

Overview of changes to the Bargaining System

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Introduction

From its inception, the *Fair Work Act 2009 (Cth)* (**FW Act**) has privileged bargaining within a single enterprise above other forms of bargaining. The changes to the bargaining system introduced by the *Secure Jobs Better Pay Act 2022* (**SJBP Act**) are designed to improve access to bargaining beyond the single enterprise and improve the likelihood of agreements of such wider scope being successfully concluded. The underlying policy of incentivising agreements at the enterprise level remains a feature of the FW Act and the intersection of this with the SJSP Act amendments will likely be a contested area in the initial period of operation of those amendments.

Existing pathways to agreement making are to be heavily modified when the changes to the bargaining system take effect later this year¹, and it is helpful to conceptualise the changes both by reference to what they replace, as well as the rights and obligations associated with those pathways and the role of the FWC with respect to each.

While each of the bargaining pathways introduced by the SJBP Act will be the subject of its own briefing note, this introductory note serves as an overview of the differentiators and linkages between them.

Different types of bargaining

Changes were made to the terminology contained in the SJBP Bill while it was being debated in the Parliament. It is important to establish a common understanding of how to refer to the different types of agreements and bargaining streams that will exist under the FW Act as amended. This terminology will be utilised throughout the subject specific briefing notes.

1.1 *Single Enterprise Agreements*

The most common type of agreement under the current system is the *single enterprise agreement* and the most common type of single enterprise agreement is one that applies only to a single employer. Not all single enterprise agreements cover only a single employer.

The current system provides for single enterprise agreements to cover more than one employer in two circumstances:

¹ The relevant amendments will take effect on 6 June, or an earlier date fixed by proclamation.

- (1) Where the employers concerned are related bodies corporate or engaged in a joint venture or common enterprise; or
- (2) Where the FWC has otherwise permitted the employers to bargain together, by issuing a single interest employer authorisation.

The changes brought about by the SJPB Act mean that an agreement made in the first circumstance will continue to be called a *single enterprise agreement*, but an agreement made in the second circumstance will now be referred to as a type of *multi enterprise agreement*.

1.2 *Multi Enterprise Agreements*

As above, agreements involving multiple employers may be *single enterprise agreements* where the employers concerned are related bodies corporate or engaged in a joint venture or common enterprise. Outside of this, all agreements involving multiple employers are referred to as *multi enterprise agreements*.

1.3 *Majority Support vs. Majority Support Determination*

Demonstrating majority support for a particular form of bargaining will remain an integral part of the bargaining system and will be a feature of bargaining under many different streams of bargaining. However, applications to the FWC for majority support determinations will continue to be available only in respect of the *single enterprise agreement* bargaining stream.

1.4 *General building and construction work*

The definition of “general building and construction work” at section 23B(1) of the FW Act as amended is important because certain types of agreements cannot be made in respect of, or extended to operate to, that type of work. The definition is based on descriptions of industries contained in the text of modern awards as at the same date that the changes to the bargaining system take effect.

Types of Agreements and Streams of Bargaining

Enterprise agreements will continue to be categorised in single enterprise agreements or multi enterprise agreements, however there are an expanded range of sub-categories.

Changes to the single enterprise bargaining stream relate to the process for initiating bargaining, and the provisions relating to approval requirements (see the Agreement Approval and Initiating Bargaining briefing notes for more detail). It is worth noting however, that the new entitlements for initiating bargaining and the creation of three multi-employer bargaining streams mean that the consequence of the overall legislation reform may be a significant update in single enterprise bargaining.

The most significant changes relate to bargaining for multi enterprise agreements, which are described as the following:

- (1) Single interest employer agreements;
- (2) Supported bargaining agreements; or
- (3) Cooperative workplace agreements.

Whilst the features of each will explained in more detail in the individual briefing notes relevant to each, the following discussion assists in differentiating between them and provides an overview as to their key features.

2.1 *Gateways to bargaining*

Bargaining for single enterprise agreements will continue to be accessed in the usual way. In addition, it will be easier to initiate bargaining for replacement single interest agreements which are not more than 5 years passed their nominal expiry date, because the good faith bargaining obligations will be enforceable even without a majority support determination or employer agreement to bargain.³

Bargaining for multi-enterprise agreements can commence consensually without any particular authorisation, but the characterisation of the proposed agreement as either a single interest employer agreement or supported bargaining agreement (and the consequent activation of the rights associated with these forms of bargaining) depends on additional steps being taken and authorisations being issued by FWC.

