

IN THE FAIR WORK COMMISSION

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

Matter No: (B2023/538)

Outline of Submissions – United Workers Union

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INTRODUCTION

1. This application seeks that the Fair Work Commission (**FWC**) make a supported bargaining authorisation in respect of the applicant Unions and 64 Employers, all of whom are engaged in the early childhood education and care (**ECEC**) sector in Australia. Each of the Applicant Unions and each of the Respondent employers support the making of the authorisation sought. The application is brought by United Workers' Union (**UWU**), Australian Education Union (**AEU**) and Independent Education Union of Australia (**IEU**) ("**the Applicant Unions**").
2. It is appropriate that each of these employers and their employees bargain together. Each of the employers has common interests. Each provide early education services to Australian families and children during their formative years, in accordance with a nationally regulated system and curriculum and are substantially funded by the Commonwealth. Most of the employers are not party to and have never been party to an enterprise bargaining agreement and operate in a sector that is heavily Award dependent and has low levels of single enterprise bargaining agreement coverage.
3. In seeking the authorisation, the parties plan to make a new multi-employer agreement covering employees who work in long day care settings in ECEC (**the proposed agreement**).¹ They hope to engage in a genuine tripartite discussion about improving wages and conditions at a multi-employer level in a sector in which low rates of pay prevail. They intend this bargaining process to include the Commonwealth Government: a person who exercises a significant degree of control over the terms and conditions of the employees who will be covered by the agreement such that its participation in bargaining is necessary for the agreement to be made.

Statement of Agreed Facts

4. Each of the applicant Unions and each of the respondent Employers supports a Statement of Agreed Facts which has been filed jointly by the parties. UWU relies on that Statement.

¹ Statement of Agreed Facts, [3].

THE APPLICATION

5. The application is brought pursuant to s 242 of the *Fair Work Act 2009* (**FW Act**). UWU is entitled to make this application because it is entitled to represent the industrial interests of employees in relation to work to be performed under the agreement.² UWU is also a bargaining representative for the proposed agreement because employees who would be covered by the proposed agreement are members of UWU³ and UWU is an applicant for the authorisation.⁴
6. The employers and the employees that will be covered by the proposed agreement are expressed in the Applicant in a manner consistent with s 256A of the FW Act.
7. The application specifies that the employers who will be covered by the proposed agreement are those employers specified in Schedule 1 of the application. In a note filed with FWC on 13 June 2023 these employers were set out as follows:
 - a. “Group 1”: members of the Australian Childcare Alliance (**ACA**)
 - b. “Group 2”: members of the Community Child Care Association (**CCC**)
 - c. “Group 3”: members of Community Early Learning Australia (**CELA**)
 - d. “Group 4”: G8 Education Limited.
8. The application specifies that the employees who will be covered by the proposed agreement are the employees of the employers outlined in Schedule 1 of the application who perform the following work in the ECEC sector:
 - a. Work covered by the *Children’s Services Award 2010* (the **CS Award**) occurring in a long day care setting, but not including the following types of work or work performed in the following settings:
 - i. Adjunct care;
 - ii. A stand alone preschool or a kindergarten;

² *Rules of the United Workers’ Union* Schedule 1, Part A, Part 1, 80.

³ Statement of Agreed Facts, [9].

⁴ *FW Act* s 176(2).

- iii. Occasional care;
 - iv. Out of school hours care;
 - v. Vacation care;
 - vi. Mobile centres;
 - vii. Early childhood intervention programs: and
 - viii. Work covered by an enterprise agreement that has not reached its nominal expiry date, including:
 - 1. *Bermagui Pre-School Co-Operative Society Ltd. Teachers' Agreement 2020 (AE509492)*
 - 2. *Gowrie Victoria Early Childhood Teachers Enterprise Agreement 2022*
 - 3. *Victorian Early Childhood Teachers and Educators Agreement 2020*
 - 4. *Victorian Early Educators Agreement 2020*
 - 5. *Victorian Early Childhood Agreement 2021*
 - ix. Work covered by the *Educational Services (Teachers) Award 2020* (the **EST Award**) in a long day care setting, but not including the types of work or work performed in the settings outlined in 1(a)(i) – (viii) above; and
 - x. Work performed in the ECEC sector in a long day care setting including that of a qualified chef or cook.
9. The application seeks an authorisation in relation to a sub-set of the ECEC sector, namely, the “long day care” part of the sector. Variances in the nature of services such as family day care or stand alone kindergarten, while not significant, are not relevant.

