Australian Industry Group

Application for a Supported Bargaining Authorisation – Early Education and Care Industry

Submission (B2023/538)

7 August 2023

B2023/538 APPLICATION FOR A SUPPORTED BARGAINING AUTHORISATION – EARLY EDUCATION AND CARE INDUSTRY

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) relates to an application made by three unions for a supported bargaining authorisation (**SBA**) – the first of its kind – and is filed in accordance with directions issued by the Fair Work Commission (**Commission**) on 14 June 2023 (as varied on 2 August 2023).

2. We do not seek to advance a position as to whether the application should be granted. Rather, these submissions focus on the proper interpretation of s.243 of the *Fair Work Act 2009* (**Act**).

3. We note that the directions issued by the Commission permit the filing of submissions by peak councils, including Ai Group, in relation to *'the operation of ss 243 and 244'* of the Act. Given that the parties to this matter do not rely on s.244, which deals with variations to SBAs, we do not propose to advance submissions about it at this time.

2. THE STATUTORY PROVISIONS

4. Section 3 sets out the objects of the Act: (emphasis added)

> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
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> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
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> (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
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> (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
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> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
>
> (g) acknowledging the special circumstances of small and medium-sized businesses.

5. The *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* altered various aspects of Division 9 of Part 2-4 of the Act, such that it now provides for a *'supported bargaining'* scheme, in lieu of what was previously called *'low-paid bargaining'*.

6. The new objects of Division 9 are set out in s.241 of the Act in the following terms: (emphasis added)

> The objects of this 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
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> (d) to enable the FWC to provide assistance to those employees and their employers to facilitate bargaining for enterprise agreements.

7. Section 243(1) requires the Commission to make a SBA if the criteria there stipulated are satisfied: (emphasis added)

> (1) The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:
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> (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:
>
> (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.

8. Examples of what might constitute *'clearly identifiable common interests'* for the purposes of s.243(1)(b)(ii) are listed at s.243(2) of the Act: (emphasis added)

> (2) 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.

9. Section 243(3) identifies the matters that must be specified in a SBA:

> (3) The authorisation must specify:
>
> (a) the employers that will be covered by the agreement; and
>
> (b) the employees who will be covered by the agreement; and
>
> (c) any other matter prescribed by the procedural rules.

10. Section 244 of the Act deals with variations to SBAs, to add or remove employers: (emphasis added)

> Variation to remove employer
>
> (1) An employer specified in a supported bargaining authorisation may apply to the FWC for a variation of the authorisation to remove the employer's name from the authorisation.
>
> (2) If an application is made under subsection (1), the FWC must vary the authorisation to remove the employer's name if the FWC is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.
>
> Variation to add employer
>
> (3) The following may apply to the FWC for a variation of a supported bargaining authorisation to add the name of an employer that is not specified in the authorisation:
>
> (a) the employer;
>
> (b) a bargaining representative of an employee who will be covered by the proposed multi-enterprise agreement to which the authorisation relates;
>
> (c) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under that agreement.

(4) If an application is made under subsection (3), the FWC must vary the authorisation to add the employer's name if the FWC is satisfied that it is in the public interest to do so, taking into account:

(a) if the employer's employees are in an industry, occupation or sector declared by the Minister under subsection 243(2B)--the declaration; and

(b) if paragraph (a) of this subsection does not apply--the matters set out in paragraph 243(1)(b); and

(c) any other matters the FWC considers appropriate.

(4A) Despite subsection (4), the FWC must not vary the authorisation if subsection 243A(1) (employees covered by single-enterprise agreement that has not passed nominal expiry date) would prevent the FWC from making a supported bargaining authorisation specifying the employees.

(5) Despite subsection (4), the FWC must not vary the authorisation if, as a result of the variation, the proposed multi-enterprise agreement to which the authorisation relates would cover employees in relation to general building and construction work.

11. If a SBA is made, the Commission can provide bargaining representatives with assistance in accordance with s.246 of the Act. This includes requiring certain persons to attend a conference, as per s.246(3).

3. THE PROPER INTERPRETION OF SECTION 243

12. We here deal with various elements of s.243 of the Act.

Appropriateness of Making a SBA

13. The Commission's power to make a SBA is not enlivened unless it is satisfied that it is *'appropriate'* for the employers and employees who would be covered by the agreement to *'bargain together'*.[1]

14. Thus, where an application for a SBA is made, the Commission must make a discretionary value judgement as to whether it is *'suitable or fitting'*[2] for the relevant cohort of employers and employees to bargain together. That assessment must be made having regard to the factors enumerated at s.243(1)(b).[3] The assessment should also involve a consideration of:

    (a) The objects of the Act;

    (b) The objects of Division 9 of Part 2-4 of the Act; and

    (c) The scheme of the Act as a whole, including the implications of making a SBA.

