DECISION

Fair Work Act 2009
s.248 - Application for a single interest employer authorisation

Australian Municipal, Administrative, Clerical and Services Union
v
Central Goldfields Shire Council, Ararat Rural City Council
(B2024/840)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT CLANCY
COMMISSIONER CONNOLLY

SYDNEY, 27 NOVEMBER 2024

Application by the Australian Municipal, Administrative, Clerical and Services Union for a single interest employer authorisation – requirements in s 249 of the Fair Work Act 2009 (Cth) – whether the employer and an employee organisation had agreed in writing to bargain for a single-enterprise agreement – first occasion s 249(1D)(b) has been considered by the Commission – "agreed in writing" – whether indicating willingness to attend a meeting by email constituted agreement in writing to bargain for a single-enterprise agreement – whether contrary to the public interest to make a single interest employer authorisation – whether making a single interest authorisation would be inconsistent with the object of the Act or the fundamental workplace relations principles agreed between the Commonwealth and the States – history of enterprise bargaining – requirements of ss 249 and 249A of the Fair Work Act 2009 (Cth) satisfied – single interest employer authorisation made.

Introduction

[1] The Australian Municipal, Administrative, Clerical and Services Union (the **ASU**) wishes to engage in collective bargaining for the purpose of making an enterprise agreement to cover two local councils in Victoria, namely, Central Goldfields Shire Council (**Goldfields Council**) and Ararat Rural City Council (**Ararat Council**). To facilitate that outcome, the ASU has filed an application under s 248 of the *Fair Work Act 2009* (Cth) (the **Act**) for what is known as a single interest employer authorisation.

[2] Ararat Council does not oppose the application or otherwise wish to be heard. The application is, however, opposed by Goldfields Council. By the time of the hearing of the application, Goldfields Council advanced two grounds which it contends mean a single interest employer authorisation cannot be made. The two grounds are:

(a) That Goldfields Council and the Australian Nurses and Midwives' Federation (the **ANMF**) have agreed in writing to bargain for a proposed single-enterprise agreement for the purposes of s 249(1D)(b) of the Act; and

(b) That the Commission should not be satisfied that it is not contrary to the public interest to make the authorisation sought by the ASU for the purposes of s 249(3)(b) of the Act.

[3] The application is made under provisions of the Act which were substantially amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (the **SJBP Act**). The relevant amendments commenced on 6 June 2023. The current proceeding represents the first application for a single interest employer authorisation which raises the issue of whether an employee organisation and an employer have "agreed in writing to bargain for a proposed single-enterprise agreement" within the meaning of s 249(1B)(e) and (1D)(b). The application was assigned to a Full Bench of the Commission by the President under s 615(1) of the Act. The Australian Council of Trade Unions (the **ACTU**) was given permission to make written and oral submissions in relation to that question and, once it was raised, the question of whether it is not contrary to the public interest to make the authorisation for the purposes of s 249(3)(b).

[4] The material filed by the parties in relation to the application included:

(a) A statement of agreed facts agreed to as between the ASU and Goldfields Council dated 9 August 2024;

(b) A statement of agreed facts agreed to as between the ASU and Ararat Council dated 9 August 2024;

(c) A witness statement of Jane Humphrey, an elected workplace delegate of the ASU, dated 18 September 2024;

(d) A witness statement of Veronica Hutcheson, Manager People and Culture for Goldfields Council, dated 18 September 2024;

(e) A number of outlines of written submissions filed by the ASU, Goldfields Council and the ACTU addressing the questions of majority support, whether there had been an agreement in writing to bargain for a single-enterprise agreement and the public interest; and

(f) Some additional documents tendered by Goldfields Council, including the Intergovernmental Agreement for a National Workplace Relations System for the Private Sector, the Form F17 application for approval of the 2020 Agreement and a series of previous enterprise agreements which had covered Goldfields Council since around 1996.

[5] Neither of the witnesses who made witness statements for the purposes of the proceedings were required for cross-examination and there was no dispute of any substance in relation to the relevant facts.

[6] For the reasons that follow, we are satisfied that the relevant requirements of ss 249 and 249A of the Act have been met such that the Commission must make a single interest employer authorisation as sought by the ASU.

Statutory Provisions

[7] Division 10 of Part 2-4 of the Act makes provision for the Commission to make a single interest employer authorisation. Section 248 provides that an application for an authorisation in relation to a proposed enterprise agreement that will cover two or more employers may be made by those employers or a bargaining representative of an employee who will be covered by the agreement.

[8] The circumstances in which the Commission must make a single interest employer authorisation are then set out in s 249 which provides as follows:

> **249 When the FWC must make a single interest employer authorisation**
>
> *Single interest employer authorisation*
>
> (1) The FWC must make a single interest employer authorisation in relation to a proposed enterprise agreement if:
> (a) an application for the authorisation has been made; and
> (b) the FWC is satisfied that:
> (i) at least some of the employees that will be covered by the agreement are represented by an employee organisation; and
> (ii) the employers and the bargaining representatives of the employees of those employers have had the opportunity to express to the FWC their views (if any) on the authorisation; and
> (iii) if the application was made by 2 or more employers under paragraph 248(1)(a)—the requirements of subsection (1A) are met; and
> (iv) if the application was made by a bargaining representative under paragraph 248(1)(b)—each employer either has consented to the application or is covered by subsection (1B); and
> (v) the requirements of either subsection (2) or (3) (which deal with franchisees and common interest employers) are met; and
> (vi) if the requirements of subsection (3) are met—the operations and business activities of each of those employers are reasonably comparable with those of the other employers that will be covered by the agreement.
>
> (1AA) If:
> (a) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and
> (b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;
> it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved.
>
> *Additional requirements for application by employers*
>
> (1A) The requirements of this subsection are met if:
> (a) the employers that will be covered by the agreement have agreed to bargain together; and
> (b) no person coerced, or threatened to coerce, any of the employers to agree to bargain together. Additional requirements for application by bargaining representative

(1B) An employer is covered by this subsection if:
(a) the employer employed at least 20 employees at the time that the application for the authorisation was made; and
(b) the employer has not made an application for a single interest employer authorisation that has not yet been decided in relation to the employees that will be covered by the agreement; and
(c) the employer is not named in a single interest employer authorisation or supported bargaining authorisation in relation to the employees that will be covered by the agreement; and
(d) a majority of the employees who are employed by the employer at a time determined by the FWC and who will be covered by the agreement want to bargain for the agreement; and
(e) subsection (1D) does not apply to the employer.

(1C) For the purposes of paragraph (1B)(d), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

(1D) This subsection applies to an employer if:
(a) the employer and the employees of the employer that will be covered by the agreement are covered by an enterprise agreement that has not passed its nominal expiry date at the time that the FWC will make the authorisation; or
(b) the employer and an employee organisation that is entitled to represent the industrial interests of one or more of the employees of the employer that will be covered by the agreement have agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and those employees or substantially the same group of those employees.

Franchisees

(2) The requirements of this subsection are met if the employers carry on similar business activities under the same franchise and are:
(a) franchisees of the same franchisor; or
(b) related bodies corporate of the same franchisor; or
(c) any combination of the above.

Common interest employers

(3) The requirements of this subsection are met if:
(a) the employers have clearly identifiable common interests; and
(b) it is not contrary to the public interest to make the authorisation.

(3A) 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.

(3AB) If:
(a) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and

(b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the requirements of subsection (3) are met in relation to that employer, unless the contrary is proved.

Calculating number of employees

(3AC) For the purposes of calculating the number of employees referred to in paragraph (1AA)(b), (1B)(a) or (3AB)(b):

(a) ***employee*** has its ordinary meaning; and

(b) subject to paragraph (c), all employees employed by the employer at the time that the application for the authorisation was made are to be counted; and

(c) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer; and

(d) associated entities of the employer are taken to be one entity.