10. None of the employees who will be covered by the proposed agreement are covered by a single-enterprise agreement that has not passed its nominal expiry date.⁵
11. The proposed agreement is not a greenfields agreement.⁶
12. The proposed agreement would not cover employees in relation to general building and construction work.⁷

Summary of the jurisdictional pre-requisites

13. FWC must make a supported bargaining authorisation in relation to this proposed multi-enterprise agreement if it is satisfied of the following:
 - a. That an application for the authorisation has been made;⁸
 - b. That it is appropriate for at least some (or all) of the employers or employees specified in the application that will be covered by the proposed multi-enterprise agreement bargain together having regard to:
 - 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.
 - c. That at least some of the employees who will be covered by the agreement are represented by an employee organisation;⁹ and

⁵ *FW Act* s 243A.

⁶ *FW Act* s 242(3).

⁷ *FW Act* s 243(4).

⁸ *FW Act* s 243(1)(a).

⁹ *FW Act* s 243(1)(c).

- d. That the authorisation would not cover an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date;¹⁰ and
- e. That the proposed agreement would not cover employees in relation to general building and construction work.¹¹

APPROPRIATE FOR THE EMPLOYERS AND THE EMPLOYEES THAT WILL BE COVERED BY THE PROPOSED AGREEMENT TO BARGAIN TOGETHER.

- 14. For the purposes of s 243(1)(b), FWC need not be satisfied that it is appropriate for all of the employers and all of the employees specified in the application to bargain together. If FWC were only satisfied that it is appropriate for some of the employers, and / or some of the employees to bargain together, it could grant a supported bargaining authorisation in respect of only those employers and / or those employees.¹²
- 15. On the basis of the considerations set out below, UWU submits that FWC can be satisfied it is appropriate for *all* of the employers specified in the application to bargain together. It should also be satisfied that it is appropriate for all of the employees of those employers specified in the application to bargain together.
- 16. FWC should approach the consideration as to whether it is appropriate for a group of employers and employees to bargain together broadly. The consideration should include:
 - a. Specific regard to the factors set out in s 243(1)(b)(i) – (iii); and
 - b. Regard to any other matter it considers appropriate;¹³ and
 - c. Regard to the objects of the Division: to assist and encourage employees and their employers who require support to bargain, 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,

¹⁰ *FW Act* s 243A(1).

¹¹ *FW Act* s 243A(4).

¹² Revised Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, [983].

¹³ *FW Act* s 243(1)(b)(iv).

bargaining strength or previous bargaining experience) and to enable the FWC to provide assistance to those employees and their employers to facilitate bargaining for enterprise agreements.¹⁴

17. Consistent with well established principles of statutory construction, FWC should in this matter have regard to the Revised Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Revised Explanatory Memorandum)*.¹⁵ In several cases, the Revised Explanatory Memorandum suggests it was intended that the supported bargaining scheme was an appropriate framework to be used to facilitate multi-employer bargaining in a sector such as ECEC. At [983] the Revised Explanatory Memorandum said:

*“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.”*¹⁶

Prevailing pay and conditions within the relevant industry or sector

18. The first of the considerations FWC should have regard to in reaching satisfaction as to whether it is appropriate for some of the employers and employees to bargain together are the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector).¹⁷ The “relevant” industry or sector is the industry or sector of which the employers and the employees who are proposed to bargain together are part of.