15. Critically, the objects of the Act continue to place an emphasis on enterprise-level collective bargaining; that is, bargaining in respect of terms and conditions that apply at a particular enterprise; as compared to multi-enterprise bargaining, which is intended to result in the setting of uniform terms and conditions across a number of employers and employees, or indeed, potentially, across an entire sector.

[1] Section 243(1)(b) of the Act.

[2] Macquarie Dictionary.

[3] Section 243(1)(b) of the Act.

16. As extracted above, s.241 makes clear that the purpose of the supported bargaining stream is to assist and encourage those *'who require support to bargain'*[4] to make an enterprise agreement, to address certain constraints that they may be facing and to enable the Commission to provide assistance to facilitate bargaining.[5]

17. When read together, s.3 and s.241 make clear that supported bargaining is intended to operate in the narrow set of circumstances where employers and employees require support to bargain (and where s.243 of the Act is satisfied). Except to that extent, the facilitation of enterprise-level bargaining is to be emphasised and encouraged. This is consistent with the following remarks made by Minister Burke in the Second Reading speech he delivered in relation to the *Fair Work Legislation (Secure Jobs, Better Pay) Bill 2022* (**Bill**): (emphasis added)

> Bargaining at the enterprise level delivers strong productivity benefits and is intended to remain the primary and preferred type of agreement making. For employees and employers that have not been able to access the benefits of enterprise level bargaining, these reforms will provide flexible options for reaching agreements at the multi-employer level. …[6]

18. Section 243 must be read in this context and the question of whether it is *'appropriate'* to make a SBA must be considered with these objectives in mind.

19. Accordingly, the Commission should be satisfied that the cohort of employers and employees to whom a given SBA would apply are in fact of the nature for whom this new legislative scheme is intended, before determining that it is appropriate to make a SBA. The making of a SBA in relation to employers and employees who do not require such support would fall beyond the scope of the supported bargaining scheme, as contemplated by Parliament. Alternatively, it would not be *'appropriate'* to issue a SBA in relation to such employers and employees.

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[4] Section 241(a) of the Act.

[5] Section 241 of the Act.

[6] House of Representatives, Official Hansard, 27 October 2023 at 2180.

20. It must also be recognised that the scheme of the Act now facilitates much greater access to multi-employer bargaining, through the ability to seek a single interest employer authorisation. An assessment of the *'appropriateness'* of issuing a 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 bargaining scheme, or, in particular, the important limitations that Parliament has imposed upon access to it.

21. The making of a SBA will facilitate the negotiation of a multi-enterprise agreement and in turn, enable the simultaneous taking of protected industrial action across the enterprises of a potentially large number of employers. In addition, the Act will enable the Commission to add an employer (or employers) to a SBA [7] and to add an employer (or employers) to a multi-enterprise agreement, once made;[8] including where the relevant employer(s) do(es) not wish to be added to the SBA or agreement.

22. A decision to make a SBA therefore has significant potential implications, including for employers who are not named in the SBA when made. The supported bargaining scheme may, subject to the particular circumstances of the relevant employers, ultimately result in the making of multi-enterprise agreements that cover entire, if not large proportions of certain parts of our economy. Such an outcome may serve to stifle competition, productivity, innovation and efficiency. For some employers, being roped into multi-enterprise agreements may result in financially and operationally unsustainable and unviable outcomes.

23. Given the seriousness of the microeconomic and macroeconomic consequences that can ultimately flow from the making of a SBA, the Commission should not lightly find that it is appropriate to do so. Once understood in its context, the test of appropriateness must be seen as a bar that is overcome only where the

[7] Section 244(4) of the Act.

[8] Section 216BA of the Act.

circumstances indicate a genuine need to provide the relevant employers and employees with access to the supported bargaining scheme.

