

BRIEFING NOTE



Initiating Bargaining

14 February 2023, BN18

Introduction

Recent changes to the FW Act that became operative on 7 December 2022 mean that bargaining for a replacement single enterprise agreement can now be initiated by a union without requiring a majority support determination if this occurs within five years of the nominal expiry date (NED).¹

This addresses one of the significant impediments to collective bargaining under *the Fair Work Act 2009 (Cth)* (**FW Act**), which was that even if there had been a history of collective bargaining in a workplace, an employer had a lot of power to freeze wages and conditions simply by refusing to bargain.² This problem – to which majority support determinations were an incomplete solution at best – was compounded by changes to the FW Act made by the then Coalition Government which prohibited the taking of protected industrial action as a means of securing agreement to bargain.³

The Fair work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (SJBP Act) amends the FW Act to provide that the “notification time” (or the time when bargaining is taken to have commenced) in relation to a proposed single-enterprise agreement occurs when the following conditions are met:

- The employer has received a written request to bargain from a bargaining representative of an employee who would be covered by a single-enterprise agreement that is not a greenfields agreement;⁴
- The proposed agreement will replace an earlier single-enterprise agreement;⁵ •
- The earlier single enterprise agreement did not follow from a single-interest employer authorisation;⁶

¹ For a full list of the operative dates of all parts of the Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 see <https://www.fwc.gov.au/about-us/news-and-media/news/information-about-secure-jobs-betterpay-act-2022-changes>

² An estimated 16% of all employees are covered by expired enterprise agreements. See DEWR Trends in Federal Enterprise Bargaining.

³ See FW Act 437(2A), enacted in response to TWU v JJ Richards & Sons Pty Limited [2012] FWA 5609

⁴ FW Act s 173(2)(aa)

⁵ FW Act s 173(2A)(a)

⁶ FW Act s 173(2A)(b)

- The earlier agreement has passed its nominal expiry date, but this occurred less than 5 years prior to the request to bargain being given;⁷ and
- The proposed agreement will cover the same, or substantially the same group of employees as the earlier agreement.⁸

The effect of this constituting a “notification time” is that bargaining – and the corresponding rights and responsibilities that attach to it – is taken to have commenced.

Bargaining considerations

While it may be easier for a union to initiate bargaining for a new single enterprise agreement under these provisions, unions should also first consider other options available under the new provisions.

Under the new provisions, multi-employer bargaining will be more available through the single interest and supported bargaining streams from 6 June 2022. These bargaining streams could provide better options for negotiating wages and conditions with multiple employers. Unions should therefore carefully consider whether to initiate re-negotiation of an expired enterprise agreement as doing so will mean that they lose access to the single-interest bargaining stream in respect of that employer.⁹ While an employer specified in a supported bargaining authorisation may not bargain for another type of agreement (such as a single-enterprise agreement), they may be able to avoid being covered by the authorisation if they are able to conclude a single-enterprise agreement before the authorisation comes into effect.¹⁰

Similarly, employers that have previously refused to bargain to update an expired enterprise agreement, may now be motivated to do so as a means of avoiding being covered by a new multiemployer agreement.

Bargaining Disputes and Arbitration

Section 234 and 235 of the amended Act will insert a new mechanism by which the FWC can assist parties to resolve bargaining when it is intractable.

The mechanism will allow a bargaining representative (employer or Union) to apply for an Intractable Bargaining Declaration.

An application may be made in relation to bargaining for a single-enterprise agreement, supported bargaining or single interest multi-employer bargain (other than a greenfield).

The FWC may only make an intractable bargaining declaration if an application has been made and 9 months has passed since bargaining commencing or the nominal expiry date of the existing agreement, whichever is later.

When making an intractable bargaining declaration, the FWC *may* specify a “post-declaration negotiating period” during which the FWC will not make a Workplace Determination and instead

⁷ FW Act ss 173(2A)(a), 173(2A)(c)

⁸ FW Act s 173(2A)(d)

⁹ FW Act s 249(1D)(b)

¹⁰ See proposed FW Act ss 172(7), 236A(1)

negotiations may continue with the assistance of the FWC. This period may be of any length determined by the FWC.

After making the declaration and at the conclusion of any post-declaration period (if applicable) the FWC will commence the process of making a Workplace Determination (an arbitrated agreement).

More information about Bargaining Disputes, Intractable Bargaining Declarations and Workplace Determinations can be found in the Bargaining Disputes briefing note.

Initiating Bargaining

Employers will also now face the prospect of arbitrated outcomes in bargaining. This is likely to change the bargaining dynamics and make it almost impossible for employers to avoid actually bargaining.

A template letter for unions to initiate bargaining in the above circumstances is available. For access, please contact the ACTU.ⁱ

ⁱ *The information in this document does not constitute legal advice and should not be taken to include all requirements or obligations relevant to the entitlement.*