Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 – Multi-Enterprise Bargaining: The Single Interest 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 single interest 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 or variation 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 single interest bargaining stream

The FW Act currently permits two or more employers that are not '*single interest employers*', but have a close connection, to seek a single interest employer authorisation (for example franchisees) to commence bargaining for a single interest employer agreement.

Alternatively, employers that are declared by the Minister to be a single interest employer (for example schools and public health service providers) may also bargain together for a single interest employer agreement.

The Amendment Act will permit employers or union bargaining representatives to apply for a 'single interest employer authorisation'. It will remove the Ministerial declaration power as concerning single interest employers. Instead, the Amendment Act transfers the power to permit bargaining for a single interest employer agreement to the Fair Work Commission (**FWC**) and sets a new test for the granting of such authorisation.

If an employer becomes covered by a single interest employer authorisation they will need to comply with the good faith bargaining requirements in relation to the proposed singe interest employer agreement. They will also be precluded from bargaining for a single-enterprise agreement.

Is protected industrial action permitted under this stream?

Protected industrial action will be permitted under this 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.

General requirements for the making of a single interest employer authorisation

The FWC must make a single interest employer authorisation if it is satisfied that:

- At least some of the employees who will be covered by the agreement are represented by a union.
- The employers and the bargaining representatives have had an opportunity to express their views on the authorisation.
- The employers:
    - have 'clearly identifiable common interests' (see further below) and it is not contrary to the public interest to make the authorisation; or
    - carry on similar business activities under the same franchise and/or are related bodies corporate of the same franchisor.
- If the common interest requirements 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 (see further below).

Additional requirements for the making of a single interest employer authorisation where the application is made by employers

Employers may themselves make an application seeking that they be covered by a single interest employer authorisation. Where the application is made by two or more employers, they must have agreed to bargain together, free of coercion.

Additional requirements for the making of a single interest employer authorisation where the application is made by a union and the employer has not consented

If the application is made by a union, and the employers have not consented to the application, the additional requirements below must also be met before a single interest employer authorisation is made:

- The employer must not have made an application for a single interest employer authorisation that has not yet been decided.
- The employer must not be named in an existing single interest employer authorisation or supported bargaining authorisation.
- A majority of the employees who are employed by the employer and who will be covered by the agreement must want to bargain for the agreement.
- The employer must not be covered by an enterprise agreement that has not passed its nominal expiry date at the time when the FWC will make the authorisation.
- The employer and a union 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, must not 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
- If the employer has **less than 20 employees**, they cannot be drawn into a single interest employer authorisation, unless they otherwise agree to be included.

The clearly identifiable common interest requirement (the 'common interest test') and reasonably comparable operations and business activities requirement (the 'reasonably comparable test')

The common interest test requires the FWC to consider whether there are clearly identifiable common interests between the employers and whether it would be contrary to the public interest to make the authorisation.

The Amendment Act identifies that the matters that may be relevant to determining whether the employers have a common interest include:

- 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.

Providing that the common interest test has been satisfied, the FWC must also consider whether the operations and business activities of each employer to be covered by the single interest employer agreement are reasonably comparable with those of other employers that will be covered by the agreement.

Both the 'common interest test' and 'reasonably comparable test' will vary depending on the size of the employer:

- **If the employer has 50 or more employees** - there is a presumption that the common interest test and reasonably comparable test have been met. The onus to prove otherwise would rest with the employer.
- **If the employer has between 20 and 49 employees** - there is no presumption that the common interest test and reasonably comparable test have been met. The onus to prove that the tests are met would rest with the union.

Interaction between single interest employer authorisations and single-enterprise agreement making

An employer specified in a single interest employer authorisation:

- can only make a single interest employer agreement; and
- must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement.

However, where employers and employees are covered by a current enterprise agreement, or the employer has already agreed in writing with an employee organisation to bargain for a replacement single-enterprise agreement, such employers cannot be compelled to bargain for a single interest employer agreement.

The FWC will also have the discretion to refuse to vary a single interest employer authorisation to cover a particular employer and employees if:

- the employer is bargaining in good faith for a proposed enterprise agreement that will cover the employer and the relevant employees, or substantially the same group as the relevant employees;
- the employer and the relevant employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employer and the relevant employees, or substantially the same group as the relevant employees; and
- on the day that the FWC will make the authorisation, less than 9 months have passed since the most recent nominal expiry date of an agreement referred to above.

Variations to single interest employer authorisations to add additional employers and employees

Once a single interest employer authorisation has been made by the FWC, a union can apply to the FWC to add additional employers and their employees to the authorisation if any of the employees of the new employer are members of the union.

An employer and the majority of its employees can also agree to become covered by an existing single interest employer authorisation (subject to certain requirements being met).

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

Variations to single interest employer authorisations to remove employers and employees

A bargaining representative of an employee or employer can apply to the FWC to vary a single interest employer authorisation to remove an employer and its employees.

The FWC must vary the authorisation if either of the following requirements are met:

- the employers specified in the authorisation and the bargaining representatives of the employees of those employers have had an opportunity to express to the FWC their views (if any) on the application and because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation; or
- where a bargaining representative of an employee makes an application, the FWC is satisfied that.
    - the relevant employer employed fewer than 50 employees at the time that the application was made;
    - the employers specified in the authorisation 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 application;
    - the relevant employees, on request by the bargaining representative, approved the removal of the relevant employer's name (i.e. at least 50% of the relevant employees casted a vote and more than 50% of the valid votes were in favour of the removal); and
    - there are no reasonable grounds for believing that the removal of the relevant employer's name has not been genuinely approved by the relevant employees. The Amendment Act notes that a person must not coerce another person to exercise a workplace right in a particular way.

Variations to single interest employer agreements to add additional employers and employees

Once a single interest employer agreement has been made, a union can apply to the FWC to add additional employers and their employees to the agreement if any of the employees of the new employer are members of the union.

An employer and the majority of its employees can also agree to become covered by an existing single interest employer agreement (subject to certain requirements 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 single interest employer agreements to remove employers and employees

Employer and its employees are permitted to jointly make a variation to a multi- enterprise agreement, including single interest employer 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 such 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.

What should Growers do?

At this stage, the strongest protection from being drawn in to this multi-employer bargaining stream is having an Enterprise Agreement in place.

Should growers want to avoid becoming embroiled or compelled into in the new single interest agreement stream, you should have clearest strategy available and consider implementing an Enterprise Agreement or renegotiating an agreement if you have one in place.

Whether or not this is worthwhile will depend on each growers' specific circumstances, but now would be a good time to get some strategic advice on such matters.