Operation of authorisation

(4) The authorisation:

(a) comes into operation on the day on which it is made; and

(b) ceases to be in operation at the earlier of the following:

(i) at the same time as the enterprise agreement to which the authorisation relates is made;

(ii) 12 months after the day on which the authorisation is made or, if the period is extended under section 252, at the end of that period.

[9] Section 249A provides that the Commission must not make a single interest employer authorisation in relation to a proposed enterprise agreement if the agreement would cover employees in relation to general building and construction work. The required content of a single interest employer authorisation is then prescribed by s 250 of the Act.

[10] The requirements that must be satisfied for an authorisation to be made under s 249 of the Act are complex and vary depending on the nature of the application, the circumstances of the employers involved and the circumstances in which the application is made. The Revised Explanatory Memorandum to the SJBP Act stated that the purpose of the amendments leading to the current provisions of the Act was as follows:[1]

> 1006. Part 21 of Schedule 1 to the Bill would amend Division 10 of Part 2-4 of the FW Act to remove unnecessary limits on access to single interest employer authorisations and simplify the process for obtaining them, and facilitating bargaining by:
>
> - removing the requirement for two or more employers with common interests who are not franchisees to obtain a Ministerial declaration before applying a single interest employer authorisation;
> - providing for employee bargaining representatives to apply for a single interest employer authorisation to cover two or more employers, subject to majority support of the relevant employees;
> - permitting employers and employee bargaining representatives to apply to vary a single interest employer authorisation to add or remove the name of an employer from the authorisation, subject to meeting specified requirements; and
> - inserting new Subdivision AD—Variation of single interest employer agreement to add employer and employees, into Division 7 of Part 2-4 of the FW Act to permit employers and employee organisations to apply to the FWC for approval of a variation to extend

coverage of an existing single interest employer agreement to a new employer and its employees, subject to meeting specified requirements.

[11] The Revised Explanatory Memorandum later explains:[2]

> 1066. New subsection 249(1) would delineate the requirements of which the FWC must be satisfied before making a single interest employer authorisation depending on whether the application for the authorisation was made by the employer and its employees, or an employee organisation. It would also clarify the requirements of which the FWC must be satisfied depending on whether the single interest employer authorisation is to operate in respect of two or more common interest employers or franchisees. The term 'common interest employers' would be introduced by these amendments and used to identify those employers who may be included in a single interest employer authorisation but who are not franchisees.

[12] The application in the present matter has been made by the ASU under s 248(1)(b) on the basis that it is a bargaining representative of an employee who will be covered by the proposed single interest employer agreement. In the circumstances of this application, the relevant requirements that must be met before the Commission must make an authorisation are that:

(a) An application for an authorisation has been made (s 249)(1)(a));

(b) At least some of the employees that will be covered by the agreement are represented by an employee organisation (s 249(1)(b)(i));

(c) The employers and bargaining representatives of the employees of those employers have had the opportunity to express their views on the authorisation to the Commission (s 249(1)(b)(ii));

(d) Each employer has consented to the application or, if not, the employer is covered by subsection (1B) (s 249(1)(b)(iv));

(e) The employer has at least 20 employees at the time of the application, the employer has not made an application for a single interest employer authorisation that has not yet been decided in relation to the employees and is not named in a single interest employer authorisation in relation to the employees and a majority of employees employed by the employer at a time determined by the Commission and who will be covered by the Agreement want to bargain (s 249(1B)(a)-(d));

(f) Subsection (1D) does not apply to the employer in that the employer and employees are not covered by an enterprise agreement that has not passed its nominal expiry date and the employer and an employee organisation have not agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and those employees or substantially the same group of employees (s 249(1B)(e) and (1D);

(g) The requirements eithers subsections (2) or (3) of s 249 are met in that, relevantly in the case of "common interest employers", that the employers have

clearly identifiable common interests and it is not contrary to the public interest to make the authorisation (s 249(1)(b)(v) and (3));

(h) In case of common interest employers, the operations and business activities of each of the employers are reasonably comparable with those of other employers that will be covered by the agreement (s 249(1)(b)(vi)); and

(i) The proposed enterprise agreement would not cover employees in relation to general building and construction work (s 249A).

[13] Initially, Goldfields Council objected to the application on grounds that the Commission should not be satisfied that a majority of employees who will be covered by the agreement want to bargain (s 249(1B)(d)) and that the ANMF had agreed in writing to bargain for a single-enterprise agreement (s 249(1D)(b)). After the ASU filed its evidence, Goldfields Council indicated that it does not oppose a finding that a "slim majority" of employees want to bargain for a multi-enterprise agreement for the purposes of s 249(1B)(d) but continued to contend that it had agreed in writing with the ANMF to bargain for a proposed single-enterprise agreement. Shortly prior to the hearing of the application, Goldfields Council also raised a contention that the Commission should not be satisfied that it is not contrary to the public interest to make an authorisation (s 249(3)(b)).

Background

[14] One of the submissions advanced by Goldfields Council is that the Commission is precluded from making the authorisation because the Council has agreed in writing to bargain with the ANMF under s 249(1D)(b) through communications that took place in late May and early June 2024. The communications involving the Goldfield Council and the ASU, the ANMF and Professionals Australia in relation to bargaining for a new enterprise agreement between February and June 2024 have some potential relevance to that issue so as to provide context in which to understand the communications relied upon by the Goldfields Council.

[15] Employees of Goldfields Council who are eligible to be members of the ASU, the ANMF and Professionals Australia are currently covered by an enterprise agreement known as the *Central Goldfields Shire Council Enterprise Agreement No. 8 2020* (the **2020 Agreement**). The parties to the 2020 Agreement are described as being Goldfields Council, the ASU, Professionals Australia and the ANMF. The 2020 Agreement passed its nominal expiry date on 30 June 2024. Relevant employees of Ararat Council are covered by the *Ararat Rural City Council Enterprise Agreement No. 9 2021*. That agreement also passed its nominal expiry date on 30 June 2024.

[16] On 7 February 2024, officials of the ASU and delegates employed by Goldfields Council met and discussed the possibility of joining with another council and bargaining for one enterprise agreement to apply across the two local councils. Subsequently, on 27 February 2024, a Lead Organiser for the ASU, Zoe Edwards, contacted Goldfields Council and requested a meeting with the CEO of the Council. As the CEO was then on leave, Ms Edwards requested that Goldfields Council delay issuing a notice of employee representational rights to commence bargaining until the ASU had met with the CEO.

[17] On 15 March 2024, Ms Edwards and the Deputy Branch Secretary of the ASU, Tash Wark, met with representatives of Goldfields Council. During the meeting, Ms Wark and Ms Edwards communicated that the ASU wanted to bargain for a multi-enterprise agreement with another local council. On 21 March 2024, a Goldfields Council sent an email to the ASU thanking the ASU for the offer to be part of a multi-employer bargaining process but stating that the Council's preference was for "an individual approach". The email further advised that "the P&C team will be in touch shortly to discuss getting the process underway".

[18] On 27 March 2024, Ms Edwards sent an email to the Council indicating that the ASU was disappointed by the response and that: "For the avoidance of any doubt, the ASU does not consent to commencing bargaining for a single enterprise agreement, at this time". On 10 April 2024, Goldfields Council confirmed that it would not be committing to entering into multi-employer agreement processes. Further discussions took place involving representatives of Goldfields Council and the ASU without resolving this disagreement.

