

## IN THE FAIR WORK COMMISSION

**Matter No:** B2023/538

**Applicants:** United Workers' Union, Australian Education Union and  
Independent Education Union of Australia

**Respondents:** DMP Child Care Association & Ors

**Subject:** s.242 – Application for a supported bargaining authorisation

### **OUTLINE OF SUBMISSIONS FOR**

### **THE INDEPENDENT EDUCATION UNION OF AUSTRALIA**

#### **Introduction**

1. On 6 June 2023 the Applicant parties filed a Form F82, Application for a supported bargaining authorisation with named Respondent employers. The proceedings represent the first occasion on which the Commission has been required to construe and apply the important new provisions that provide for supported bargaining<sup>1</sup>.
2. The Application for a supported bargaining authorisation is by consent between Applicant Union parties, all employee organisations within the meaning of section 12 of the *Fair Work Act 2009* (Cth) (**FW Act**), and Respondent Employer parties (national system employers within the meaning of the FW Act)<sup>2</sup>.
3. The supported bargaining authorisation, if made, is to allow for supported bargaining in the early childhood education and care sector (**ECEC sector**), specifically for the Respondents' long day care operations<sup>3</sup>.
4. The parties have prepared an Agreed Statement of Facts (**ASOF**), which have been jointly filed. The ASOF establishes that the requirements and relevant considerations for the granting of the supported bargaining authorisation by the Fair Work Commission (**FWC**) have been met, having regard to s.243 of the **FW Act**, and the Commission should make the authorisation.
5. The Independent Education Union of Australia (**IEUA**) has coverage of teacher employees (relevant Bachelor degree qualifications) who are engaged in the ECEC sector<sup>4</sup>. For the purposes of the proceedings the IEUA is a bargaining representative for our teacher members of the Respondent employers who are engaged in long day care settings.

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<sup>1</sup> *Fair Work Act 2009* (Cth), Chapter 2, Enterprise Agreements Part 2-4, Supported Bargaining Division 9, s.241 to s.246.

<sup>2</sup> See the Agreed Statement of Facts (ASOF) at [7] and [8].

<sup>3</sup> Application at 2.1.

<sup>4</sup> See Rule 2(e) of the Rules of the IEUA, [IEUA current rules](#).

## The New Provisions – Supported Bargaining

7. The supported bargaining provisions were legislated as part of a range of reforms enacted in the *Secure Jobs, Better Pay Bill*<sup>5</sup>. The Supported Bargaining provisions became operative from 6 June 2023.
8. The statutory and policy intent is addressed in the Second Reading Speech and the Revised Explanatory Memorandum. The Second Reading Speech, relevantly extracted:

In overview:

*“The urgency of getting wages moving is most acute in feminised industries. The gender pay gap still sits at an unacceptable 14.1 per cent....*

*To promote job security, to close the gender pay, to get wages moving – we need to change to law.*

*In the design of these reforms, we have deliberately focused on the needs of lower-paid and feminised workforces<sup>6</sup>.”*

On gender equity:

*“Some of the most undervalued workers in our country are workers in female dominated industries. Many are the very workers who put their health and safety on the line to guide us through the shut down period of the pandemic. Workers in healthcare, aged care, disability support, early childhood education and care, community sector and other care and service sectors.*

*Work in these industries is undervalued because of unfair and discriminatory assumptions about the value of the work and the skill required to do the job.*

*This undervaluation is one of the biggest causes of the gender pay gap, and our reforms take a number of key steps to address it<sup>7</sup>.”*

On supported bargaining:

*“The bill will rename and remove barriers to access the existing low paid bargaining stream with the intention of closing the gender pay gap and improving wages and conditions in sectors such as community services, cleaning and early childhood education and care which have not been able to successfully bargain at the enterprise level.*

*Unnecessary hurdles to entry in the current low paid stream will be replaced by a broad discretion for the Fair Work Commission to consider the prevailing rates of pay in the industry, including whether the workers in the industry or sector are low paid.*

*The Commission must also be satisfied that employers who will be covered by a supported bargaining authorisation have clearly identifiable common interests, for example whether or not they are substantially funded, directly or indirectly by the Commonwealth, a state or a territory<sup>8</sup>.”*

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<sup>5</sup> *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, the bill passed both houses on 2 December and received royal assent on 6 December 2022, the commencement of the amendments is staged over 12 months, the support bargaining amendments commenced operation on 6 June 2023, [Secure Jobs, Better Pay Bill 2022](#)

<sup>6</sup> Second Reading Speech, *Secure Job and Better Pay*, Bill 2022, [Second Reading Speech Secure Jobs, Better pay Bill](#) at pg 2176

<sup>7</sup> Ibid pg 2177

<sup>8</sup> Ibid pg 2182

9. The Revised Explanatory Memorandum states:

In outline:

*“Remove unnecessary limitations to access to the low-paid bargaining stream (and rename it the supported bargaining stream) and the single-interest employer authorisation stream; and provide enhanced access to FWC support for employees and their employers who require assistance to bargain<sup>9</sup>... and Improving job security and gender equality by including both concepts in the objects of the FW Act, limiting the use of fixed term contracts, introducing a statutory equal remuneration principle and prohibiting pay secrecy clauses<sup>10</sup>.”*

