



## *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 – Multi-Enterprise Bargaining – The Supported Bargaining Stream*

On 2 December 2022, the [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Act 2022](#) (Cth) (**Amendment Act**) was passed by the Commonwealth Parliament and received Royal Assent on 6 December 2022.

The Amendment Act introduces major changes to the Fair Work Act 2009 (**FW Act**) and other laws, particularly in relation to the availability and conduct of multi-enterprise bargaining.

The Amendment Act will provide for 3 streams of multi-enterprise bargaining:

- Single interest employer agreements
- Supported bargaining agreements
- Cooperative workplaces agreements.

This Summary provides an overview of the supported bargaining stream. The new provisions in respect of multi-enterprise bargaining **commence from the earlier of 6 June 2023 or a day to be proclaimed.**

### **Multi-enterprise bargaining**

The Amendment Act will introduce major changes to the availability and conduct of multi-enterprise bargaining under the FW Act. This is separate to bargaining that occurs in relation to a single-enterprise agreement.

The Amendment Act will replace the existing streams of multi-enterprise bargaining previously available under the FW Act with 3 streams that can result in the making of either:

- a supported bargaining agreement;
- a single interest employer agreement; or
- a cooperative workplace agreement.

Generally, employers must obtain written agreement from each union bargaining representative before requesting that their employees vote to approve or vary a multi-enterprise agreement.

Employers can apply to the FWC for a 'voting request order,' permitting the employers to request that the agreement be put to a vote, providing that the following are satisfied:

- for each union bargaining representative that refused the employer's request, that the refusal was unreasonable; and
- that the making of the request by the employer would not be inconsistent with or undermine good faith bargaining.

## **The supported bargaining stream (replacing the low-paid bargaining stream)**

The FW Act currently permits a bargaining representative to seek a low-paid authorisation from the FWC to compel employers to engage in multi-enterprise bargaining. The FWC must grant the authorisation if it is satisfied that it is in the public interest to do so, taking into account various matters related to historical and current collective bargaining, as well the likely success of collective bargaining. This stream has previously been aimed at assisting low-paid employees who have not historically had the benefits of collective bargaining.

The Amendment Act reforms the existing low-paid bargaining stream, which has been renamed the supported bargaining stream

### Can protected industrial action be taken?

Protected industrial action has not been permissible under the low-paid bargaining stream but will be under the new 'supported bargaining stream.' with additional measures, including mandatory conciliation and a requirement for 120 hours' (or 5 days') notice. Participants in this stream also have access to the new intractable bargaining process, which allows parties to seek conciliation and arbitration in certain circumstances.

### Application for a 'supported bargaining authorisation' by a union or other bargaining representative

The FWC must grant a 'supported bargaining authorisation' if it is satisfied that it is 'appropriate' for the employers and employees that will be covered by the multi-enterprise agreement to bargain together, having regard to:

- 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 employers have clearly identifiable 'common interests' (examples of which include geographical location, nature of the enterprises, terms and conditions of employment in those enterprises, and the extent to which those enterprises receive government funding);
- whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process;
- any other matters the FWC considers appropriate; and
- that at least some of the employees who will be covered by the agreement are represented by a union.

### Minister declared industry, occupation or sector

The Amendment Act will also require the FWC to make a supported bargaining authorisation if an application for such authorisation has been made and the employees specified in the application are employees in an industry, occupation or sector that is covered by a Ministerial declaration.

The Minister may make a declaration in relation to a particular industry, occupation or sector to facilitate entry into the supported bargaining stream. If this occurs, the Commission is not required to consider the factors outlined above.

The Minister may make such a declaration if satisfied that doing so is consistent with the following objectives:

- to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs;
- to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises;
- to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and
- to enable the FWC to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements.

### Variations to supported bargaining authorisations

Once a supported bargaining authorisation has been made by the FWC, a union can apply to the FWC to add additional employers and their employees to the authorisation, without the employer's consent.

An employer and the majority of its employees can also agree to become covered by an existing supported bargaining authorisation.

An employer or a union can apply to the FWC to vary a supported bargaining authorisation to remove an employer and its employees. The FWC can vary the authorisation if, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

### Interaction between supported bargaining agreements and single-enterprise agreements

The FWC must not make a supported bargaining authorisation covering an employee who is otherwise already covered by a single-enterprise agreement that has not passed its nominal expiry date.

This means an employer covered by an in-term enterprise agreement cannot be covered by a supported bargaining authorisation. However, where the FWC is satisfied that the employer's main intention in making the agreement was to avoid being specified in the authorisation, a supported bargaining authorisation can cover an employee who is covered by an existing single-enterprise agreement that has not passed its nominal expiry.

If an employer is specified in a supported bargaining authorisation, the only kind of agreement the employer may make with their employees who are specified in the authorisation is a supported bargaining agreement, and the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement.

Where a supported bargaining agreement comes into operation, the single-enterprise agreement ceases to apply to the employee and can never apply again.

## Variations to supported bargaining agreements to add additional employers and employees

Once a supported bargaining agreement has been made and approved by the FWC, a union can apply to the FWC to add additional employers and their employees to the agreement, without the employer's consent, subject to certain conditions.

An employer and the majority of its employees can also agree to become covered by an existing supported bargaining agreement, if a majority of those employees want to be covered by the agreement and subject to range of other conditions being met.

An application to vary the agreement must be made to the FWC and the variation takes effect once the variation has been approved by the FWC.

## Variations to supported bargaining agreements to remove employers and employees

An employer and its employees to jointly make a variation to a supported bargaining agreement so they cease to be covered. The variation will take effect if approved by the FWC.

However, before an employer requests that employees approve a variation of a multi-enterprise agreement, by voting for it, the employer must obtain written agreement to the making of the request from each union covered by the enterprise agreement. Employers can apply to the FWC for a 'voting request order,' if agreement is unreasonably refused.

In addition to the requirement for union agreement, the FWC must also be satisfied that:

- the employer took all reasonable steps to notify employees of the time and place at which the vote will occur and the voting method that will be used and gave the employees a reasonable opportunity to decide whether they want to approve the proposed variation;
- affected employees have voted by ballot or electronic method and a majority of those approved the variation; and
- there are no reasonable grounds for believing that a majority of affected employees who cast a valid vote did not approve the variation.

## When do these changes come into effect?

The new provisions in respect of multi-enterprise bargaining commence from the earlier of 6 June 2023 or a day to be proclaimed.