2.2 *Who can (and can't) be covered by the different types of agreements*

There are no new requirements concerning the employees who can be covered by single enterprise agreements. There are however changes to the employees who can be covered by multi enterprise agreements, connected to the definition of general building and construction work. No multi enterprise agreement can be made or approved where they cover general building and construction work, unless those agreements are greenfields agreements.⁴

Employees, unions, and employers can be covered by supported bargaining agreements or single interest employer agreements if an authorisation has been issued by FWC in respect of them, or an existing authorisation subsequently varied by FWC to include them. Once made, supported bargaining agreements and single interest employer agreements can be varied to include new employers and their employees.⁵

Supported bargaining agreements and single interest employer agreements also restrict the employers that can be covered by them, because the matters which must be considered by the FWC in issuing an authorisation to bargain for each type of agreement look closely to the characteristics of the employers (and to some extent, the employees) concerned. In the most simple terms:

- *Supported bargaining authorisations* can be issued either in respect of:
 - an industry occupation or sector specified by the Minister; or
 - The FWC is satisfied of matter set at section 243 including taking into account:
 - The prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector)
 - Whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process.
 - Whether the employers have clearly identifiable common interests. Examples of common interests that employers may have include the following:
 - a geographical location;
 - the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;

³ See sections 172(2), 173(2A), 230(2)(aa) and the briefing note on *Initiating Bargaining*

⁴ See sections 186(2B), 243A(4), 249A.

⁵ S. 211(3A), 216AB(2), 216BA(3), 216DC(4). Note that cooperative workplace agreements also cannot be varied to include a new employer in respect of general building and construction work: s, 216CB(2).

- being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.
- The supported bargaining stream replaces the “low paid bargaining stream” and might be considered appealing for sectors reliant on 3rd party funding who have had little success in escaping low pay through bargaining. A supported bargaining authorisation cannot specify an employee who is covered by a single enterprise agreement that has not passed its nominal expiry date, and an authorisation has no effect to the extent that it covers such an employee.⁶ This might be expected to incentivise employers to make single enterprise agreements in response to organising efforts directed toward utilisation of the supported bargaining stream. This possibility, as well as the protective mechanisms available, are discussed in the briefing note concerning supported bargaining. Supported bargaining authorisations can be varied by the FWC during bargaining.
- *Single interest employer authorisations* can be issued either in respect of:
 - employers involved in franchise arrangements; or
 - other groups of employers with common interests whose operations and business activities are reasonably comparable, provided that it is not contrary to the public interest.

A representation test applies in either case. Other tests and requirements apply depending on whether the application was made by or consented to by employers. If the relevant employers oppose the making of the authorisation, then those employers cannot be specified in the authorisation if they employ less than 20 employees⁷, or if they are covered by an unexpired agreement (of any type) in respect of employees that will be covered by the proposed new agreement⁸, or if they have agreed in writing with a registered union to bargain for a single enterprise agreement in respect of the same or substantially the same group of employees⁹, or if there is not majority support for bargaining among their employees who would be covered by the agreement¹⁰. Once the FWC has decided to issue a single interest employer authorisation, it nonetheless has a discretion to decline to specify some of the eligible employers from it where they are bargaining in good faith for another agreement in respect of a similar group of employees, have a history of effectively bargaining and the last agreement expired less than 9 months ago. Single interest employer authorisations can be varied by the FWC during bargaining.

2.3 *Representation during bargaining*

The current “default bargaining representative” rules¹¹ operate in the same way for all forms of agreement save for multi enterprise agreements in relation to which a supported bargaining authorisation has been issued. That is, in the ordinary course, the union is the default bargaining representative for its members. If and after a supported bargaining authorisation is issued, a union that applied for that authorisation is by default a bargaining representative for all

⁶ s243A

⁷ S. 249(1)(iv), 249(1B)(a)

⁸ S. 249(1)(iv), 249(1B)(e), 249(1D)(a)

⁹ S. 249(1)(iv), 249(1B)(e), 249(1D)(b)

¹⁰ S. 249(1)(iv), 249(1B)(d).

¹¹ See sections 176-178A

employees specified in that authorisation (whether members or not), provided that they are eligible to members of that union¹². Employees remain free to appoint another person, or themselves, as a bargaining representative in the usual way.

A supported bargaining authorisation that is not supported by a ministerial declaration requires at least some of the employees to be represented by a registered union. A single interest employer authorisation requires in all cases that at least some of the employees are represented by a registered union. A cooperative workplace agreement cannot be approved by the FWC unless at least some of the employees were represented by a registered union in bargaining. Single enterprise agreements will continue to be able to be bargained for and approved without any explicit requirement for representation by a registered union.

2.4 Rights and obligations associated with bargaining for different types of agreements

The following table sets out whether rights and obligations are or available or exist in respect of bargaining for each type of agreement. The available rights are qualified rather than absolute and further detail is provided in the briefing notes in respect of each stream of bargaining.