[19] Relevant communications with the ANMF also commenced in February 2024. On 13 February 2024, Goldfields Council's Manager People and Culture, Robyn Clark, emailed an industrial relations organiser for the ANMF, Cassia Drever-Smith, to request a meeting to discuss the commencement of bargaining. The email stated:

> Good morning Cassie,
>
> My name is Robyn Clark and I am the Manager People and Culture at Central Goldfields Shire Council (CGSC). Mick Smith, GM Corporate Performance, (and my manager), has passed on your details to me.
>
> As you may be aware, CGSC's Enterprise Agreement expires 30th June 2024 - yes, this year.
>
> So I was wondering, would you like to set up a meeting time, to start the conversation about our EA Renewal process.
>
> Look forward to hearing back from you,
> Regards, Robyn

[20] Ms Drever-Smith responded on the same day indicating that she was happy to meet "to discuss the commencement of bargaining". A meeting took place on 23 February 2024. However, on 1 March 2024, Ms Clark emailed Ms Drever-Smith to inform her that the ASU had requested that Goldfields Council hold off issuing a notice of employee representational rights. No further communications occurred involving the ANMF concerning the commencement of bargaining until May.

[21] On 15 May 2024, the new Manager People and Culture for Goldfields Council, Veronica Hutcheson, sent identical correspondence to the ASU and the ANMF indicating an intention to start bargaining. Correspondence to the same effect was sent to Professionals Australia albeit not until 28 May 2024. The letter dated 15 May 2024 sent to the ANMF was in the following terms:

> Dear Cassia
>
> **Re: Commencement of Bargaining Period**

> I wish to invite the ANMF to participate in bargaining for a new Enterprise Agreement to cover employees of Central Goldfields Shire Council.
>
> An initial meeting has been scheduled for:
> Tuesday 11 June 2024
> 8.30am to 10.30am
> 12-22 Nolan St Maryborough Victoria.
>
> Our intention at this first meeting is to cover the following matters:
> • Introduction of participants
> • Future meeting schedule
> • Bargaining obligations of the parties
> • Logs of claim
> • Other business
>
> If the ANMF has settled a Log of Claims by the date of the first meeting, there will be an opportunity for the Log to be tabled and the items explained. Alternatively, we would expect that the Union Log would be tabled at the second meeting. To ensure that the Union Log is tabled as soon as possible, I would be willing to approve paid Union meetings with members.
>
> As a matter of process, employees will receive the Notice of Employee Representational Rights this week.

[22] On 20 May 2024, Ms Drever-Smith responded on behalf of the ANMF responded by email in the following terms:

> Good morning, Veronica
>
> Thank you for advising of the commencement of bargaining.
>
> I will be on leave the week commencing 10 June 2024, but relieving Organiser Tara Hill will attend in my stead. Alternately, I am happy to negotiate dates the week preceding and following.
>
> As you are aware, I have met with members to commence drafting the LOC – I will advise of when the next meeting will be and anticipate the that the LOC will be ready to present by 11 June 2024.
>
> I look forward to meeting soon, …

[23] A notice of employee representational rights was issued to employees of Goldfields Council who were eligible to be members of the ASU, Professionals Australia and ANMF on 17 May 2024.

[24] As foreshadowed, a bargaining meeting then took place on 11 June 2024. In attendance at the meeting were Ms Hutcheson and other representatives of Goldfields Council, a representative of Professionals Australia, Andy Richards, an Industrial Relations Organiser for the ANMF, Tara Hill, and a workplace delegate of the ANMF, Leonie Harper. No representative of the ASU was in attendance. Among other things, the minutes of the meeting record that discussion took place in relation to the non-attendance of the ASU. The minutes record the following discussion:

> AR - Wondering why ASU were not at the meeting and if an ASU representative was present at the meeting.
>
> RC - confirmed ASU did not have a representative present at the meeting, despite being invited in writing no confirmation or apology had been received. RC then conveyed that ASU had requested that CGSC consider a multi-employer agreement and join with Ararat City Council. After considering the proposed direction it was decided that CGSC was not in a position at this point in time to join a multi-employer agreement as a number of consolidations are still required in the EA and the needs of our people and CGSC business are being met. Asked us to reconsider for a second time which CGSC did and legal advice and industrial was sought. In an email back to us ASU displayed disappointment that we were not progressing with a multi employee agreement and that was their position, and they are not willing to negotiate a single enterprise agreement with us (CGSC). We will continue to invite them to the table and continue to give them the minutes from our discussions. ASU are party to our agreement, but we (CGSC) need to progress bargaining for a single enterprise agreement.

[25] ANMF and Professionals Australia both indicated that they would need to speak to the ASU to understand the ASU's position. Ms Hill, who attended for the ANMF, is later recorded has having said:

> TH - presented the AMF perspective guided by MCH and Immunization appendices. In light of ASU not being present a rethink of the process may be required; the current log is submitted in good faith at this time but will require expansion with ASU not in attendance.

[26] Towards the end of the meeting on 11 June 2024, Ms Hill sent an email to Ms Hutcheson attaching a log of claims for the ANMF. The text of the email itself was in the following terms:

> Hi Veronica,
>
> As discussed, the current LOC, noting it's subject to change through the next member's meeting dependent on ASU's position moving forward.
>
> Kind regards, Tara

[27] The log of claims itself bears the title "ANMF Local Government MCH & Immunisation Nurses EBA Claim 20203'. The log of claims contained a preamble which stated as follows:

> The intention of the ANMF (Victoria Branch) is to genuinely negotiate with respondent employers and their representatives in accordance with the provisions of the Fair Work Act 2009 and to consider all genuine proposals of settlement that provide outcome that enhance the economic conditions and careers of registered nurses and midwives employed in the Local Government nursing sector. To this extent, this EBA claim may be varied by the ANMF to allow for conditions of employment and other arrangements specific to individual workplaces.

[28] On 26 June 2024, a further bargaining meeting took place. The only union representative present at the meeting was the workplace delegate of the ANMF, Ms Harper. During the meeting, representatives of Goldfields Council recorded that Mr Richards had communicated that Professionals Australia was not in a position to commence bargaining having regard to the position of the ASU.

[29] On 2 July 2024, the ASU filed their application with the Commission for a single interest employer authorisation. On 4 July 2024, a meeting took place involving Ms Hutcheson, Ms Clark, Ms Drever-Smith and an Industrial Officer of the ANMF, Monique Segan. At the meeting, the ANMF requested that bargaining be paused until after the ASU's application was determined.

[30] On 11 September 2024, Ms Segan sent an email to Ms Hutcheson on behalf of the ANMF. The email stated:

> Dear Veronica,
>
> As you are aware, ANMF (Vic Branch) is supportive of the Fair Work Commission making a single interest employer authorisation in matter B2024/840.
>
> On this basis, I am writing to confirm that ANMF does not agree to bargain for a single enterprise agreement for Central Goldfields Shire Council.

[31] Goldfields Council relied upon two pieces of correspondence as giving rise to an agreement in writing between it and the ANMF to bargain for a single-enterprise agreement being the email from Ms Drever-Smith to Ms Hutcheson dated 20 May 2024 and the preamble to the ANMF's log of claims sent by Ms Hill to Ms Hutcheson on 11 June 2024. It also says, however, that the remaining communications and events to which we have referred provide relevant context or background which assists in understanding those two communications.

Requirements of sections 249 and 249A of the Act – Matters not in contention

[32] Against that background, it is necessary to deal with each of the requirements in ss 249 and 249A in turn with particular focus on the two requirements that remain in dispute between the parties. It is convenient to first address the considerations that are not in dispute.

Was a valid application made?

[33] An application was made by the ASU under s 248 of the Act on 2 July 2024 as required by s 249(1)(a). There is no dispute, and we are satisfied on the evidence, that the ASU is a bargaining representative of an employee who will be covered by the Agreement for the purposes of s 248(1)(b). The application specifies the employers and employees who will be covered by the agreement for purposes of s 248(2).

Are at least some of the employees who will be covered by the Agreement represented by an employee organisation?

