KINGSTON REID

Industrial Relations, Bargaining, Disputes and Strikes in the New Era - WORKSHOP PAPER

AUSTRALIA'S FUTURE WORKPLACE LAW SUMMIT

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Contents

Introduction

One thing that can be said about the Labor Government's industrial relations agenda, is that it is ambitious. Since coming to power in May 2022 there has been a Summit, and two major tranches of legislative changes Secure Jobs Better Pay and Closing the Loopholes.

In furtherance of "secure jobs and better pay" there was an expansion and rebranding of multi-employer bargaining, permitting the roping in of employers to a multi-employer agreement where they have a 'common interest' with other employers under the agreement. The effect of this means for any employer roped in, there is little in the way of bargaining or agreement making at all.

There was also the introduction of Intractable Bargaining Declarations to better deal with protracted bargaining.

The end of 2023 and the beginning of 2024 has seen even more profound changes to the industrial landscape with Closing the Loopholes (including closing loopholes from Secure Jobs Better Pay), involving, changes to casual employment, the introduction of same job same pay, wage theft, delegates rights and gig economy provisions. In the first weeks of the Parliamentary sitting calendar for 2024, we have also seen changes to the Intractable Bargaining Declarations provisions to ensure that if the Commission arbitrates as result of the Declaration, to paraphrase that hit by *Yazz* from 1988, *The Only Way is Up* in respect of that arbitrated outcome.

All this means is that the currently bulky Fair Work Act will continue to expand (by about a third), the Fair Work Commission, given its significantly expanded jurisdiction, will likely grow in size (by about a third), and those who work in the area will have a lot of work arguing about the meaning and intent of this increasingly complex system.

A lot of food for thought.

Multi-employer 'bargaining'…

Snap Shot	When and in what circumstances can a single-interest employer application be made?

Procedural step / issue	Explanation
Apply for a single interest employer authorisation	
Who may apply for an authorisation?	Who may apply to the FWC for a single interest employer authorisation in relation to a proposed single interest employment agreement that will cover two or more employers:[1] • *employers* – these employers will have agreed to bargain together and must not have been coerced to do so;[2] **or** • a *bargaining representation of an employee* who will be covered by the proposed agreement (**employee bargaining representative**).
What the application must include?	An application for a single interest employer authorisation must specify: • the employers and employees that will be covered by the proposed single interest employer agreement; and • the person who will make applications to the Fair Work Commission (**FWC**) on behalf of the employers if an authorisation is made.
Requirements to obtain an authorisation	The following requirements must be satisfied irrespective of who applies for an authorisation. The FWC must make a single interest employer authorisation if the FWC is satisfied that:[3] • an application for the authorisation has been made; • at least some of the employees that will be covered by the single interest employer agreement are represented by a union; • the employers, and the employee bargaining representatives, have had a chance to express their views to the FWC;

[1] Section 248(1) of the FW Act.
[2] Section 249(1)(b)(ii) of the FW Act.
[3] Section 249 of the FW Act.

Procedural step / issue	Explanation
	• the employers have 'clearly identifiable common interests' (considering their geographical location, regulatory regimes, the nature of their enterprise, and the terms and conditions of employment in such enterprise); • it is not contrary to the public interest to make the authorisation; • the operations and business activities of the employers are reasonably comparable; and • the **additional requirements** outlined below are met (which are contingent on who the relevant applicant is). If the application is made by an employee bargaining representative in relation to an employer that employs 50 or more employees (including regular casual employees and employees in associated entities), it will be *presumed* (*"unless the contrary is proved"*) that: • the relevant employers have 'clearly identifiable common interests'; • it is not contrary to the public interest to make the authorisation;[4] and • the operations and business activities of the relevant employers are reasonably comparable.[5] In other words, there is a reverse onus of proof.
Additional requirements - applications made by employers	If the application was made by two or more employers, then the FWC must also be satisfied that the employers who will be covered by the agreement have agreed to bargain together and were not coerced to do so.

Additional requirements - applications made by a union	If the application was made by an **employee bargaining representative**, then the FWC must also be satisfied that:[6]
	• *each employer* has **consented to** the application; **or**
	• *each employer* meets the following conditions:
	  ○ they employ at least 20 employees;
	  ○ they have not made an application for a single interest employer authorisation, and are not named in a single interest employer authorisation or supported bargaining authorisation, relating to the employees that will be covered by the proposed single interest employer agreement;

[4] Section 249(3AB) of the FW Act.
[5] Section 249(1AA) of the FW Act.
[6] Sections 249(1)(b)(iv) and 249(1B) of the FW Act.