24. The operation of s.246(2) of the Act is consistent with this proposition. It enables the Commission, *of its own motion*, to provide the bargaining representatives for a proposed multi-enterprise agreement with assistance to facilitate bargaining. Generally, however, bargaining representatives do not require assistance of this nature. Many bargaining representatives have prior experience in bargaining, have dedicated resources to bargain and / or seek assistance from a third party. Moreover:

    (a) The Act provides a readily accessible mechanism that enables bargaining representatives to apply to the Commission to deal with a dispute about a proposed enterprise agreement.[9] Typically, where a party notifies the Commission of such a dispute, a member of the Commission will endeavour to assist the parties to resolve it through conciliation. Indeed, the recent amendments to the Act afford the Commission a radically expanded capacity to bring to a resolution *'intractable bargaining'*.[10]

    (b) The Act now requires the Commission to conduct a compulsory conference of the bargaining representatives to a proposed agreement where an application for a protected action ballot order is made.[11] Again, these conferences present an opportunity for the Commission to assist the parties to resolve matters of difference between them.

25. The Commission can, and does, play a significant role in assisting parties engaged in enterprise bargaining. The mechanisms for seeking that assistance can be easily accessed. This again suggests that the circumstances that warrant the making of a SBA for parties who require assistance with bargaining, and which will result in an avenue for the Commission to do so of its own motion, will be narrow.

[9] Section 240 of the Act.

[10] Part 2-4, Division 8, Subdivision B of the Act.

[11] Section 448A of the Act.

Application of the SBA & Coverage of the Proposed Agreement

26. Where an application for a SBA has been made, the employers and employees who would be covered by the proposed agreement must be clearly identified. This is evident from various aspects of the legislative provisions. For example:

    (a) Section 243(1)(b) requires the Commission to determine whether it is appropriate for *'the employers and employees … that will be covered by the agreement'* to bargain together; and

    (b) Section 243(3) requires that the employers and employees that will be covered by the proposed agreement must be specified in the SBA.

27. For the purposes of s.243(3):

    (a) The relevant employers must be identified by name. We note in particular that s.244 clearly proceeds on the basis that employers will be identified in this matter.

    (b) The relevant employees need not be identified by name; however, the class of employees must be described with sufficient specificity, such that they can be identified definitively and without doubt.

28. The scope of the parties who would be covered by a proposed SBA is a relevant consideration when determining whether the SBA should be made. It is conceivable that decisions about the scope or coverage of a proposed SBA will be made pragmatically by parties, with a view to limiting the impact of potentially divergent views amongst bargaining representatives being advanced during bargaining. However, the scope of a proposed SBA could give rise to a raft of relevant discretionary considerations in the context of an application made pursuant to s.242(1) of the Act, depending on the circumstances of the particular matter. This could include:

(a) Any foreseeable potential impact of bargaining between the relevant parties on the economy, specific sectors and / or members of the community that rely upon services of the employers that will be covered by the proposed SBA; and

(b) The impact on other employers that might be said to have a common interest with those covered by the proposed SBA but who have been selectively excluded from the scope of any application. This should include a consideration of the possibility that such employers may subsequently be roped into the coverage of the SBA or any agreement ultimately made.

Having regard to the matters listed at ss.243(1)(b)(i) – (iv)

29. For the purposes of determining whether it is *'appropriate'* for certain employers and employees to bargain together, the Commission is directed by the Act to *'have regard to'* certain matters. This is not an exhaustive list of matters that may be relevant to the exercise of the Commission's discretion.

30. The requirement to *'have regard to'* various matters is substantially the same as a statutory directive to take certain matters *'into account'*. As previously accepted by the Commission, the obligation to take into account matters identified by the statute *'means that each of these matters must be treated as a matter of significance in the decision making process'*.[12] Similarly, in *Nestle Australia Ltd v Federal Commissioner of Taxation*, Wilcox J said as follows:

> To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant.[13]

31. Nonetheless, as Kitto J noted in *Rathborne v Abel*: (emphasis added)

> In the third place, plainly <u>the provision that the listed matters are to be regarded does not imply that nothing else may be regarded</u>. So this Court said in Owen v. Woolworths Properties Ltd. (1956), 96 CLR 154, at p. 160; and indeed to hold otherwise would be to alter and not to construe the words of parliament. … [14]

[12] *Four yearly review of modern awards: Preliminary issues* [2014] FWCFB 1788 at [31].

[13] *Nestle Australia Ltd v Federal Commissioner of Taxation* (1987) 16 FCR 167 at 184.

[14] *Rathborne v Abel* (1964) 38 ALJR 293.