19. The consideration set out in s 243(1)(b) is not a low pay threshold. In having regard to the prevailing pay and conditions within the relevant industry or sector, whether low rates of pay prevail is one aspect of the consideration. In other words:

- a. FWC should have regard to whether the prevailing pay and conditions within the relevant industry or sector make it appropriate for some or all of the

¹⁴ *FW Act* s 241.

¹⁵ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, [82]; *Mondalez Australia Pty Ltd v AMWU* [2020] HCA 29 [68] – [73]; *Acts Interpretation Act 1901* (Cth) s 15AB.

¹⁶ Revised Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, [921].

¹⁷ *FW Act* s 243(1)(b)(i).

employers and the employees that will be covered by the proposed agreement to bargain together; and

- b. In addition, FWC should consider whether low rates of pay prevail in the industry or sector, which may also weight in favour of the appropriateness that some or all of the employers and the employees that will be covered by the proposed agreement to bargain together.

20. The legislation envisages there may be circumstances in which it may be appropriate for a group of employers and their employees to bargain together, having regard to those employees' prevailing pay and conditions. It is not necessary in respect of this application for FWC to determine the extent of those circumstances. One such circumstance may be where, in an industry or sector, the rates of pay and conditions that prevail are not substantially based on single enterprise bargaining agreements, and are largely based on the relevant modern award. In these circumstances, it may be appropriate for employers and their employees to bargain together, to overcome whatever impediments have led to the low incidence of bargaining over pay and conditions at the single enterprise level. That is so in respect to this application.

Low rates of pay

21. Low rates of pay prevailing within the industry or sector of which the employers and employees are part of will weigh in favour of the appropriateness of the employers and employees bargaining together, and a supported bargaining authorisation being granted.¹⁸

22. Often, FWC has adopted a definition of the "low paid" as persons whose ordinary-time earnings are below two-thirds of median (adult) ordinary time earnings of full time employees.¹⁹ In the *Annual Wage Review 2022-23*, FWC identified two different measures by which this threshold may be calculated: ABS Characteristics of Employment data (**COE**), and ABS Employee Earnings and Hours data (**EEH**).²⁰

23. The two thirds median approach is used by FWC primarily in the context of the minimum wages objective and the modern awards objective, and their use of the

¹⁸ Revised Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, [982].

¹⁹ *Annual Wage Review 2022-23* [2023] FWCFB 3500, [89]; *Re Aged Care Award 20210* [2022] FWCFB 200, [473].

²⁰ *Annual Wage Review 2022-23* [2023] FWCFB 3500, [89].

term “the low paid”.²¹ Both require FWC to give consideration to particular characteristics of a class of people (their “relative living standards” and their “needs”), thus requiring that class to be defined with some degree of specificity. Section 243(1)(b)(i) is cast in different terms and does not use the term “the low paid”. It requires regard to be had to the “prevailing” pay and conditions within the relevant industry or sector, including whether low rates of pay “prevail”. The use of the word “prevailing” suggests against the imposition of a particular threshold or limitation on the consideration.

24. In *Application by United Workers’ Union & Australian Workers’ Union of Employees, Queensland, The (the Aged Care Low Paid Bargaining Case)*,²² FWC was required to consider a different bargaining stream – the “low paid bargaining stream”, and the reference to the term “low paid employees” in former s 243 of the FW Act. In its approach to this term, FWC did not use the two thirds median approach. Rather, it said:

*“We have no doubt that in the context of the provisions of Division 9 the phrase is intended to be a reference to employees who are paid at or around the award rate of pay and who are paid at the lower award classification levels.”*²³

25. Other decisions relating to the low paid bargaining scheme cited this approach with approval, while also giving consideration generally as to the relationship between the two-thirds median measure and Award pay rates in the relevant sectors.²⁴

26. The supported bargaining scheme is cast in a way that strongly suggests an intention it operate in a manner that is less complex than the low paid bargaining scheme, is easier to access and is intended to apply in a broader range of circumstances. The *Revised Explanatory Memorandum* says the provisions are ‘intended to improve access to the scheme beyond the scope of the low paid bargaining stream’,²⁵ and:

“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

²¹ FW Act ss 134(1)(a) and 284(1)(c).