[34] There is no dispute, and we are satisfied on the evidence, that at least some of the employees who will be covered by the agreement are represented by an employee organisation for the purposes of s 249(1)(b)(i). The statements of agreed facts filed in the proceedings indicate that the ASU, the ANMF and Professionals Australia each have members who are employees of Goldfields Council and Ararat Council to whom the proposed agreement would apply.

Have the parties had the opportunity to express their views?

[35] We are satisfied that Goldfields Council and Ararat Council, as employers, and the ASU, ANMF and Professionals Australia, as the bargaining representative of the employees who will be covered by the agreement, have had the opportunity to express their views on the proposed authorisation for the purposes of s 249(1)(b)(ii). The ASU and Goldfields Council appeared at the hearing and made submissions. Ararat Council, the ANMF and Professionals Australia all received the directions issued by the Commission and were represented at the hearing of the application but chose not to make submissions.

Has each employer consented to the application or is each employer covered by (1B)?

[36] Ararat Council does not oppose the application. However, as has been made clear, Goldfields Council has not consented to the application. Accordingly, it is necessary that both Goldfields Council and Ararat Council are covered by s 249(1B).

[37] There is no dispute and we are satisfied that both Goldfields Council and Ararat Council are covered by s 249(1B)(a)-(d). For the purposes of s 249(1B)(a)-(c), the statements of agreed facts record that Goldfields Council and Ararat Council both have more than 20 employees, have not made an application for a single interest employer authorisation that has not been decided and are not named in a single interest employer authorisation or supported bargaining authorisation that would cover the employers and those employees or substantially the same group of employees.

[38] There was initially dispute as to whether a majority of employees who are employed by Goldfields Council and will be covered by the agreement want to bargain for the agreement. The ASU filed evidence in the form of the witness statement of Jane Humphrey which included evidence of the collection of a petition of employees of Goldfields Council. A preliminary assessment of the petition was undertaken by the Commission on 1 August 2024. The preliminary assessment indicated that 108 employees had signed the petition indicating support for a multi-enterprise agreement and that there were 208 employees of Goldfields Council who would be covered by the proposed agreement as at 2 July 2024.

[39] Section 249(1B)(d) requires that the Commission determine the time at which the assessment of whether a majority of employees want to bargain should be assessed. We determine that the appropriate time is 2 July 2024 being the date of the ASU's application. On the basis of the evidence that has been filed, we are satisfied that a majority of the employees who were employed by Goldfields Council as at 2 July 2024 and who will be covered by the proposed agreement want to bargain for the agreement. As we have mentioned, Goldfields Council did not contend that the Full Bench should not make such a finding.

[40] The combined operation of ss 249(1)(b)(iv) and (1B)(e) requires that subsection (1D) not apply to each employer. Neither Goldfields Council or Ararat Council are covered by an enterprise agreement that has not passed its nominal expiry date for the purposes of s 249(1D)(a). There is no evidence that Ararat Council has agreed in writing with any employee organisation to bargain for a single-enterprise agreement that would cover relevant employees for the purposes of s 249(1D)(b). That issue is, however, is contest in relation to Goldfields Council. We will consider that matter later in this decision.

Have the requirements of s 249(2) or (3) been met?

[41] Section 249(1)(b)(v) requires that the Commission be satisfied that the requirements of subsection (2) or (3) be met. Section 249(2) is not applicable because Goldfields Council and Ararat Council are not franchisees. Section 249(3) contains two components, namely, that the employers have clearly identifiable common interests and that it is not contrary to the public interest to make the authorisation.

[42] Some guidance in relation to the task of determining whether the employers have clearly identifiable common interests is provided in s 249(3A) which lists matters that may be relevant to that determination. Those matters are geographical location, regulatory regime and the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises. In *Re United Workers' Union* [2023] FWCFB 176, the Full Bench considered the expression "common interests" in dealing with an application for a supported bargaining authorisation in the context of s 243 of the Act and observed as follows:

> … the expression "common interests" used in s 243(1)(b)(ii) in connection with the employers the subject of an authorisation application is one of wide import, and on its ordinary meaning extends to any joint, shared, related or like characteristics, qualities, undertakings or concerns as between the relevant employers. The diversity of the non-exhaustive list of "examples" of common interests in s 243(2) gives contextual support to the breadth of meaning which we assign to the expression. The common interests must be "clearly identifiable", that is, plainly discernible or recognisable, but need not be self-evident.

[43] The commonality of language used in s 243(1)(b)(ii) and (2) and s 249(3)(a) and (3A), suggests that those observations are relevant in the context of an application for a single interest employer authorisation.[3] In our opinion, that is the case even though the list of potential common interests are provided as examples in s 243(2) and as matters that may be relevant to the determination in s 249(3A).

[44] The agreed statements of fact filed with respect to Goldfields Council and Ararat Council record, and we are satisfied, that Goldfields Council and Ararat Council have clearly identifiable common interests for the purposes of s 249(3)(a). Both statements of agreed facts record as follows:

> CGSC and ARCC have clearly identifiable common interests because they are each:
>
> a. Operating in regional Victoria;
> b. Councils regulated by the *Local Government Act 2020* (Vic);
> c. Deliver the same or substantially the same array of services in their communities; and
> d. Covered by the *Victorian Local Government Award 2015* and have similar applicable nominally expired enterprise agreements.

[45] Where an employer employed 50 employees or more at the time the application was made, s 249(3AB) means that it is presumed that the requirements of subsection (3) are met, unless the contrary is proved. This includes the common interests requirement in s 249(3)(a). No party contended that the requirement was not met, and the presumption means that we must be satisfied the requirement is met.

[46] In any event, we are satisfied that the matters set out in the agreed statements of facts provide a sufficient basis to conclude that the requirement the two councils have clearly identifiable common interests. Whilst the councils operate in distinct geographical locations, both are located in regional Victoria. The councils are subject to the same regulatory regime as local government entities in Victoria, undertake the same or substantially the same type of activities by way of the provision of services to their communities and employees employed by the councils are covered by the same modern award and the terms and conditions of employment are determined by enterprise agreements with similar terms.

Do the employers have reasonably comparable operations and business activities?

[47] We are also satisfied that the operations and business activities of Goldfields Council and Ararat Council are reasonably comparable for the purposes of s 249(1)(b)(vi). The question is again the subject of the statements of agreed facts filed with respect to Goldfields Council and Ararat Council. Both agreed statements of fact record as follows:

> The business activities of CGSC and ARCC are reasonably comparable because they have a common purpose derived from the *Local Government Act 2020* (Vic) and in meeting their purpose each delivers the same or substantially the same array of services in their communities, including but not limited to services relating to:
>
> i. Waste and Recycling;
> ii. Libraries;
> iii. Planning and Building;
> iv. Animals and pets;
> v. Immunisation;
> vi. Maternal and Child Health;
> vii. Parks and Gardens;
> viii. Pools;
> ix. Roads and footpaths;
> x. Sports facilities;
> xi. Gym and fitness facilities;
> xii. Tourism; and
> xiii. Arts and Culture (Visual & Performing).

[48] Section 249(1AA) provides that, if an employer that will be covered by the agreement employed 50 employees or more at the time the application was made, it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers, unless the contrary is proved. Both Goldfields Council and Ararat Council employed more than 50 employees at the time the ASU's application was made. As such, there is a presumption that the requirement in s 249(1)(b)(vi) was met unless the contrary is proved.

[49] As no party has sought to prove that the requirement in s 249(1)(b)(vi) is not satisfied, and there is no evidence before us that this is the case, we find that the requirement in s 249(1)(b)(vi) is met. All parties assert that the requirement is met. Even leaving aside the operation of s 249(1AA), we are satisfied that the requirement in the provision has been met. Although the requirement for comparability of operations and business activities might be said to impose a test that is more stringent than and distinct from the requirement for common interests in s 249(3)(a),[4] the matters recorded in the agreed statements of facts are more than

sufficient to establish that the operations and business activities of the two councils are reasonably comparable.