32. The text of the statute does not require that any of the considerations identified therein are to be given particular importance relative to others. Moreover, the weight that is attributed to the various factors by the Commission may vary, having regard to the particular circumstances of a given matter. A given factor may take on more or less significance in the context of different matters, having regard to the surrounding circumstances of each application. Critically, none of the factors are determinative; rather, each factor must be weighed and considered against the others.

33. Each of the factors identified in s.243(1)(b) must be *meaningfully* weighed. In some cases, the Commission may not be in a position to have regard to the matters identified at s.243(1)(b), because there is insufficient material before it about the relevant issue(s). For instance, in the absence of evidence about the *'prevailing pay and conditions within the relevant industry or sector'*, *'including whether low rates of pay prevail'*, the Commission may not be in a position to properly take into account the matters articulated at s.243(1)(b)(i).

34. If the Commission is not properly informed in relation to any of the mandatory considerations, it follows that, respectfully, it cannot reach the requisite degree of satisfaction required to invoke its power to make a SBA. That is, the Commission cannot be satisfied that it is appropriate to make a SBA if it is unable to have regard to any of the mandatory considerations. In such circumstances, its assessment as to whether it would be appropriate for the relevant employers and employees to bargain together would be fundamentally incomplete and therefore, it would not have jurisdiction to make a SBA.

35. Any limitation on the capacity of the Commission to robustly assess the matters that it is directed to take into account, either as product of deficiencies in the material put before it or limitations on its capacity to ascertain relevant information on its accord, is a factor that will, at the very least, weigh against the granting of an application.

36. We also note that the consent of the parties to a particular application does not negate the task imposed upon the Commission by s.243(1); nor will reliance upon agreement between individual employers and employees (or their representatives) about relevant factual propositions necessarily be sufficient for the Commission to meet its obligations under the Act. The Commission's role is not to rubber stamp an application, even if it is desired by all parties.

The Prevailing Pay and Conditions

37. Section 243(1)(b)(i) requires the Commission to take into account:

> the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector).

38. We make various observations about this provision.

39. *First,* s.243(1)(b)(i) requires a consideration of remuneration levels *and* other conditions of employment. This includes leave entitlements, hours of work arrangements, entitlements associated with the termination of employment, consultation obligations, rights to flexible working arrangements and all other relevant terms. The requisite assessment is a wholistic one that takes all conditions into account, rather than a narrower assessment that is limited to employees' pay.

40. *Second,* the provision requires a consideration of the prevailing terms and conditions in the *'industry or sector'*. This requires an assessment that is broader than a consideration of the terms and conditions prevailing amongst the employers and employees who would be covered by the proposed SBA.

41. *Third,* s.243(1)(b)(i) refers to *'the relevant industry or sector'*, in the singular. This strongly suggests that Parliament did not intend for SBAs to require a group of employers in different industries and sectors to bargain together.

42. *Fourth*, specific consideration must be given to whether *'low rates of pay'* prevail in the industry or sector. The existence of low rates of pay would lend support to the granting of a proposed SBA. The absence of low rates of pay would weigh strongly against the granting of a SBA.

43. *Fifth,* the Act does not require that all employees in a particular sector be paid at or below a particular rate in order to enable the granting of a SBA. Nonetheless, the remuneration that is paid in a sector is an important consideration. This should entail a consideration of both the quantum of remuneration paid to individual employees in an industry or sector and of how commonly rates beyond low rates are paid. The greater the extent to which rates of pay in excess of *'low rates'* are paid, the less appropriate the grant of a SBA will be. It would generally not be appropriate to grant a SBA where payment of low rates of pay in a sector was not a typical or predominant practice.

44. *Sixth,* whilst a consideration of the extent of award-reliance in the industry or sector may be relevant, the existence of widespread award-reliance of itself may not render a SBA appropriate. For example, it would be necessary to also consider the specific pay and conditions that are afforded to employees under the relevant award. Put simply, not all award rates could be characterised as being *'low'*.

Clearly Identifiable Common Interests

45. Section 243(1)(b)(ii) requires the Commission to have regard to *'whether the employers have clearly identifiable common interests'*. Section 243(2) provides examples of common interests *'that employers may have'*.

46. The existence of common interests will be critical when determining whether it is appropriate to make a SBA. In the absence of relevant common interests, a group of employers may have various characteristics that distinguish them in ways that render it inappropriate or impracticable to bargain together.