²² [2011] FWA FB 2633.

²³ *Aged Care Low Paid Bargaining Case*, [17].

²⁴ *Australian Nursing Federation v IPN Medical Centres Pty Limited and Others* [2013] FWC 511, [91]; *Application by United Voice* [2014] FWC 6441, [26] – [28].

²⁵ Revised Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, [982].

*authorisation is intended to address the limited take-up of the low-paid bargaining process.*²⁶

27. In circumstances where the prevailing pay and conditions in an industry or sector falls below the two-thirds median threshold, FWC may well have regard to that measure in its consideration as to whether it is appropriate for specified employers and employees within that sector to bargain together. However, Uwu submits that the consideration in s 243(1)(b)(i) cannot be limited to a threshold, and the supported bargaining scheme is intended to encompass circumstances broader than those involving only employees falling below the two-thirds median measure. The approach taken by the Full Bench of FWC in the *Aged Care Low Paid Bargaining Case* is also a useful consideration, although also not definitive because the supported bargaining scheme is intended to have broader application than the low paid bargaining scheme. The approach is however more consistent with the language used in s 243 – that is – an approach which considers whether the pay and conditions which “prevail” in the industry or sector in question at or close to Award rates. This construction is supported by the *Revised Explanatory Memorandum*:

*“the prevailing pay and conditions in the relevant industry – this is intended to include whether low rates of pay prevail in the industry, whether employees in the industry are paid at or close to relevant award rates, etc.”*²⁷

28. Accordingly, in respect of these matters, Uwu submits as follows:

- a. In determining whether low rates of pay prevail within an industry or sector, FWC may have regard to whether some of the employees in the sector in question earn less than two-thirds of the median earnings thresholds; however
- b. The reference to “low rates of pay” in s 243(1)(b)(i) is not intended to be limited to a consideration of whether pay rates are at or below a particular threshold and is a broader consideration taking into account whether employees in the industry are paid at or close to award rates.

²⁶ Ibid [922].

²⁷ Ibid [984].

Do low rates of pay prevail in the ECEC sector?

29. In respect to this application, the relevant industry or sector may be described as the early education and care sector – the industry of long day care, occasional care (including those occasional care services not licensed), nurseries, childcare centres, day care facilities, family based childcare, out-of-school hours care, vacation care, adjunct care, in-home care, kindergartens and preschools, mobile centres and early childhood intervention programs.²⁸

30. The most common Award classifications in the sector are the Diploma classification (level 4.1 – 4.3 of the CS Award) and the Certificate III classification (level 3.1 – 3.3 of the CS Award). About 30% of employees in the sector are qualified at the Certificate III level and about 42% at the Diploma level.²⁹

31. The minimum rates of pay attaching to the most common Award classifications in the sector are:

CS Award level			Award weekly rate of pay
Level 3.1	Certificate III qualified		\$995.00
Level 3.2		After 1 year	\$1,029.30
Level 3.3		After 2 years	\$1,061.70
Level 4.1	Diploma qualified		\$1,172.00
Level 4.2		After 1 year	\$1,190.00
Level 4.3		After 2 years	\$1,207.70

32. There is a relatively high level of Award dependency in the ECEC sector.³⁰

33. Employers in the ECEC sector who are not covered by an enterprise agreement, and whose primary industrial instruments are thus the Awards, generally pay their employees at or around Award levels.³¹

34. Accordingly, FWC should find that employees in the ECEC sector are paid at or around Award levels.

²⁸ Statement of Agreed Facts [10].

²⁹ Statement of Agreed Facts [15].

³⁰ Statement of Agreed Facts [17].

³¹ Statement of Agreed Facts [19].

