IN THE FAIR WORK COMMISSION

Registry: Perth

Action No: B2023/703

RE: APPLICATION BY INDEPENDENT EDUCATION UNION (130N)

Application pursuant to section 248 of the *Fair Work Act 2009* for a Single Interest Employer Bargaining Authorisation

SUBMISSIONS OF THE APPLICANT

THE APPLICATION

1. The Independent Education Union of Australia (**IEU**) has filed an application pursuant to section 248 of the *Fair Work Act 2009* (**the Act**), seeking a single interest employer authorisation (**SIEA)** in respect of bargaining for an enterprise agreement to cover general and support staff employed in the Catholic education sector in the state of Western Australia.

2. This application invites the first consideration by the Fair Work Commission (**FWC**) of recent legislative amendments that facilitate an application for an SIEA by a non-employer party.

3. In this matter, both the employer and non-employer bargaining representatives share a common desire to bargain for a single enterprise agreement covering general and support staff across the sector. The application is therefore made with the consent of the respondent employers and on facts agreed between the parties.

THE FACTS

4. The IEU is a trade union representing workers in the private education sector in Australia.[1] It represents workers employed in the Catholic education system in Western Australia.

[1] *Rules of the Independent Education Union of Australia*, Rules 2(a)-(d).

5. The IEU is bargaining for an enterprise agreement with each of the employers that are respondents in this application and their teaching staff pursuant to a single interest bargaining authorisation made on application by the employers.[2]

6. Each of the employers is a corporation[3] which is primarily engaged in delivering primary and / or secondary education in a school setting.[4] Each operates in Western Australia,[5] and is registered under the *School Education Act 1999* (WA).[6] They each engage in Roman Catholic religious instruction[7] and are represented by Catholic Education Western Australia in respect of bargaining.[8] Every one of the employers employs, or taken together with an associated entity employs, more than 50 employees.[9] The entities are funded to deliver education by a mix of state and Commonwealth funding.[10]

7. The employment arrangements of the employee cohort that would be covered by the proposed agreement are underpinned by a set of common employment arrangements.[11] For completeness, the relevant employees do not undertake construction work.[12]

STATUTORY PROVISIONS AND PRINCIPLES

8. The application is made pursuant to s. 248 which falls within Division 10 of Part 2-4 of the Act, which concerns multi-employer enterprise bargaining.

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[2] B2021/227 and as varied by B2022/151, B2022/1307, B203/101 and B2023/630.

[3] Statement of Agreed Facts at [1.1].

[4] Ibid at [1.2].

[5] Ibid at [1.3].

[6] Ibid at [1.4].

[7] Ibid at [1.6].

[8] Ibid [1.10].

[9] Ibid at [4].

[10] Ibid at [1.7] and [1.8].

[11] Ibid at [5].

[12] Ibid at [6].

9. Section 248 of the Act has been amended to provide that a bargaining representative, not being an employer, may apply for an SIEA.[13] The explanatory memorandum reveals that the intention of the amendments to the division were threefold: *"to remove unnecessary limits on access to single interest employer authorisations and simplify the process for obtaining them, and facilitating bargaining*".[14]

10. It further provides that an application must specify the employers and employees covered by the agreement, and the person (if any) authorised to make applications under the Act on behalf of the employer cohort.[15]

11. Section 249 of the Act provides that upon satisfaction of certain matters, the Fair Work Commission (**FWC**) *must* make an SIEA. The use of the word "must" is significant; it makes clear that upon the conditions precedent being satisfied, there is no residual discretion to decline to make an SIEA.

12. There are two types of considerations conditioning the issuance of a SIEA. The first arises under s. 249(1)(a) of the Act and is simply that an application has been made.[16] This appears to be a jurisdictional fact.

13. The second class, provided at s. 249(1)(b) of the Act, are the matters about which the FWC must be "satisfied".[17] The requirements are cumulative. In respect of this category, the use of the term "satisfied" in s. 249(1)(b) in contradistinction to s. 249(1)(a) must be taken to be deliberate. The statute makes clear that the matters provided at s. 249(1)(b) are conditions precedent to the exercise of power, but are they jurisdictional facts?

14. In *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union*[18] it was held that when the Act spoke in terms of a requirement for the Commission to be "satisfied" of certain matters prior to approving an enterprise agreement, the Act

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[13] The Act, s. 248(1)(b).

[14] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022,* Revised Explanatory Memorandum at cl. 1006.

[15] The Act, s. 248(2).

[16] The Act, s. 249(1)(a).

[17] The Act, s. 249(1)(b).

[18] [2018] FCAFC 77; (2018) 262 FCR 527 at [97] - [107].

did not precondition the exercise of the power on a jurisdictional fact but instead imposed a requirement that the FWC make an evaluative and final determination.