General building and construction work

[50] The agreed statements of facts filed with respect to Goldfields Council and Ararat Council both record that the proposed agreement will not cover employees in relation to general building and construction work. Section 249A does not prevent the Commission making a single interest employer authorisation as sought by the ASU.

Requirements of sections 249 of the Act – Matters that are in contention

[51] As we recorded at the outset of the decision, Goldfields Council opposes an authorisation being made on two grounds: that it and the ANMF have agreed in writing to bargain for a proposed single enterprise agreement and that the Commission should not be satisfied that it is not contrary to the public interest to make the authorisation. We will deal with those two issues in turn.

Have Goldfields Council and the ANMF agreed in writing to bargain for a proposed single-enterprise agreement?

[52] The first issue in contention between the parties is whether Goldfields Council and the ANMF have agreed in writing to bargain for a proposed single-enterprise agreement that would cover Goldfields Council and the employees that will be covered by the agreement are substantially the same group of employees for the purposes of s 249(1D)(b). Section 249(1D)(b) asks whether an employer and an employee organisation that is entitled to represent the industrial interests of one or more of the employees of the employer that will be covered by the agreement have agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and those employees or substantially the same group of those employees.

[53] The requirements that must be met for s 249(1D)(b) to apply to an employer are that:

(a) There must be an agreement between the employer and an employee organisation;

(b) The employee organisation involved must be entitled to represent the industrial interests of one or more employees of the employer that will be covered by the agreement;

(c) The employer and the employee organisation must have “agreed in writing”; and

(d) The agreement must be to “bargain for a proposed single-enterprise agreement” that would cover the employer and the employees or substantially the same group of employees.

[54] A number of aspects of s 249(1D)(b) are not in dispute. It is accepted that s 249(1D)(b) requires only that there be agreement with a single employee organisation and not all relevant

employee organisations. There is no dispute that the ANMF is an employee organisation that is entitled to represent the industrial interests of one or more employees of Goldfields Council that will be covered by the proposed agreement. The dispute is whether Goldfields Council and the ANMF have agreed in writing to bargain for a single-enterprise agreement. There is no suggestion that the ASU or Professionals Australia have agreed to do so.

[55] The dispute between the parties concentrates on what is meant by the phrase "agreed in writing to bargain for a proposed single-enterprise agreement". The concept of a person having "agreed to bargain" is found in other parts of the Act.[5] In *Transport Workers' Union of Australia v Hunter Operations Pty Ltd* [2014] FWC 7469, Hatcher VP (as his Honour then was) said in the context of s 230(2)(a) that:[6]

> The first issue which needs to be considered is whether Hunter Operations agreed to bargain for the purpose of s.230(2)(a). What constitutes an agreement to bargain is not defined in the Act. Applying conventional contractual principles, I consider that an employer may agree to bargain expressly in writing or orally, or that an employer may be inferred to have agreed to bargain through its conduct (such as by commencing to actually engage in bargaining in relation to a proposed enterprise agreement).

[56] Generally, a person may "agree to bargain" in various ways, including in writing, orally or by conduct. The concept of a person having agreed to bargain in s 249(1D)(b) is distinct in two ways. First, agreement must be in writing. An agreement to bargain made orally or inferred from conduct will not be sufficient. Second, s 249(1D)(b) does not refer to an agreement to bargain in a general sense. The employer and a relevant employee organisation must have agreed in writing to bargain for "a proposed single-enterprise agreement".

[57] The explanatory memorandum to the SJBP Act does not provide any real assistance in understanding the purpose of the requirement in s 249(1D)(b) that agreement be in writing.[7] It can, in our opinion, be inferred that the purpose of the requirement that agreement be in writing must be to provide certainty and to avoid disputation as to whether the employer and an employee organisation have agreed to bargain for a proposed single-enterprise agreement. Given that the consequence of such an agreement is that a single interest employer authorisation cannot be made with respect to the relevant employer without the consent of the employer, we also infer that the section is intended to ensure that an agreement is reached by the parties only after due consideration and not hastily or inadvertently. Although no particular formulation of words is required, that suggests that the agreement in writing should be sufficiently explicit. These considerations provide some context in which s 249(1D)(b) is to be construed.

[58] The text of s 249(1D)(b) requires that the employer and the relevant employee organisation have "agreed in writing" to bargain for a single-enterprise agreement. The requirement to agree "in writing" does not, in our opinion, dictate any particular form of written document or mechanism by which the written agreement is reached. For the purposes of the Act, "writing" includes any mode of representing or reproducing words, figures, drawings or symbols in a visible form.[8]

[59] There is no general requirement that contracts or agreements be in writing. A requirement that an agreement be "in writing" is, however, imposed by statute in various contexts. Without endeavouring to be exhaustive, such a requirement arises in legislation derived from the *Statute of Frauds 1677*, in consumer protection legislation, in relation to costs

agreements with a legal practitioner and with respect to arbitration agreements. The Act requires agreement in writing in a number of circumstances.[9] The content of the requirement that an agreement be in writing is likely to be influenced by the context in which the requirement is imposed, the statutory language used to describe the requirement and the statutory purposes of the requirement being imposed.[10] It is not possible to make a comprehensive statement as to what is required in any particular statutory context.

[60] It is uncontroversial that two persons may agree in writing in a number of ways. An agreement may be made by the execution of a single formal document which contains the terms of the bargain agreed between the parties and shows by writing the accession of both parties to those terms, for example, by signature.[11] Generally, an agreement in writing could also be formed by an exchange of letters or correspondence.[12] In some contexts, an "agreement in writing" may be formed by the oral acceptance of a comprehensive written offer or document.[13] We have some doubt that such a conclusion should be drawn in the context of s 249(1D)(b) given that the provision requires that the employer and an employee organisation "have agreed in writing" to bargain. That language suggests that the act of agreement must be made in written form. However, it is unnecessary to express a final view on that question.

[61] What is more significant in the present matter is that, for there to be an agreement in writing, all the terms of the agreement must be in writing and contained in a document or documents. That is important because, in the context of s 249(1D)(b), the agreement made in writing must be specific. The employer and the employee organisation must have agreed in writing to bargain for a proposed single enterprise agreement. Although the facts of each case will need to be considered, it is likely that this aspect of the agreement will need to be explicit. It is unlikely to be sufficient that an employee organisation has agreed to bargain in a general sense or communicated in writing that it is willing to attend bargaining meetings. The scope of a proposed agreement can itself be subject to bargaining.[14] That could include bargaining in relation to whether an agreement should be made involving a single employer or covering multiple employers. An employee organisation merely agreeing in writing to participate in bargaining in a general sense, or attend a bargaining meeting, is unlikely to be sufficient without more to constitute an agreement to bargain for a proposed single-enterprise agreement. Merely agreeing to participate in bargaining, or attend a meeting, does not foreclose a contest in the bargaining itself in relation to the scope or nature of the bargaining process.

[62] It is necessary to turn then to the communications relied on by Goldfields Council. The first is the email of Ms Drever-Smith dated 20 May 2024. That email responded to the correspondence sent to the ANMF by Ms Hutcheson dated 15 May 2024 inviting the ANMF to participate in bargaining. The email attaching the letter referred to an "intent to start bargaining" and the opening sentence of the letter dated 15 May 2024 indicated that: "I wish to invite the ANMF to participate in bargaining for a new Enterprise Agreement to cover employees of Central Goldfields Shire Council". The reference to an "intent to start bargaining" is not specific as to the form of agreement proposed. Although the invitation contained in the letter of 15 May 2024 does refer to bargaining for a new agreement to cover employees of Goldfields Council, the language is nonetheless somewhat equivocal. It does not expressly request that the ANMF agree to bargain for a single-enterprise agreement.