35. In *Annual Wage Review 2022-23*,³² FWC identified the two-thirds median adult ordinary-time earnings thresholds as:
- a. COE: \$1016.67 per week.
 - b. EEH: \$1062.00 per week.
36. The median weekly full time earnings for “child carers” based on ABS Employee Earnings and Hours (**EEH**) data is \$1059 per week.³³
37. The median weekly full time earnings for “child carers” based on the ABS Characteristics of Employment (**COE**) is \$1000 per week.³⁴
38. If the question as to whether “low rates of pay prevail in the industry or sector” is to include consideration as to whether persons working in that sector earn below two thirds of median adult ordinary time earnings, then FWC can be satisfied in this sector that is so, because:
- a. Employees paid award rates of pay at the Certificate III level (Level 3.1 – 3.3 of the CS Award), who comprise about 30 per cent of the workforce, are paid between \$995.00 and \$1,061.70 per week, or less than the two thirds median thresholds using both COE and EEH measures; and
 - b. The median weekly full time earnings for “child carers” (using the ABS categorisation description), using COE data is less than that of the two thirds median threshold using COE data; and
 - c. The median weekly full time earnings for “child carers” using EEH data is less than the two thirds median threshold using EEH data.
39. The consideration in s 243(1)(b)(i) is, however, not a low pay threshold. FWC should also have regard to whether, in the sector, employees are paid at or around Award levels. In the ECEC sector, 78.7% of employees are either entirely award dependent or paid less than 10% above the award.³⁵

³² *Annual Wage Review 2022-23* [2023] FWCFB 3500, [89].

³³ Statement of Agreed Facts, [20].

³⁴ Statement of Agreed Facts, [21].

³⁵ Statement of Agreed Facts, [16].

40. UWU submits it is appropriate for the employers specified in the application and their employees to bargain together including because low rates of pay prevail in the sector.

CLEARLY IDENTIFIABLE COMMON INTERESTS

41. In determining whether it is appropriate for the employers and the employees to bargain together, FWC should also have regard to whether the employers have clearly identifiable common interests. Section 243(2) provides several examples of what will constitute a clearly identifiable “common interest” among employers in this regard. These include:

“For the purposes of subparagraph (1)(b)(ii), examples of common interests that employers may have include the following:

(a) a geographical location;

(b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;

(c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.”

Being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory

42. Each of the employers respondent to this application is substantially funded, directly, by the Commonwealth.³⁶

43. In this regard each of the employers has a clearly identifiable common interest weighing in favour of the appropriateness that they and their employees bargain together.

Regulatory regime

44. Division 10 of Part 2-4 of the FW Act establishes a different scheme to allow employers and employees to engage in multi-employer bargaining – by obtaining a single interest employer authorisation. In considering whether to grant a single interest authorisation, FWC is similarly required to consider (among other things)

³⁶ Statement of Agreed Facts, [34].

whether the employers have clearly identifiable common interests (s 249(3)). Section 249(3A) also contains examples of “common interests” employers may have:

“For the purposes of paragraph (3)(a), matters that may be relevant to determining whether the employers have a common interest include the following:

(a) geographical location;

(b) regulatory regime;

(c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises.”

45. UWU submits that the examples in s 249(3A) of common interests are applicable to the supported bargaining framework in Division 9 of Part 2-4 of the FW Act. Generally, a provision in one part of the statute should be given the same meaning as another.³⁷
46. Each of the employers respondent to this application are subject to a common regulatory regime which is comprehensive and detailed. This regime is comprised of the National Quality Framework (NQF) and the National Quality Standard (NQS). The framework is overseen by the national body, the Australian Children’s Education & Care Quality Authority (ACECQA) and a regulatory authority in each jurisdiction responsible for monitoring and assessing the services in their jurisdiction.³⁸
47. The NQF was introduced to provide a consistent and uniform framework across Australia to monitor the educational and developmental outcomes for children in long day care, family day care, preschool/kindergarten and outside school hours care services.³⁹
48. Each of the employers are monitored to enforce compliance with the National Law and Regulations by the relevant state based regulatory authorities.⁴⁰
49. Accordingly, each of the employers in this application have a further clearly identifiable common interest – they are subject to a common regulatory regime within the meaning s 249(3A)(b).