Procedural step / issue	Explanation
	○ a majority of their employees want to bargain for a single interest employer agreement – the FW Act says that the FWC can *"work out whether a majority of employees want to bargain using any method [it] considers appropriate*"; ○ the employer and their employees who will be covered by the proposed single interest employer agreement are **not covered by an enterprise agreement that has not passed its nominal expiry date**; and ○ the employer and a union (entitled to represent the industrial interests of one or more of the employees that will be covered by the proposed single interest employer agreement) have not already agreed in writing to bargain for a single employer agreement that would cover substantially the same group of employees.
The FWC choosing to exclude an employer	The FWC may decide not to include an employer and their employees in an authorisation (but who is named in an application), where it is satisfied that:[7] • the employer is already bargaining in good faith for a proposed enterprise agreement that will cover the relevant employees (or substantially the same group of employees); • the employer and the employees have a history of effectively bargaining in relation to enterprise agreements; and • less than 9 months have passed since the nominal expiry date of such an enterprise agreement. If the FWC's exercise of discretion means that *"**no employers** would be specified in the authorisation, the FWC **may refuse** the application for the authorisation"* (emphasis added).[8]
If approved, when does the authorisation cease operating?	A single interest employer authorisation will cease operation at the earlier of the following: • when the relevant single interest employer agreement is made; or • 12 months after the day on which the authorisation is made (or a longer period, if extended by the FWC on application under s.252 of the FW Act).

[7] Section 250(3) of the FW Act.
[8] Section 250(4) of the FW Act.

Procedural step / issue	Explanation
Adding another employer to the authorisation (once it has already been made)	An **employer (who wishes to be added to an authorisation)**, or an **employee bargaining representative**, may apply to the FWC to add themself (in the case of an employer-initiated application) or employers (in the case of a union initiated application) to the authorisation.[9] In broad terms, in deciding whether to add an additional employer, the FWC will consider the same matters involved in deciding whether to make an authorisation (see above). However, if the application to add an employer is made by an **employee bargaining representation**, the FWC will only add the new employer if:[10] • they are not covered by an enterprise agreement that has not passed its nominal expiry date; and • a majority of the new employer's employees want to bargain for the proposed single interest enterprise agreement.
Voting on a single interest employer agreement	
Written agreement from union to commence voting	Before an employer can request employees to approve a single interest employer agreement, the employer must first obtain:[11] • the written agreement from each bargaining representative that is a union; or • a 'voting request order' from the FWC – in summary, this order is made where a failure by the union to provide written agreement was unreasonable in the circumstances.
No agreement by all employers	A multi-enterprise agreement (i.e., a single interest employer agreement) is ***made*** when a majority of the employees of *"at least one"* employer named in an authorisation vote to approve the agreement.[12] If the agreement was not approved by the employees of all the employers, then prior to seeking the FWC's approval, a bargaining representative must vary the agreement so that the agreement is expressed to *"each employer"* whose employees approved the agreement.[13]

[9] Section 251 of the FW Act.
[10] Sections 251(5) and (7) of the FW Act.
[11] Section 180A of the FW Act.
[12] Section 182(2)(d) of the FW Act.
[13] Section 184 of the FW Act.

Procedural step / issue	Explanation
After the agreement is approved	
Ability to 'rope in' new employers	A single interest employer agreement can be varied to 'rope in' another employer (and their employees) through: • a joint application by the new employer (seeking to be 'roped in') and their affected employees;[14] or • an application by a union already covered by the agreement.[15] The FWC must approve an application to vary a single interest employer agreement (by adding a new employer) if the FWC is satisfied that:[16] • the employers and any employee organisation covered by the agreement have had an opportunity to express their views on the variation; • the new employer to be 'roped in' employs at least 20 employees; • the majority of the affected employees of the new employer want to be covered by the agreement; • **in a union-initiated application, the new employer and the affected employees are not covered by another enterprise agreement that has not passed its nominal expiry date;** • the new employer and a union that represents the interests of one or more affected employees have not already agreed in writing to bargain for a proposed single enterprise agreement that would cover substantially the same group of affected employees; • the new employer and the employees covered by the agreement have clearly identifiable common interests (taking into account their geographical location, regulatory regimes, the nature of their enterprise, and the terms and conditions of employment in such enterprise) – this is presumed in an application by a union; • it is not contrary to the public interest to make the authorisation – this is presumed in an application by a union; and • the operations and business activities of the employers are reasonably comparable – this is presumed in an application by a union.

[14] Section 216D(1) of the FW Act.
[15] Section 216DB(1) of the FW Act.
[16] Section 216DC of the FW Act.