[63] Even if the letter of 15 May 2024 is understood as disclosing an intention on the part of Goldfields Council to bargain for a single-enterprise agreement, that is not the end of the issue.

The ANMF must have agreed in writing to do so. Ms Drever-Smith's email of 20 May 2024 indicates a willingness to attend a meeting and discusses the possible timing of a meeting. It does not, expressly or otherwise, contain a written agreement to bargain for a single-enterprise agreement. It says nothing about the position the ANMF will take at the meeting in relation to the scope or nature of the agreement it might wish to make or any other issue. Indeed, the email indicates that the ANMF is still in the process of consulting members and formulating the claims it will pursue. In our opinion, the ANMF did not agree in writing to bargain for a proposed single-enterprise agreement through Ms Drever-Smith's email of 20 May 2024.

[64] The second communication relied on by Goldfields Council is the preamble to the log of claims sent to Ms Hutcheson by Ms Hill by email on 11 June 2024. The preamble to the log of claims provided by the ANMF is also insufficient to constitute an agreement in writing to bargain for a proposed single-enterprise agreement. The email attaching the log of claims expressly stated it was "subject to change through the next members meeting dependent on the ASU's position moving forward". Plainly, the ANMF was not reaching a concluded agreement about the scope or nature of the bargaining. The email was sent towards the end of the meeting held on 11 June 2024 at which the position of the ASU that there should be multi-employer bargaining was discussed. The reference to the "ASU's position moving forward" can only be understood as a reference to the ASU's preference for multi-employer bargaining.

[65] That is sufficient to dispose of Goldfield Council's reliance on the preamble to the ANMF's log of claims. The email attaching the log of claims is inconsistent with a concluded agreement having been reached to bargain for a single enterprise agreement. In any event, the preamble itself, which is set out above, is reasonably obviously a pro forma statement used generally in logs of claims prepared by the ANMF. The preamble contemplates bargaining with multiple "respondent employers" and for variations to be made "to allow for conditions of employment and other arrangements specific to individual workplaces". Again, the preamble does not contain an agreement to bargain for a proposed single enterprise agreement. At most, it indicates a willingness to discuss variations to the log of claims to allow for the arrangements at individual workplaces. It is not explicit as to the form or scope of bargaining.

[66] For these reasons, we are not satisfied that Goldfields Council and the ANMF at any time agreed in writing to bargain for a proposed single-enterprise agreement for the purposes of s 249(1D)(b) of the Act. The ASU advanced a further contention in the alternative. It submitted that, even if there had been an agreement with the ANMF, there no longer was because the ANMF had now communicated it does not consent to bargain for a single-enterprise agreement in the email of 11 September 2024. The ACTU did not expressly join in that submission. The ASU's alternative submission faces some challenges in light of the language and apparent purposes of s 249(1D)(b). However, it is unnecessary to resolve the submission given that we have found the ANMF never agreed in writing to bargain for a proposed single-enterprise agreement.

Is it not contrary to the public interest to make the authorisation?

[67] The combined effect of ss 249(1)(b)(v) and 249(3)(b) is that, for the obligation to make an authorisation to arise, the Commission must be satisfied that it is not contrary to the public interest to do so. Where an employer employed 50 employees or more at the time the application

was made, s 249(3AB) means that it is presumed that the requirements of subsection (3) are met, unless the contrary is proved. This includes the public interest requirement in s 249(3)(b).

[68] Both Goldfields Council and Ararat Council employed more than 50 employees when the ASU's application was made. As such, the starting point in dealing with the present application is that it is presumed that it is not contrary to the public interest to make an authorisation unless the contrary is proved. To put it another way, s 249(3)(b) is satisfied unless it is proved that it is contrary to the public interest to make the authorisation. That conclusion might be proved by reason of any evidence introduced in the proceedings. However, in a practical sense, s 249(3)(b) is presumed to be satisfied unless Goldfields Council proves is it contrary to the public interest to make the authorisation.

[69] It has long been recognised that the expression "in the public interest" imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view".[15] In which direction the public interest points may not be easy to discern. Ascertainment in any particular case of where the public interest lies may require a balancing of countervailing public interests.[16] In *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393, for example, Mason CJ, Wilson and Dawson JJ said (at 395):

> … Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree. In this case the Commission was called upon to weigh in the balance two competing public interests. One was the importance of settling in its entirety the dispute initiated by the E.T.U.'s log of claims. The other was the importance of leaving the dispute to be resolved by the State tribunal despite the limitations on its jurisdiction if that course was likely to maintain the marked improvement in industrial relations in the industry that had occurred since the dispute arose and thereby contribute to industrial peace and an efficient power supply.

[70] In identifying matters that may be relevant to an assessment of the public interest, a distinction is often drawn between matters affecting the public interests and the private interests of the parties.[17] In *Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000* (2005) 139 IR 34, the Full Bench explained (at [23]):[18]

> The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards. An example of something in the last category may be a case in which there was no applicable award and the termination of the agreement would lead to an absence of award coverage for the employees. While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them

[71] The distinction between matters that affect the public interest as opposed to the private interests of the parties will often not be clear. A consideration may affect both the interests of the public at large and the interests of one of more of the parties to the proceedings. The interests of the public might also be affected as a result of the impact of an authorisation on one of the

parties. The assessment of whether the making of an authorisation is contrary to the public interest will depend, very much, on the facts of a particular case.

[72] Section 249(3AB), when it is applicable, means it must be proved that there is some consequence that would result from making an authorisation that could lead to the conclusion that it is contrary to the public interest to do so. Of course, the identification of one consideration or consequence of making an authorisation that might be said to be contrary to the public interest may not be sufficient. It will, in such a case, be necessary to assess the whole of the facts and circumstances to determine whether, as a whole, it had been proved that making an authorisation would be contrary to the public interest.

[73] Goldfields Council contends that it would be contrary to the public interest to make an authorisation for four reasons. The first reason is said to arise from the object of the Act generally and the objects of Part 2-4 in particular. Goldfields Council points to s 3(f) which indicates that one of the means by which the Act seeks to achieve its object of providing "a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians" is by "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining". It also refers to s 171(a) which provides that the objects of Part 2-4 include "to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits".

[74] As we understand the argument, Goldfields Council submits that there is a public interest in bargaining at the enterprise level which is recognised in the object to the Act and the objects of Part 2-4. It submits that making a single interest employer authorisation would be contrary to this express object and that this represents a powerful consideration favouring a conclusion that it would be contrary to the public interest to make an authorisation. It submits that there must be something out of the ordinary to warrant the Commission to depart from giving effect to what it describes as "this primary public interest".

[75] We do not accept that the object of the Act or the objects of Part 2-4 provide a basis for us to conclude that making an authorisation in this case would be contrary to the public interest. It may be accepted that the objects of the Act may be relevant to the assessment of what is in the public interest for the purposes of the exercise of a power conferred by the Act. However, the legislature seeks to achieve the object of a piece of legislation through the provisions that it in fact enacts. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126; (2015) 233 FCR 301, for example, the Full Court explained (at [23]):

> First, both s 3 and s 171 of the FW Act set out the objects of the provisions to which they refer (the FW Act as a whole and Pt 2-4 respectively). While the Commission would undoubtedly be required to exercise any otherwise unconfined discretion in a way that was not antagonistic to these objects, it must be remembered that the primary means by which the legislature sought to achieve them was to enact the detailed provisions of the FW Act itself. It will be the section, or group of sections, that applies directly that will most usefully indicate what it was the legislature was seeking to achieve in a particular situation. What the Full Court said about s 208 of the FW Act in *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at [86] was an instance of this approach.