15. The considerations that underpinned that conclusion: the specialist nature of the tribunal, the undesirability of collateral attack and the evaluative nature of the exercise,[19] all apply with equal force to the construction of s. 249(1)(b). Accordingly, the matters listed at s. 249(1)(b) are *"facts which need only be established to the satisfaction of the decision-maker"*.[20]

16. In determining the manner in which satisfaction is to be attained, it is notable that the objects of Part 2-4 of the Act which make clear parliament's intention that the role of the FWC will be one concerned with the *facilitation* of bargaining and the *making* of enterprise agreements. It is submitted that the FWC may be more readily satisfied where the parties come before it seeking an order of this nature by consent and in relation to considerations about which there is no controversy.

17. In the case of an application made by a bargaining representative not being the employer, the matters about which the FWC must be satisfied are as follows.

    17.1. **Firstly**, per s. 249(1)(b)(i), the FWC must be satisfied that at least some of the employees that will be covered are represented by an employee organisation.

    17.2. **Secondly**, per s. 249(1)(b)(ii), the FWC must be satisfied that the employers who would be subject to the SIEA and employee bargaining representatives have been afforded the opportunity to express their views to the FWC.

    17.3. **Thirdly**, per s. 249(1)(b)(iv) that each employer has either consented to the Application or meets each of the criteria described in s. 249(1B).

    17.4. **Fourthly,** that the employers are either franchisees of a relevant kind, or are "common interest employers". The criteria for deciding whether the

[19] Ibid at [105] – [106].

[20] *D'Amore v Independent Commission against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242 at [241] per Basten JA.

employers are "common interest employers" are provided at s. 249(3) of the Act. Section 249(3AB) establishes a rebuttable presumption that this is satisfied in respect of an employer who has more than 50 employees at the time an application is made.

17.5. **Fifthly**, per s. 249(1)(b)(vi), in the case of "common interest employers" that each employer's "operations and business activities are reasonably comparable with those of the other employers that will be covered by the agreement". Section 249(1AA) establishes a rebuttable presumption that this is satisfied in respect of any employer who has more than 50 employees at the time an application is made.

18. For the purpose of determining the number of employees that an employer has, any persons employer by an "associated entity" of the employer are deemed to be its employees.[21]

19. Finally, s. 249A of the Act provides that a single interest bargaining authorisation cannot be made in circumstances in which the proposed agreement extends to workers in relation to general building and construction work.

APPLICATION OF PROVISION AND PRINCIPLES

20. In view for the foregoing, *must* the FWC grant the application in the instant matter?

The Application

21. There can be no doubt that an application was made, and that the application complies with the requirements of imposed by s. 248 of the Act.

Representation

22. In relation to the first issue about which the FWC must be satisfied, the FWC can be satisfied that "at least some" of the employees covered by the proposed agreement will be covered are represented by an employee organisation. The

[21] The Act, s. 249(3AC)(d).

parties have agreed that the IEU has at least one member who is represented by the IEU employed by each of the employers.[22]

An Opportunity to be Heard

23. In relation to the second issue, the FWC can be satisfied that the parties (being the employers and bargaining representatives) have been afforded an opportunity to be heard. The FWC has convened a conference at which the parties (or their representatives) attended, made orders granting the parties and any other party or intervenor leave[23] to file submissions and evidence and has published the application and materials filed in the proceeding online through its "Major Cases" portal.

The Additional Considerations

24. In relation to the third issue, the FWC need not be satisfied as to the matters set out in s. 249(1B), because the employers have consented to the application.

Common Interest Employers

25. In relation to the fourth issue, it is the position of the applicant that the employer cohort is an exemplar of a "common interest employer" group. Notwithstanding this, the FWC is not required to undertake a consideration of the characteristics of the employers, nor to form any conclusion in relation to that question. That is because the presumption provided s. 249(3AB) is engaged by the making of the application by a bargaining representative in circumstances in which each of the employers employed (or was deemed to employ) 50 or more employees at the time the application was made.[24] The presumption can only be displaced by proof of the contrary.

26. In relation to the fifth issue, again, the FWC need not consider whether the entities have reasonably comparable operations and business activities because of the operation of the presumption provided at s. 249(1AA) which is enlivened for the same reasons as for s. 249(3AB).

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[22] Statement of Agreed Facts at [2].

[23] Directions of Deputy President Hampton dated 21 July 2023, orders [1] – [4].

[24] Statement of Agreed Facts at [4].

Disposition of Application

27. It is respectfully submitted that, the conditions precedent to the exercise of the power provided at s. 249(1) being met, the FWC is obliged to make the SIEA.

28. Pursuant to s. 250 of the Act, and because there is presently no bargaining for an agreement, the SIEA must be made in the terms set out in the application.

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3 August 2023