³⁷ *Tabcorp Holdings Limited v Victoria* [2016] HCA 4, [65].

³⁸ Statement of Agreed Facts, [24] – [33].

³⁹ Statement of Agreed Facts, [24].

⁴⁰ Statement of Agreed Facts, [32].

The nature of the employers' enterprises

50. The “nature” of the enterprises as it is referred to in ss 243(2)(b) and 249(3A)(c) of the FW Act should be given a broad meaning. The term is not expressly defined in the FW Act but a broad approach has generally been taken in relation to the expression (for example, when used in relation to the low paid bargaining scheme).⁴¹

51. The common regulatory regime which applies to each employer has a rigidity which results in significant commonality in relation to many aspects of the nature of these employers' enterprises. For example:

- a. The NQF provides the educator to child ratio requirements for children's education and care services in Australia. Each of the employers listed in the application is subject to these ratio requirements.⁴² Educators must be working directly with children to be counted in the educator to child ratios.
- a. The *Education and Care Services National Regulations* (***National Regulations***) contain numerous obligations on education and care service providers which further define and align the operational nature of those services, including:
 - i. The requirements and conditions on obtaining provider and service approval, such as the proposed ages and number of children to be educated and cared for and the proposed hours and days of operation of the education and care service;⁴³
 - ii. setting out the assessment and rating process for all education and care services against the NQS and the establishment of mandatory quality improvement plans upon provider approval;⁴⁴
 - iii. minimum requirements relating to the operation of all education and care services organised around each of the seven quality areas and aligned with the NQS. This includes obligations on services to

⁴¹ See *Application by United Voice; Australian Workers' Union* [2011] FWAFB 2633, [27]; *Application by United Voice* [2014] FWC 6441, [98]-[99]; *Australian Nursing Federation v IPN Medical Centres Pty Ltd and Others* [2013] FWC 511, [129]-132].

⁴² Statement of Agreed Facts, [30].

⁴³ *National Regulations*, Chapter 2.

⁴⁴ *National Regulations*, Chapter 3.

implement policies and procedures, codes of conduct and educational programs based on an approved learning framework;⁴⁵

iv. staffing arrangements and qualifications;⁴⁶

v. fees for a range of transactions;⁴⁷ and

vi. complying with the NQS.⁴⁸

52. In addition to their structural similarity, the employers specified in this application have further commonality in regard to the “nature” of their enterprises in that:

- a. they all operate within the early education and care sector;
- b. they all provide early education and care services;
- c. the commonalities in providing these services apply, regardless of the size of the enterprise;
- d. Children’s Services Employees are covered by the CS Award and EST Award;
- e. The employees of the employers outlined in Schedule 1 of the Application perform essentially the same kind of work;
- f. they are all dependent on being able to attract and retain employees from the group of appropriately qualified people in Australia who want to work in the sector. This group of appropriately qualified people includes people with Diplomas, Certificates or Bachelor’s Degrees in Early Childhood Education and Care or other applicable qualifications;⁴⁹
- g. their workforces are female dominated (significantly so, relative to other sectors).⁵⁰

⁴⁵ *National Regulations*, Chapter 4.

⁴⁶ *National Regulations*, Chapter 7.

⁴⁷ *National Regulations*, Schedule 2.

⁴⁸ *National Regulations*, Schedule 1.

⁴⁹ Statement of Agreed Facts, [14] – [15].

⁵⁰ Statement of Agreed Facts, [12].

The terms and conditions of employment in the employers' enterprises

53. There is significant commonality in the terms and conditions of employment in the enterprises of the employers specified in the application. There is a relatively high degree of award dependence in the early education and care sector.⁵¹ Employers who are not covered by an enterprise agreement generally pay employees at or around Award levels.⁵² All of the employers specified in the application are covered by a modern award (namely the CS Award and the EST Award) and only some of the employers specified in the application are covered by an enterprise agreement.