[76] A simplistic appeal to the object of the Act and the objects of Part 2-4 tends to distract from the nature of the jurisdiction conferred by s 249 of the Act. Whilst the object of the Act records an "emphasis on enterprise-level collective bargaining" and s 171(a) indicates Part 2-4 establishes a framework for bargaining "particularly at the enterprise level", the Act has, from the outset, contained provisions permitting multi-employer bargaining. The Act now contains a number of avenues through which collective bargaining can occur across a number of enterprises. The references in s 3(f) to an emphasis on enterprise-level bargaining and in s 171(a) to bargaining occurring "particularly at the enterprise level" acknowledge that bargaining across enterprises is not necessarily inconsistent with the objects of the Act.

[77] The existence of s 249 of the Act demonstrates that the legislature does not regard bargaining involving two or more employers as being inconsistent with the object of the Act where the requirements of the section are met. It is to be remembered that those requirements include, relevantly to the present matter, that a majority of employees want to bargain for such a multi-enterprise agreement and that the employers are either franchisees or have clearly identifiable common interests and reasonably comparable operations and business activities. In those circumstances at least, bargaining involving two or more employers is not regarded by the Act as necessarily or presumptively contrary to the public interest.

[78] More specifically, Parliament has included s 249(3AB) within the section. As has been noted, s 249(3AB) means that, in the present matter at least, it is presumed that making an authorisation is not contrary to the public interest unless the contrary is proved. Plainly, the legislature does not regard the starting point of the analysis to be that making an authorisation would be inconsistent with the object of the Act. The submission that there must be something out of the ordinary to justify making an authorisation is incongruent with the existence of s 249(3AB). At least where an employer has more than 50 employees at the time the application is made, the starting point is a presumption that making an authorisation is not contrary to the public interest.

[79] The ASU also submitted that the reference to "enterprise level" bargaining in the objects of the Act includes multi-enterprise bargaining. It says that the reference to "enterprise level" bargaining was included in industrial legislation to distinguish collective bargaining from centralised wage fixation. The object of the *Industrial Relations Act 1988* (Cth) prior to the 1993 reforms contained a clear focus on centralised conciliation and arbitration and wage fixation by settlement of disputes. Enterprise bargaining was introduced to the federal industrial relations system following the enactment of the *Industrial Relations Reform Act 1993* (Cth). One of the objects of Part VIB of the amended legislation was to "encourage the use of agreements, particularly at the workplace or enterprise level".[19] The object of the part of Part of the *Workplace Relations Act 1996* (Cth) after the amendments made in 1996 was to "facilitate the making, and certifying by the Commission, of certain agreements at the level a single business or part of a single business".[20] The object of the current Act refers to bargaining at an enterprise level rather than only at the level of a single business or part of a single business.

[80] We accept that a single interest employer authorisation contemplates bargaining which is not limited to the "enterprise level". Goldfields Council and Ararat Council operate distinct enterprises. It is also true that the Act gives some priority to single enterprise bargaining. However, the objects of the Act do not preclude multi-enterprise bargaining. For present purposes it is sufficient to note that we agree with the Full Bench in *Association of Professional*

Engineers, Scientists and Managers, Australia v Great Southern Energy Pty Ltd (t/as Delta Coal) [2024] FWCFB 253 (at [46]) that the import of the objects of the Act is that the legislation promotes collective bargaining which achieves productivity and fairness through collective bargaining at the level of the enterprise, including where authorised and subject to the express provisions giving some priority to single enterprise agreements, at a multi-enterprise level. Understood in that context, simple reference to the object of the Act or the objects of Part 2-4 does not, without more, support a conclusion that making a single interest employer authorisation would be contrary to the public interest.

[81] The second reason advanced by Goldfields Council is that making a single interest employer authorisation would be contrary to the fundamental workplace relationship principles set out in the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector* made in 2009 (the **National Agreement**) and the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (the **Referral Act**). Relevantly, the Referral Act provides in s 3A as follows:

> **3A Fundamental workplace relations principles**
> The following are the fundamental workplace relations principles under this Act—
> (a) that the Commonwealth Fair Work Act should provide for, and continue to provide for, the following
> …
> (ii) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;
> (iii) collective bargaining at the enterprise level with no provision for individual statutory agreements
> …

[82] The same two principles are set out at clause 1.2 of the National Agreement which records that the parties acknowledge that the "National Workplace Relations System" will be built on those principles, amongst others.

[83] The direct relevance of the fundamental workplace relations principles is dependent on Goldfields Council being a national system employer only by reason of the referral of powers by Victoria. A local council in Victoria is a body corporate.[21] Whether it is a "constitutional corporation" for the purposes of the Act in that it is a "trading or financial corporation"[22] requires the application of the "activities test".[23] The outcome of the application of that test to local government has been mixed,[24] and there is at least some uncertainty in relation to that question in any particular case.[25] No evidence was before the Full Bench in this matter which would permit the application of the activities test. Goldfields Council relied on the statement of agreed facts which recorded that it is covered by the *Victorian Local Government Award 2015* which only covers a "State reference public sector employer".[26]

[84] That appears to us to be an unsatisfactory basis to determine the constitutional status of Goldfields Council. Fortunately, however, it is not necessary to resolve that question. Even accepting that Goldfields Council is covered by the Act only by reason of the referral of powers by Victoria, the fundamental workplace relations principles do not, in themselves or together with other considerations, suggest that it would be contrary to the public interest to make the authorisation.

[85] The ACTU submitted, and we accept, that only operative effect of the fundamental workplace relations principles in the context of the Referral Act is that Victoria may withdraw its referral of powers to the Commonwealth on three months' notice instead of six months' notice if the Act is amended in a manner that is inconsistent with the principles.[27] That demonstrates that the fundamental workplace relations principles could not provide a basis to construe the Act itself or limit the manner in which the Commission exercises its powers or discretions under the Act. The remedy, if powers are conferred on the Commission the exercise of which would be inconsistent with the fundamental workplace relations principles, is that Victoria could withdraw its referral. The principles do not justify the Commission exercising its powers in a manner other than as required by the terms of the Act itself.

[86] In any event, the two principles relied upon do not support a finding that it would be contrary to the public interest to make the authorisation. The principle referred to in s 3A(a)(ii) of the Referral Act refers to principles of freedom of association and the protection of the rights of individuals to join and be represented by a union and participate in collective activities. The making of a single interest employer authorisation does not affect the principles of freedom of association. The principle referred to in s 3A(A)(iii) of the Referral Act refers to the Act providing for collective bargaining at the enterprise level. For the reasons set out above with respect to the relevance of the object of the Act and the objects of Part 2-4, that principle does not suggest, as a general matter, that it is contrary to the public interest to make a single interest employer authorisation in any particular case.

[87] The third reason advanced by Goldfields Council as to why it is contrary to the public interest to make an authorisation is that bargaining has already commenced. Goldfields Council notes that, in this case, bargaining has commenced, there is a notification time, bargaining representatives have been appointed and those representatives are subject to the good faith bargaining requirements set out in s 228 of the Act. It is submitted that there is a public interest in ensuring that bargaining continues until such time as it results in an enterprise agreement being made and bargaining should not be "taken off the course" set by the relevant provisions of the Act.