Procedural step / issue	Explanation
The FWC refusing a 'rope in' application	The FWC *may* refuse to approve a 'rope in' application if it is satisfied that:[17] • the new employer is already bargaining in good faith for a proposed enterprise agreement that will cover the affected employees (or substantially the same group of employees); • the new employer and the employees have a history of effectively bargaining in relation to enterprise agreements; and • less than 9 months have passed since the nominal expiry date of such an enterprise agreement. The FWC *may* also refuse to 'rope in' a new employer if the variation would result in:[18] • a person committing an offence against a Commonwealth law; or • a person being liable to pay pecuniary penalties in relation to contravening a Commonwealth law.
'Leaving' a single interest employer agreement	An employer and their employees can make a joint application to no longer be covered by a single interest employer agreement. The FWC must approve this variation if it is satisfied that:[19] • a majority of the employees have approved the variation through a vote – there are associated notice requirements prior to any vote; • there are no other reasonable grounds for believing that a majority of the affected employees who cast a valid vote did not approve the variation; and • each **union covered by the agreement, which is entitled to represent the industrial interests of one or more affected employees, agrees to the variation**. Additionally, if a single enterprise agreement that covers the employee in relation to the same employment comes into operation (even though the single interest employer agreement had not reached its nominal expiry date), the single interest employer agreement will cease to operate in relation to that employer and the relevant employees[20].

[17] Section 2DC(3B) of the FW Act.
[18] Section 216DE of the FW Act.
[19] Section 216EB of the FW Act.
[20] Section 58(4) of the FW Act

Procedural step / issue	Explanation
	In order though for a single enterprise agreement to commence operating however, where there is a single interest employer agreement that has not passed its nominal expiry date: • the employer cannot request that employees approve the single enterprise agreement by voting on it, unless each union that is covered by the single interest employer agreement has provided their written agreement to the vote taking place or a voting request order permits the employer to make the request[21]; and • the single enterprise agreement passes the BOOT when compared to the terms of the single interest employer agreement that applied to the employee[22]. For the purpose of assessing the BOOT, the FWC must give consideration to any views expressed by the union bargaining representatives to the single interest employer agreement[23].
Terminating a single interest employer agreement	Any application by a covered employer to terminate a single interest employer agreement will be difficult even after its nominal expiry date, as the FWC will have regard to:[24] • whether it is appropriate in all the circumstances to terminate the agreement; • whether the continued operation of the agreement would be unfair for employees; • the views of the employees, each employer and each union; and • whether terminating the agreement would adversely affect the bargaining position of employees in respect of a new enterprise agreement.

[21] Section 180B(2) of the FW Act
[22] Section 193(1)(b) of the FW Act
[23] Section 193A(4) of the FW Act
[24] Section 226 of the FW Act.

What has been the response to multi-employer bargaining?

Initially the uptake on the use of the multi-employer bargaining provision was measured. The first applications were in the supported bargaining space for employers in the early education and care industries, followed shortly by an application for a single-interest employer authorisation in the Independent Schools or TAFE sector, and Health Services where a single agreement across multiple employers was seen as preferable and was consented to by those employers.

Now we are seeing unions starting to flex their muscle beyond supported bargaining and environments where there has been a history and willingness from employers to bargain on a multi-employer basis.

The mining and resources sector in NSW: Professionals Australia has applied for a single-interest employer authorisation to cover a range of major **mining companies** (Peabody Energy, Whitehaven Coal, Wollongong Resources, Ulan Coal and Delta Coal) and their employees performing professional engineering, control room operations and managerial/supervisory functions. The matter first came before the FWC on 23 December 2023 and will likely be allocated to a Full Bench for determination, in much the same way as the first Independent Schools sector application was. It will become a test case.

The Union did not have any existing enterprise agreement which covered the relevant workers and it is understood that the relevant employee cohort are relatively highly paid and are engaged under individual contracts. For three of the five employers covered by the application, Professionals Australia has asserted that the individual contracts which employees are working on exceed a guarantee of annual earnings arrangement of $167,500 and accordingly remove the operation of the *Black Coal Mining Award 2020* as a safety net.

Whilst the Union had not been successful previously in establishing sufficient support amongst a large enough proportion of the relevant employees within any of the individual employers to bargain collectively previously, they have indicated in their application that via a survey conducted in the weeks leading up to the application first coming before the Fair Work Commission, that there is a majority of employees who want to bargain for a multi-employer agreement across the five employers.

This application (which all of the employers have indicated will be opposed) is going to be a clear benchmark for where the rubber will hit the road about how these provisions will be applied. Once the Union can demonstrate that it has met the jurisdictional thresholds (of employer size[25], and that a majority of employees want to bargain for a single-interest employer agreement[26]), the employers involved in these applications bear the onus of demonstrating that they don't have clearly identifiable common interests, that it is contrary to the public interest, or that the operations are not reasonably comparable.