And on the supported bargaining provisions:

*“Part 20 would reform the low-paid bargaining provisions in Division 9 of Part 2-4 of the FW Act and create the supported bargaining stream. The proposed supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively. The supported bargaining stream will also assist employees and employers who may face barriers to bargaining, such as employees with a disability and First Nations employees<sup>11</sup>.”*

## **The Supported Bargaining Provisions**

### **Section 242 – the Application**

10. Section 242 of the FW Act sets out the requirements for the making of the application for a supported bargaining authorisation. A s.242 application may be made by a bargaining representative, s.242 (1) (a), or an employee organisation that is entitled to represent the relevant employees, s.242 (1) (b). The Applicant parties meet the requirement of both s.242 (1) (a) and (b), see the ASOF at [7] and [9].
11. The Application must specify the employers and the employees who will be covered by the Agreement, s.242 (2) (a) and (b). The Application meets this requirement, see the Application at 2.1 and Schedule A.
12. The Application is not in relation to a greenfields agreement, s.242 (3).
13. The requirement for the making of a valid application pursuant to s.242 of the FW Act have been met.

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<sup>9</sup> [Revised Explanatory Memorandum, Secure Jobs, Better Pay Bill](#) pg iii

<sup>10</sup> Ibid pg iii

<sup>11</sup> Ibid pg 160

## Section 243 – the Considerations

14. At s.243 (1) (a), an application has been made, see above [13].
15. At s.243 (1) (b) there are discretionary powers for the Commission to consider the authorisation having regard to:

### Section 243 (1) (b) (i), prevailing pay and conditions, including whether low rates of pay prevail

16. The Commission can be satisfied that there are low rates of pay in the ECEC sector and in the relevant sector of the ECEC for this Application, the long day care setting. This is established in the ASOF at [10] to [23].
17. Further, the FWC should have regard to the established difficulties employees in the ECEC sector have had in accessing single enterprise bargaining. A Full Bench of the FWC has recently made findings in respect of early childhood teachers and concerns around prevailing rates of pay and conditions in the sector at [661]:

*“Nearly all schoolteachers covered by the EST award receive rates of pay and conditions of employment pursuant to collective agreements that are significantly more beneficial than those in the award, both as it currently stands and under the contemplated modified remuneration structure. The variation of the EST Award will not affect collective bargaining in this area. In respect of early childhood teachers, there is a low incidence of collective bargaining. Particularly in the for profit sector. We do not consider this would change if the EST award is varied as proposed. Because the variation of the award will not positively “encourage collective bargaining”, this must be regarded as a matter which weighs against the variation, albeit only to a marginal degree<sup>12</sup>.”*

18. In reference to [17], these are matters of public record. In the New South Wales public school system, a ‘proficient level 2’ teacher is currently paid \$91,413 and in NSW Catholic Schools the comparable ‘band 2’ is paid \$91,423. Under the modern award for teachers in long day care, the comparable ‘proficient level 2’ rate is \$76,745<sup>13</sup>. This is a substantial gap despite the recent squeezing of relativities following the FWC’s last two Annual Wage Reviews that addressed the cost of living crisis. However, the differential is likely to further increase with the NSW Government increasing pay rates by 4% for public servants generally from 1 July 2023, leading to an expectation that NSW teacher rates will increase by a minimum of 4%.
19. The less beneficial conditions provided to long day care teachers in comparison to their professional counterparts in schools are numerous; substantive differences apply to release from face to face teaching, term time/hours of employment, professional development and parental leave entitlements to cite some of the more critical, less beneficial conditions, afforded to ECEC teachers.

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<sup>12</sup> *Independent Education Union of Australia* [2021] FWCFB 2051 at 661

<sup>13</sup> *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2022* at Schedule 1A, *Independent Education Union of Australia (B2023/133, s.240- Bargaining Dispute)*, published *Interim Settlement Agreement (PR762799)* at Attachment C and *Education Services (Teachers) Award 2020* at clause 17.

20. The prevailing pay and conditions in the ECEC sector and long day care, and the need for substantially improved pay and conditions are demonstrably central to the sector's need to attract and retain teachers. The Commission recently acknowledged the issue<sup>14</sup>. The current crisis should not be underestimated. The Australian Government undertakes a 'Graduate Outcomes Survey' around 4 months post-graduation seeking data on the employment status of graduates. For 'early childhood teacher graduate employment outcomes' the figures are stark:

In 2017 43% of graduates were employed in early childhood settings,

In 2018 38% of graduates were employed in early childhood settings,

In 2019 36% of graduates were employed in early childhood settings,

In 2020 31% of graduates were employed in early childhood settings

In 2021 (the most recent available figure) 29% of graduates were employed in early childhood settings.

Across the same period, 2017-2021, in excess of 50% of early childhood teacher graduates secured employment in schools<sup>15</sup>.