[88] It is sufficient to record that we do not accept that the fact that bargaining has commenced would itself be likely to lead to the conclusion it is contrary to the public interest to make a single interest employer authorisation in the circumstances of the present application. The ASU communicated that it wished to engage in multi-enterprise bargaining from February 2024 and communicated in clear terms that it did not consent to engage in single-enterprise bargaining by March 2024. Goldfields Council issued notices of employee representational rights on 17 May 2024 knowing that the ASU proposed to pursue multi-enterprise bargaining. A single interest employer authorisation could not be made until after the nominal expiry of the existing enterprise agreements applying to Goldfields Council and Ararat Council on 30 June 2024.[28] The ASU made the application promptly two days later. Furthermore, bargaining has not progressed very far. There have been only two bargaining meetings. The ASU has not attended either of the meetings and only the ANMF was represented at both. The fact that bargaining has commenced does not, in the circumstances of this matter, support a conclusion that it would be contrary to the public interest to make the authorisation.

[89] The fourth and final reason advanced by Goldfields Council as to why it is contrary to the public interest to make the authorisation is that it would be "contrary to harmonious and cooperative workplace relations" to do so. Goldfields Council submits that it wants to arrange its workplace relations at the enterprise level and that there is nothing that suggests that it has failed to utilise enterprise bargaining in a way that has not brought about harmonious, cooperative and productive workplace relationships over a long period of time. It refers to the succession of certified agreements, workplace agreements and enterprise agreements that have been made and covered its operations since 1996 and suggests that this provides evidence of regular and successful enterprise bargaining processes in which it has been involved.

[90] The mere fact that enterprise agreements have been regularly made since 1996 to cover Goldfield Council's operations does not, in our opinion, support a conclusion that it is contrary to the public interest to make the authorisation in this matter. Goldfields Council submits that the history of bargaining is indicative of harmonious and cooperative workplace relations. There is, however, no evidence before the Full Bench as to how the enterprise agreements came to be made, whether the bargaining was contentious or otherwise or whether the conditions contained in the agreements were or are positively regarded by employees or the Council. Furthermore, we were not referred to any aspect of the content of the enterprise agreements that was said to support a conclusion that a requirement that Goldfields Council participate in bargaining with Ararat Council would be contrary to the public interest.

[91] Furthermore, the assertion that Goldfields Council wishes to bargain at a single-enterprise level does not, in itself, attract the public interest. It amounts to no more than an assertion that Goldfields Council does not consent to the application. Section 249 of the Act makes provision for circumstances in which the employers consent, and do not consent, to an application for a single interest employer authorisation. Additional requirements must be met when the employers do not consent, including the requirements in s 249(1B) and (1D). The fact that one employer opposes the authorisation does not suggest it is contrary to the public interest to make an authorisation.

[92] For these reasons, we are not satisfied that the reasons relied upon by Goldfields Council, individually or taken together, prove that it is contrary to the public interest to make the authorisation sought by the ASU. The presumption in s 249(3AB) has not been displaced. Accordingly, we are satisfied that it is not contrary to the public interest to make the authorisation for the purposes of s 249(3)(b) of the Act.

Conclusion

[93] Given we are satisfied that the requirements of s 249 of the Act are met, and that s 249A does not apply, we are required to make an authorisation under s 249. The authorisation has been issued separately in PR781760.

[94] In accordance with s 249(4) of the Act, the authorisation comes into operation on the day it is made and will cease to be in operation on the earlier of the day on which the enterprise agreement to which the authorisation relates is made or 12 months after the day it is made, unless the period is extended under s 252 of the Act.

VICE PRESIDENT

Appearances:

L Saunders, counsel, for the ASU instructed by *I Szumer,* Maurice Blackburn.
L Howard, counsel, for Central Goldfields Shire Council instructed by *K Sullivan*, Maddocks.
B Bromberg, counsel, for the ACTU instructed by *T Clarke*, ACTU.
M Segan, for the ANMF.
P Davidson, for Ararat Rural City Council.
A Richards, for Professionals Australia.

Hearing details:

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

[2] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, Revised Explanatory Memorandum at [1066].

[3] *Independent Education Union of Australia v Catholic Education Western Australia Ltd* [2023] FWCFB 177 at [31]-[32].

[4] *Independent Education Union of Australia v Catholic Education Western Australia Ltd* [2023] FWCFB 177 at [34]; *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, Supplementary Explanatory Memorandum at [70]-[75].

[5] *Fair Work Act 2009* (Cth), ss 173(2)(a) (so as to create a "notification time" to trigger the obligation to give a notice of employee representational rights) and 230(2)(a) (so as to enable the Commission to make bargaining orders).

[6] See also *Maritime Union of Australia v Maersk Crewing Australia Pty Ltd* [2016] FWCFB 1894; (2016) 257 IR 30 at [35].

[7] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, Revised Explanatory Memorandum at [1071].

[8] *Acts Interpretation Act 1901* (Cth), s 25 (as in force on 25 June 2009 consistent with s 40B of the Act).

[9] *Fair Work Act 2009* (Cth), s 64(1) (averaging of hours of work); ss 93(2)(b) and 94(3) (cashing out of annual leave); s 101(2)(b) (cashing out personal/carers' leave); s 251(70(b) (variation of a single interest employer authorisation); s 536F(3)(a)(i) (deduction of membership fees).

[10] See, for example, discussion in *McNamara Business & Property Law v Kasmeridis* [2005] SASC 269; (2005) 92 SASR 382 at [42]-[47].

[11] *Re Raven; Ex parte Pitt* (1881) 45 LT 742 at 743 (Fry J).

[12] *Chamberlain v Boodle & King* [1982] 3 All E.R. 188 at 191 (Denning LJ).

[13] *Heppingstone v Stewart* (1910) 12 CLR 126 at 131 (Griffiths J) and 135-136 (Barton J); *O'Young v Walter Reid & Company Ltd* (1932) 47 CLR 497 at 508 (Dixon J) and 513 (Evatt J); *McNamara Business & Property Law v Kasmeridis* [2005] SASC 269; (2005) 92 SASR 382 at [61]-[63].

[14] *Stuartholme School v Independent Education Union of Australia* [2010] FWAFB 1714; (2010) 192 IR 29 at [21]-[25]; *MSS Security Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2010] FWAFB 6519; (2010) 197 IR 294 at [14]-[15]; *BRB Modular Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2015] FWCFB 1440 at [10].

[15] *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Plaintiff M79/2012 v Minister for Immigration and Citizenship* [2013] HCA 24; (2013) 252 CLR 363 at [39] (French CJ, Crennan and Bell JJ).

[16] *Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000* (2005) 139 IR 34 at [26].

[17] See *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [51] albeit in the particular statutory context of s 275 of the Act.

[18] See also *Association of Professional Engineers, Scientists and Managers, Australia v Great Southern Energy Pty Ltd (t/as Delta Coal)* [2024] FWCFB 253 at [498]-[499].

[19] *Industrial Relations Act 1988* (Cth), 170LA(1) after the amendments introduced by the *Industrial Relations Reform Act 1993* (Cth).

[20] *Workplace Relations Act 1996* (Cth), s 170L.

[21] *Local Government Act 2020* (Vic), s 14.

[22] *Fair Work Act 2009* (Cth), s 14(1)(a) and the definition of "constitutional corporation" in s 12.

[23] Derived from authorities such as *R v Federal Court of Australia; Ex parte WA National Football League (Inc) (*1979) 143 CLR 190.

[24] See, for example, *Burrows v Shire of Esperance* [1998] AIRC 1512; *Australian Workers' Union of Employees, Queensland v Etheridge* [2008] FCA 1268; (2008) 171 FCR 102 (Spender J); *Re Bastakos* [2018] FWC 7650; *Bracegirdle v Shire of Irwin* [2024] FWC 2201.

[25] *Re Award Modernisation Statement* [2009] AIRCFB 945; (2009) 190 IR 370 at [133].

[26] *Fair Work Act 2009* (Cth), s 168E(2) and clause 4.1 of the *Victorian Local Government Award 2015*.

[27] *Fair Work (Commonwealth Powers) Act 2009* (Vic), s 7A(2).

[28] *Fair Work Act 2009* (Cth), s 249(1D)(a).