The employers' other common interests

54. The examples of common interests that employers may have set out in s 243(2) are not expressed to be exhaustive. Employers may have other common interests weighing in favour of the appropriateness that they bargain together. The employers specified in this application have further common interests weighing in favour of the appropriateness they bargain together including:

- a. Each of the employers specified in the application wants to bargain together. UWU submits this is both a factor weighing in favour of the appropriateness of their bargaining together as a general proposition (see below) but is also in and of itself a common interest – an interest in making a multi-employer bargaining agreement together.
- b. Each of the employers are substantially reliant on Commonwealth Government funding. The level of this funding and its machinery will impact on the employers' bargaining position; their capacity to agree to improvements in pay and conditions for employees and their capacity to deliver such improvements. The employers' thus have a common interest in having the funder as closely connected to the bargaining process they want to engage in as possible.

⁵¹ Statement of Agreed Facts, [17].

⁵² Statement of Agreed Facts, [19].

THE LIKELY NUMBER OF BARGAINING REPRESENTATIVES FOR THE AGREEMENT WOULD BE CONSISTENT WITH A MANAGEABLE COLLECTIVE BARGAINING PROCESS

55. It is likely that there will be eight bargaining representatives for the agreement:

- a. UWU;
- b. AEU;
- c. IEU;
- d. CELA;
- e. CCC;
- f. Paul Mondo;
- g. Nigel Ward; and
- h. G8 Education Limited

56. UWU submits that the proposed number of bargaining representatives for the agreement is consistent with a manageable collective bargaining process in accordance with s 243(1)(iii) of the FW Act.

OTHER MATTERS

57. In considering whether it is appropriate for the employers and the employees to bargain together, FWC may have regard to any other matter it considers appropriate.⁵³ Several further factors weigh in favour of the authorisation being granted, including the following.

58. Each of the parties to the application, including each of the employers who are respondent to the application are supportive of the authorisation being made. UWU submits that where the parties to an application under s 242 are supportive of the authorisation being granted, this weighs in favour of it being made, pursuant to s 243(1)(b)(iv).

⁵³ FW Act s 243(b)(iv).

59. The relatively high dependence on the Award and the relatively low level of enterprise agreement coverage in the sector is suggestive of difficulty bargaining at the single-enterprise level, in respect of which the assistance of FWC through the support available through the supported bargaining mechanism may be beneficial. Indeed, the ECEC sector bears a number of the characteristics generally considered to be explanations as to an absence of enterprise bargaining or impediments to bargaining.⁵⁴ This in turn adds to the *appropriateness* of the employers and the employees bargaining together to overcome those limitations by utilising that support.

60. The supported bargaining scheme is designed to provide FWC with additional powers to assist parties to overcome impediments to bargaining. For example, s 246(3) allows FWC to direct a person who is not an employer specified in the authorisation to attend a conference at a specified time and place, if the FWC is satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement that the participation of the person in bargaining is necessary for the agreement to be made. In circumstances where an industry or sector is significantly dependent on third party funding (such as Government funding) this form of assistance is likely to be extremely beneficial (indeed often essential) to bargaining occurring effectively.

CONCLUSION

61. UWU submits that FWC can have a strong level of satisfaction that it is appropriate for all of the employers and their employees as described to bargain together. As the other elements of the statutory criteria are met, UWU submits FWC should make a supported bargaining authorisation in the terms sought by the application.

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⁵⁴ In respect of the effect over bargaining arising from predominance of small enterprises in the industry or sector, low levels of unionisation, high employee turnover, or that the enterprise, industry, or sector being heavily reliant on government funding which constrains its capacity to pay see *Equal Remuneration Decision 2015* [FWCFB] 8200, [208]; in respect of small business, see *Four yearly review of modern awards – Annual leave* [2015] FWCFB 3406, [287] – [301]; in respect of the feminised nature of the industry see *Re Application by Australian Municipal, Administrative, Clerical and Services Union and others* [2011] FWAFB 2700, [281].