21. The Commonwealth Government has coordinated State and Territory Governments, and industry stakeholders, for the development of a ten year strategy for the ECEC sector. The strategy document was issued in September 2021. From the consultation and engagement with the ECEC sector, the dominant issue requiring urgent action was identified as the need to improve the prevailing pay and conditions. *'Investigate options for improving workforce pay and conditions'* was stated as the number one issue requiring urgent action with outcomes needed over 3 years (announced on September 2021)<sup>16</sup>.

**Section 243 (1) (b) (ii), clearly identifiable common interests, with reference to identified considerations for Common Interests, Section 243 (2) (a), (b) and (c).**

22. The common interests grounds are compelling. The ECEC sector, for clear policy reasons, operates in a highly regulated environment. We refer to the ASOF. We refer to the national framework for learning in early childhood, systems of accreditation for employers and the accreditation and registration requirement for teachers. We note whilst there are minor variation across the states and territories, there is strong national oversight and co-ordination through ACECQA, see Annexure 5 and Annexure 6 to the ASOF; reference is also made to the ACECQA submissions to the Productivity Commission inquiry into the ECEC sector<sup>17</sup>.

23. The common interests grounds identify Government funding (direct and or indirect) as a positive consideration to issue a supported bargaining authorisation. The direct reliance on Commonwealth funding for the Respondent employers through the receipt of the Commonwealth Child Care Subsidy on behalf of parents is addressed in the ASOF, 'Funding Arrangements', at [34]-[44].

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<sup>14</sup> *Independent Education Union of Australia* [2021] FWCFB 2051 at 661 re paragraph (c).

<sup>15</sup> [Australian Government Graduate Surveys](#) please scroll down to the graph/data headed 'Early childhood teacher graduate employment outcomes (2015 - 2021)'

<sup>16</sup> 'Shaping Our Future', 10 year strategy for the ECEC sector, '[Shaping our Future' - 10 Year Strategy](#) .

<sup>17</sup> [ACECQA Submission to the Productivity Commissions inquiry into the ECEC Industry](#).

24. Having regard to considerations of the terms and conditions of employment across the Respondent employers, we refer to the ASOF. The coverage for the Agreement is solely the ECEC sector and solely for long day care settings<sup>18</sup>. There are no enterprise agreements in place with the Respondent Employers that have not passed their nominal expiry date. The Respondents substantially do not have enterprise agreements in place, with terms and conditions of employment determined by the two applicable modern awards<sup>19</sup> that apply to ECEC, long day care settings, and for the identified cohort of employees in the Application.

**Section 243 (1) (iii), manageable bargaining process**

25. The Application is a consent application. The Parties have already provided evidence of constructive engagement. All bargaining parties are represented by experienced industrial practitioners. The Application identifies the seven bargaining representative at 2.4.3. It is our contention it is a demonstrably manageable bargaining process.

**Section 243 (1) (b) (iv), any other matter/s**

26. The Application before the Commission is a consent application.

27. The ECEC sector has been specifically identified as a sector requiring attention to address prevailing low pay and challenging conditions, see [8] and [9] above. Its workforce is overwhelmingly female<sup>20</sup> and addressing pay and conditions in the ECEC sector is central to addressing the gender pay gap. It is central to the revised objectives in the FW Act, we refer the Commission to the FW Act, ‘Object of this Act’, s.3 a).

28. Further, we draw the Commission’s attention to the critical nature of the ECEC sector and the role it plays in addressing gender inequality, in addressing disadvantage, facilitating the engagement of adults in employment and of course most fundamentally the care, education and development of children aged 0 to 5 years of age. In its terms of reference to the Productivity Commission’s inquiry into the early education and care sector the Government has been clear on its critical importance:

*The Australian Government recognises that ECEC is an essential part of Australia’s education system and is integral to Australia’s economic prosperity as a powerful lever for increasing workforce participation. The Government is committed to identifying solutions that will chart the course for universal, affordable ECEC – in the great tradition of universal Medicare and universal superannuation.*

*Participation in quality ECEC has important developmental, social, and educational benefits for Australian children. It can assist with positive early childhood development and provides a foundation for our children’s future well-being and success<sup>21</sup>.*

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<sup>18</sup> Application at 2.1.

<sup>19</sup> *Education Services (Teachers) Award 2020 and Children’s Services Award 2010.*

<sup>20</sup> 92.1% of the workforce are women, see Annexure 1 to the ASOF at pg 9.

<sup>21</sup> [Terms of Reference, Productivity Commission - Inquiry into the ECEC industry.](#)

**Section 243 (1) (c), some employees will be represented by an employee organisation**

29. We refer to the Application and the ASOF at [7] and [9].

**Section 243A – restrictions on making supported bargaining authorisations**

30. The restrictions to the issuing of a supported bargaining authorisation, s.243A, are not applicable to this matter. There is no applicable restriction/s for the Commission to consider.

**Conclusion**

31. We have met the requirements of s.242 and s.243 of the FW Act for a supported bargaining authorisation. We seek the Commission make the authorisation.

**Independent Education Union of Australia**

**28 July 2023**