47. Nonetheless, the existence of a common interest cannot, of itself, satisfy the Commission that it is appropriate to make a SBA. For instance, it cannot be accepted that four businesses located in the same geographic location (e.g. on the same street, in the same suburb), each operating in different sectors, providing wholly different types of services, have a common interest that warrants the making of a SBA. The mere identification of a common interest would not be enough to establish that a SBA must be made. Rather, when

assessing the significance of a common interest and the extent to which it supports the making of a SBA, the Commission should also have regard to:

(a) The nature of the common interest;

(b) The relevance that it has to the setting of employees' terms and conditions; and

(c) The extent to which it relates to the employers' operational requirements and realities.

48. Similarly, that a group of employers are *'substantially funded … by the Commonwealth'*[15] may not of itself be enough to satisfy the Commission of the appropriateness of making a SBA. There are various types of funding afforded by the Commonwealth to different industries and, in some cases, within industries. Different funding models can operate in different ways and have differing implications for employers and employees. For instance, whilst the provision of home care to an aged person and a person with a disability are both funded by the Commonwealth, they are subsidised through fundamentally different programs that allocate funding to employers on different bases and in different ways. The specific implications of relying on such funding in respect of disability workers are different from the implications in respect of the provision of aged care in private residences.

49. Further, a group of employers receiving funding from the same source may not have a common interest that supports the making of a SBA because, for instance, some rely solely on that funding whilst others have access to other income streams. Alternatively, various organisations funded by one source may provide different types of services, such as organisations providing different types of early education and care services, which are all indirectly funded through the federal Childcare Subsidy.

[15] Section 243(2)(c) of the Act.

50. Similarly, the fact that a group of employers are required to comply with the same set of regulatory requirements may not justify the making of a SBA. Whether or not this is so will necessarily depend on the specific facts of the matter.

51. The Commission should adopt a careful and nuanced approach to evaluating any purported common interests.

52. Finally and for completeness, consistent with the Supplementary Explanatory Memorandum to the Bill, when considering the *'nature of the enterprises'*, as contemplated by s.243(2)(b), factors such as the *'relative size and scope of the enterprises would be relevant'*.[16]

The Number of Bargaining Representatives

53. In circumstances where an authorisation is sought in relation to a narrow cohort of parties and there is a small number of representatives, this matter is not likely to weigh against the granting of a SBA. If a SBA is sought that could cover a wider range of parties with a greater number of representatives, the significance of this issue will be much greater.

Any Other Matters

54. Section 243(2)(b)(iv) of the Act requires the Commission to have regard to *'any other matters the [Commission] considers appropriate'*. It casts a wide net.

55. To some extent, the matters that the Commission must take into account pursuant to s.243(2)(b)(iv) will differ between applications for SBAs, depending on the matters in issue in each set of proceedings, the circumstances of the relevant employers and employees, the context in which the application has been brought, the characteristics of the industry or sector in which the employers and employees are engaged, etc.

[16] Supplementary Explanatory Memorandum at [161].

56. Nonetheless, we apprehend that it will typically, if not always, be appropriate for the Commission to take the following matters into account:

(a) The views of the employers who would be covered by the proposed agreement. This is a matter that should be given significant weight.

We note that the Revised Explanatory Memorandum for the Bill relevantly says as follows in this regard: (emphasis added)

> 983. … In determining whether it is appropriate for the employers and employees to bargain together, it will be relevant for the Fair Work Commission to consider whether any employee organisation or employer supports this course of action. …
>
> 984. When considering whether it is appropriate for the employer and employees to bargain together, the FWC would have regard to:
>
> …
>
> • any other matters the FWC considers appropriate – this may include considering the views of the bargaining representatives.[17]

(b) Any history of bargaining between the relevant employers and employees.

(c) Any intention or efforts to make a single-enterprise agreement amongst the relevant employers and employees.

57. Where any of the employers and employees have previously engaged in enterprise bargaining and the relevant agreement has passed its nominal expiry date, the Commission should be reluctant to name them in a SBA, particularly where they do not wish to be covered by the proposed agreement and / or if they intend to engage in bargaining for a new single-enterprise agreement. Consistent with the scheme of the Act and the limited purpose for which the supported bargaining scheme has been created, such employers and employees should not lightly be required to be party to a multi-enterprise agreement. This is particularly relevant because once an employer is named in a SBA that is in operation, it can only make a supported bargaining agreement with the relevant group of employees.[18] The employer is prohibited from initiating bargaining or

[17] Revised Explanatory Memorandum at [983] – [984].

[18] Section 172(7)(a) of the Act.

agreeing to bargain with those employees or their representatives.[19] Further, the Act does not provide for a clear pathway back to single-enterprise agreements once an employer is covered by a SBA or a supported bargaining agreement.