Table 1: Rights and obligations in bargaining

	Is protected action available?	Are bargaining orders available?	Are scope orders available?	Is a Notice of Employee Representational Rights Required?	Is agreement arbitration available?
Single Enterprise Agreement (Greenfields)	No	Yes	No	No	Yes (by consent under s.240. In addition, the employer's proposed agreement can be approved without agreement of the union in some circumstances under s. 178B and 182(4))
Single Enterprise Agreement (non Greenfields)	Yes	Yes	Yes	Yes	Yes (by consent under s.240, or because bargaining is intractable, or because of protected industrial action being terminated)

¹² If an employee is a member of another union that applied for the authorisation, then their bargaining representative is that union of which they are a member. If the employee is a member of a union that did not make the application, the applicant union is their bargaining representative provided the employee is eligible to join – see further sections 176(2) and (3). The impacts of this are discussed in the briefing note on supported bargaining.

Multi Enterprise Agreement – Single Interest Employer Agreement	Yes	Yes	No	No	Yes (by consent under s.240, or because bargaining is intractable, or because of protected industrial action being terminated)
Multi Enterprise Agreement – Supported Bargaining Agreement	Yes	Yes	No	No	Yes (by consent under s.240, or because bargaining is intractable, or because of protected industrial action being terminated)
Multi Enterprise Agreement – Cooperative Workplace Agreement (Greenfields)	No	No	No	No	No (Note there are no bargaining representatives for this type of agreement)
Multi Enterprise Agreement – Cooperative Workplace Agreement (non-Greenfields)	No	No	No	No	Yes (by consent under s.240)

2.5 Role of the FWC in bargaining for different types of agreements

The FWC will have a role in bargaining consistent with the rights and obligations available in bargaining for different types of agreements as set out in Table 2 above. The FWC will continue to have a role in progressing bargaining disputes under section 240, save that where bargaining is occurring for a proposed cooperative workplace agreement the notification to the FWC would need to be made consensually. Once a supported bargaining authorisation has been issued, the FWC will be able to initiate conferences on its own motion to facilitate bargaining for an agreement and direct persons who have a capacity to control terms and conditions of employees but who are not an employer to attend those conferences¹³.

2.6 Approval requirements for different types of agreements

An additional approval requirement applies to multi enterprise agreements in that an employer must not ask employees to vote on the proposed it unless each union that is a bargaining

¹³ These provisions are explicit in respect of supported bargaining in section 246, however a general power to compel persons (including those outside of the bargaining process) to attend conferences exists under section 592(1).

representative has agreed to this.¹⁴ This requirement can be circumvented by the making of a voting request order.¹⁵ The Notice of Employee Representational Rights will not be required outside of bargaining for single enterprise agreement, so the adequacy and timing of its distribution will not be examined in the approval process for multi enterprise agreements¹⁶. As noted above, cooperative enterprise agreements will not be able to be approved unless at least some of the employees covered by them were represented in bargaining by a registered union.¹⁷

2.7 *Varying agreements to expand coverage to new employers*

Single interest employer Agreements and supported bargaining agreements will be capable of being expanded in scope in some situations and the tests for doing so will involve (among other things) many of the merit considerations that relevant to assessing whether an authorisation would be made. Procedures differ however depending on whether the employer consents or does not consent. It should be noted that all multi employer agreements can be varied to cover additional employers without the involvement of a union. In addition, it is possible in some limited circumstances for supported bargaining agreements to be extended through variation in a way that will replace a single enterprise agreement the new employer is covered by, even if the later has not passed its nominal expiry date.

Is it possible to switch streams during bargaining?

Once a single interest employer authorisation has been issued specifying particular employers and employees, the only type of agreement that they can make is a single interest employer agreement, and they are not permitted to bargain for any type of agreement.¹⁸ This prohibition continues for as long as the single interest employer authorisation specifies that employer and its employees is in operation. However, as noted above, in determining an application for a single interest employer authorisation, the FWC has a discretion to exclude certain employers who are bargaining in good faith for an enterprise agreement (of any type) and have a history of effectively bargaining, provided less than 9 months have passed since the nominal expiry date of the most recent agreement.

When a supported bargaining authorisation is made, it is possible for an employer to make a single enterprise agreement, provided that employer's the main intention in making the single enterprise agreement was not to avoid being specified in the authorisation.¹⁹

Both single interest employer authorisations and supported bargaining authorisations may be varied to expand or reduce their scope during their operation, with the latter option based on "a change in the employer's circumstances"²⁰ potentially a contested area.

¹⁴ See s. 180A.

¹⁵ See s. 240A, 240B

¹⁶ See s. 173, 181(2).

¹⁷ S.186(2A).

¹⁸ See section 172(5)

¹⁹ S. 243A(2)

²⁰ See sections s244(2), 251(2A)(v).

It should also be recalled that where an employer initiates bargaining for a single enterprise agreement, the bargaining representatives for the employees (including the default bargaining representatives) can be compelled to bargain in good faith.²¹

When the changes take effect

The relevant amendments will take effect on 6 June 2023, or an earlier date fixed by proclamation.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.*

²¹ S. 230(2)