17: The AiG suggest that supported bargaining "is intended to operate in a narrow set of circumstances…".

5. Division 9 provides for a form of bargaining for a particular class of employer and employee.

   It is clearly aimed at:

   a) providing assistance and encouragement for employers and employees who require support to bargain to make an enterprise agreement that meet their needs[1];

   b) addressing constraints on the ability of those employees and their employers to bargain[2]; and

   c) enabling the Commission to assist low paid employees and their employers to facilitate bargaining for an enterprise agreement[3].

6. Whether this focus is properly described as "narrow" is not necessary to form a view on. Rather it is clear that Division 9 is focussed on a particular class of employers and employees.

7. What is clear from the evidence and submissions of the Applicants and Respondents is that the employers and their employees identified in the application fit this class in that:

   a) none of the ACA Employers have a history of bargaining;

   b) they have not previously considered bargaining, as absent the involvement of the Commonwealth it would be commercially futile to do so (and Division 9 now provides a pathway for this);[4] and

   c) a large number of the employees subject to the Application are "low paid".

8. AiG submission paragraph 20: AiG suggest that an assessment of appropriateness in making the SBA must be made in a manner that ensures that the operation of the supported bargaining scheme does not circumvent the operation of the single interest scheme.

9. It may be something in how this is expressed, but it suggests that AiG are asserting that Division 9 is only available in circumstances where it would not be appropriate for the employers and employees to pursue an enterprise agreement under Division 10 – Single Interest.

10. If this is what is meant then it is misguided. The Act does not impose this test and the Commission should guard against reading such a test into the Act (we shall return to this in response to the ACCI submission in more detail). [5]

[1] *Fair Work Act* 2009 (Cth) s241(a).
[2] s241(b).
[3] s2431(c).
[4] s246(3).
[5] See J.J. Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 52 at [49] to [52] and [63].

11. AiG submission paragraph 23: AiG suggest that in considering the notion of being satisfied that it is appropriate, the Commission should consider "…the seriousness of microeconomic and macroeconomic consequences…". It may be that a case presents itself where this is appropriate however:

    a) this is not such a case given the role of the Commonwealth and its commitment to childcare; and

    b) the Commission should not elevate this notion to a form of public interest test as no such test arises from the language in Division 9.[6]

12. AiG submission paragraph 32: In considering what the Commission is to have regard to the AiG suggest that "…each factor must be weighed and considered against each other" (emphasis added). Such a characterisation should be approached with caution. The matters that the Commission is to have regard to in s243(1)(b) are not in contest with each other and as such are not weighed "against" each other. A distinction can be drawn here to how the Commission has approached the limbs of the modern awards objective in s134 where some favour employers and others employees and as such are to some degree weighed against each other.

13. AiG submission paragraph 58: AiG suggest a variety of matters that the Commission might consider in arriving at the requisite level of satisfaction of appropriateness. While these are conditioned as "depending on the circumstances of a given matter…", AiG do not suggest that these are considerations in this matter and as such the Commission is not required to address them in arriving at the requisite level of satisfaction of appropriateness in this matter.

ACCI

14. ACCI submission paragraph 1.7.4, 3.6 and 3.7: ACCI suggest that there is a statutory preference for enterprise level bargaining and also that if it would be more appropriate for a party to bargain under Division 10 then it would be inappropriate for a party to bargain under Division 9.

15. The Act provides for various forms of bargaining. Section 3(f) does encourage a focus on enterprise level bargaining and this should be a consideration in the exercise of the discretion in arriving at the requisite level of satisfaction of appropriateness.

16. Relevantly enterprise level bargaining is open in that it does not require the "authorisation" (or permission) of the Commission to pursue it. Given this, and the long history of its operation it is axiomatic that it will likely remain the form of bargaining most used.

17. Division 9 and Division 10 bargaining requires an authorisation or permission. This said, their similarities are limited and their differences especially in terms of jurisdictional architecture are substantive.

[6] Ibid.