58. Depending on the circumstances of a given matter, it may also be appropriate to take into account:

    (a) Where there is a third party *'who exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement'* that their participation in bargaining is *'necessary for the agreement to be made'*,[20] or there is some other third party who directly or indirectly funds the employers who would be covered by the agreement; the willingness, capacity and ability of that other party to provide the requisite support, assistance, funding etc, that would enable an improvement in the terms and conditions afforded by the employers to the employees.

    (b) Any potential implications for the customers, clients or other users of the employers' products or services.

    (c) Any potential implications for other employers and employees who work in the same supply chain as those that are the subject of the application.

    (d) Whether the making of a multi-enterprise agreement may unfavourably distort the labour market, by delivering significantly enhanced conditions to certain cohorts of workers *vis-à-vis* others who, for example, work alongside the relevant employees and undertake work that is substantially similar in nature.

[19] Section 172(2)(b) of the Act.

[20] Section 246(3) of the Act.

4. RESPONSE TO THE APPLICANTS' & RESPONDENTS' MATERIAL

59. We briefly respond to two key issues arising from the material filed by the applicants and respondents in this matter.

The Scope of Any Findings Made by the Commission

60. The SBA sought by the applicants in this matter would apply only to certain employers and employees in the long day care sector.[21] Despite this, various aspects of the materials filed by the applicants and respondents refer to the early education and care industry at large. This includes the agreed statement of facts, which contains certain statements about the *'early childhood, education and care sector'* (**ECEC Sector**) generally.

61. Given the proposed scope of the SBA, in the interests of fairness, the Commission should be cautious about make findings that relate to any part of the ECEC Sector other than the long day care sector. It should be particularly cautious about making findings upon facts *'agreed'* between a discrete cohort of employee and employer representatives.

Gender-Related Concerns

62. Various parties have raised gender-related concerns in their materials. For example:

    (a) The United Workers' Union (**UWU**) submits that the fact that the workforces of the relevant employers are *'female dominated'* is an identifiable common interest for the purposes of s.234(1)(b)(ii) of the Act.[22]

[21] See for example description of the scope of the SBA sought at pages 9 – 10 of the amended application.

[22] UWU submission at paragraph 52(g).

(b) The proposition that the workforce employed in the ECEC Sector *'is overwhelmingly female and addressing pay and conditions in the ECEC sector is central to addressing the gender pay gap'* is said by the Independent Education Union (**IEU**) to be a relevant consideration for the purposes of s.234(1)(b)(iv) of the Act.[23]

(c) Similarly, the Australian Education Union (**AEU**) argues that, pursuant to s.234(1)(b)(iv) of the Act, considerations that are likely to be relevant include *'whether the relevant employees are in a female-dominated industry or belong to a female-dominated vocation'* and *'gender-based under-valuation of work … which [is] unlikely to be effectively addressed or acknowledged in bargaining at a single-enterprise level'*.[24]

(d) The AEU also contends that in the context of these proceedings, that the *'workforce in the ECEC sector is highly feminised'* and that *'it is overwhelmingly likely that gender-based assumptions in relation to the nature of the work and skills involved in caring and education of children has contributed significantly to the undervaluation of work in the sector'* should be taken into account by the Commission pursuant to s.234(1)(b)(iv) as factors that support a conclusion that it is appropriate to issue the SBA sought.

63. In response we submit that:

(a) Similarities in the demographic profile of a group of employers' workforces does not necessarily constitute an identifiable common interest that lends support to the making of a SBA. The proposition that a cohort of employers mostly employ women, without more, does not establish that it is appropriate for them to bargain together.

[23] IEU submission at paragraph 27.

[24] AEU submission at paragraphs 31(b) – (c).

(b) The notion that the making of a SBA or a consequential multi-enterprise agreement is *'central to addressing the gender pay gap'* should not be lightly accepted, unless there is probative material before the Commission that the proposed SBA will have a fundamental bearing on the gender pay gap.

(c) The fact that the proposed SBA relates to an industry, sector or occupation that is female dominated is not necessarily relevant, for the purposes of s.243(1)(b)(iv) of the Act, to whether a proposed SBA should be issued.

(d) The Commission should not accept any contention that the work performed in a particular industry or sector has been the subject of gender-based undervaluation, or that that undervaluation will be addressed if a proposed SBA is issued, in the absence of probative material that establishes those matters.