18. Section 243 operates on the basis of an obligation arising from two jurisdictional facts[7] and a conditioned discretion (appropriateness).[8] By contrast s249 (the gateway criteria for Division 10) operates on the Commission being satisfied of specific factual matters that it must be satisfied are present.

19. What should be clear from the Act is that there is no primacy given to Division 10 over Division 9 rather Division 10 is enlivened by the satisfaction of certain specific matters and Division 9 is enlivened for a class of employers and employees where amongst other things it is "appropriate" for this class to bargain together, on a supported basis, for an enterprise agreement.

20. The ACA Employers are therefore not required to prove that a Division 10 enterprise agreement is not appropriate for them before seeking to negotiate and make a Division 9 enterprise agreement.

21. ACCI submission paragraph 3.12: ACCI suggest that where a party is capable of bargaining for a single enterprise agreement the Commission should be dissuaded from reaching the requisite level of satisfaction of appropriateness.

22. This should not be elevated to a separate test or hurdle the ACA Employers must pass. No such separate test is evident from the language in the Act.[9] The question properly put is whether the ACA Employers are of a class that fits what Division 9 is intended to address and amongst other things, that the requisite level of satisfaction of appropriateness etc is met. Having done this nothing more is required.

23. As stated, the evidence and submissions of the ACA Employers shows that this is manifestly clearly the case.

ACTU

24. ACTU submission paragraph 64: The ACTU have taken issue with the ACA Employers characterisation of "manageable".

25. Manageable is derived from the word manage. We set out the meaning of this in the ACA Employer submission (in chief) at paragraph 132. The ordinary meaning of the term is to bring something about or accomplish something.

26. Section 243(1)(b)(iii) is a matter the Commission is to have regard to. The focus is whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process.

27. In this context, manageability should be read as a consideration of the bargaining process in full including the disposition of bargaining activity (under the Act) and whether or not an enterprise agreement that meets the needs of the employers and employees subject of the Application[10] can be achieved (accomplished).

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[7] s243(1) (a) and (c).
[8] s243(1) (b).
[9] See J.J. Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 52 at [49] to [52] and [63].
[10] s241(c).

28. It should not be read to be limited to exclude a consideration of what can be accomplished or whether an enterprise agreement can be arrived at that meets the needs of employers and employees subject to the Application.

29. By contrast a situation could arise where the number of bargaining representatives (whether by their sheer number or their number in the context of their character) makes the bargaining process unmanageable and this might concern the bargaining activity and/or that it is unlikely that an enterprise agreement would be arrived at that meets the needs of employers and employees subject of the Application.

30. Importantly, it should be evident from the evidence and submissions filed by the ACA Employers (and other employers) that there is confidence in both the bargaining activity and also that there are reasonable prospects that an enterprise agreement can be arrived at that meets their needs and the needs of their employees. This is especially the case in light of s246 allowing the involvement of the Commission as facilitator and the (necessary) involvement of the Commonwealth.

Applicants

31. The Applicants in various forms comment on the notion of undervaluation and in particular gender based undervaluation. The Commission should approach this with real caution a caution that is amplified for teachers given they recently had their work properly revalued[11].

32. This is not a work value case and the case is not concerned with considering work value reasons to vary minimum award wages.[12]

33. It is unnecessary and simply not available on the basis of evidence aimed at s243 to make any findings on undervaluation or gender based undervaluation akin to those that could be required in a work value case.

34. IEU submission paragraph 18: The IEU make reference to conditions that apply in NSW awards. This should be approached with caution as the NSW jurisdiction is materially different to the Commission's jurisdiction under the Act. The Commission sets minimum wages in its awards[13] whereas the NSW Industrial Relations Commission sets "fair and reasonable conditions of employment[14] not minimums.

[11] See Application to vary Education Services (Teachers) Award 2020 on work value grounds [2021] FWCFB 2051.
[12] s135 and s157(2).
[13] s284 and s139.
[14] Refer s10 of the *Industrial Relations Act* 1996 (NSW).

Filed for and on behalf of the Australian Childcare Alliance Employers

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