Outlook:	This application (which all of the employers have indicated will be opposed) is going to be a clear benchmark for where the rubber will hit the road about how these provisions will be applied. Once the Union can demonstrate that it has met the jurisdictional thresholds (of employer size[27], and that a majority of employees want to bargain for a single-interest employer agreement[28]), the employers involved in these applications bear the onus of demonstrating that they don't have clearly identifiable common interests, that it is contrary to the public interest, or that the operations are not reasonably comparable.

What are the areas of risk for employers?

The examples provided in the Independent School and TAFE sectors, or the Health Services sectors of utilisation of these revamped single-interest employer provisions, fail to provide any great insight into how Unions might seek to use these provisions prospectively – they were each effectively consent applications, and reflect a history of using similar provisions which were available under the pre-Secure Jobs Better Pay Fair Work Act.

The Professionals Australia application however provides a much better indicator for the features that are likely to trigger risk for employers should they bear a similarity in their profile to the employers and employees subject to this application. Relevantly:

- ✓ They comprise a work group which the Union has been unsuccessful in organising through traditional means to collectivise – however in this instance the union has been able to garner sufficient majority support to produce a survey of employees which it is relying on to evidence majority support for multi-employer bargaining;
- ✓ They are not a group who had previously had a collective enterprise agreement at all, as opposed to comprising a group that were accustomed to single-enterprise bargaining, but now believe they can obtain a better outcome through multi-employer bargaining;

[25] S.249(1B)(a)
[26] S.249(1B)(d)
[27] S.249(1B)(a)
[28] S.249(1B)(d)

- ✓ They are each large and easily identified employers in the sector. The Union has not sought to "pick-off" a small group of small to medium sized businesses and then roll the larger employers into that multi-employer deal. The Union strategy appears to be very much "top down" as opposed to "bottom up" – and indeed perhaps that makes sense because should bargaining become intractable and require arbitration, it is likely the larger employers that have a great capacity to pay for enhanced terms and conditions as compared to smaller operators. The terms of any such arbitrated agreement could then, by application to rope in other employers, be applied to smaller operators;

- ✓ The high level of remuneration enjoyed by the employees through individual contracts has not prevented a significant majority seemingly being prepared (to the extent that the survey material proves reliable) now expressing their desire to bargaining collectively on a multi-employer basis.

In our view: the initial test of these provisions will be those employers who are larger, who have successfully avoided enterprise bargaining for pockets of their workforce, and where a relevant union has low penetration or an inability to effectively collectivise that are going to be most susceptible to these applications.

Beyond this, it is also easy to see the **second horizon for single-interest employer bargaining** involving some industries where they are already have a significant presence and are seeking for expediency or because of limited Union resources to leverage these provisions and create greater homogeneity in industry conditions. **Contracting businesses** in a variety of industries are likely to be part of this second horizon, be they in aviation, mechanical or electrical engineering or maintenance, cleaning, or facilities maintenance. Whilst it would be common for many employers operating in these industries to have an enterprise agreement, it is only an "in term" enterprise agreement that provides absolute protection from an application to be included in a single-interest employer authorisation[29] or to have one extended to include the employer[30].

An early indication of this occurred in the Victorian HVAC (heating, ventilation and air-conditioning) sector, where the AMWU and various HVAC operators were in early discussions to create a single-interest employer agreement which could then have been used as the basis for roping-in other employers in the sector who were either not working under an enterprise agreement, or if they did have an enterprise agreement with inferior conditions could be sought to be roped-in at the point that their existing enterprise agreement expired. This attempt to elevate conditions across an industry through securing endorsement of a small number of employers who have favourable relationships with the Union has not taken further hold, however it continues to be a scenario which will be available once single-interest employer agreements become more common place.

What can be done to minimise exposure/risk to multi employer bargaining?

[29] Section 249(1D)(a) of the FW Act
[30] Section 251 of the FW Act

If an employer wants to avoid being dragged into multi-employer bargaining then either:	➢ have an in-term enterprise agreement in place; or ➢ consider commencing bargaining for a single employer agreement. **Remember:** If a union is not agreeing to such a negotiation, then an employer commencing bargaining provides it with an argument to resist a single interest employer authorisation from being made, although the discretion rests with the FWC as to whether to make the authorisation or roping in an employer to an existing single-interest enterprise agreement. **Also:** a union can't make an application unless there is majority support from the employees of the employer pursuing a hearts and mind campaign so that there is not majority support is also a relevant defensive strategy

It should also be noted that there may be reasons why employers take an alternate view in the face of the prospects of a single-interest employer agreement – that is that it is not a situation to be avoided, but instead embraced. Where an employer is already providing terms and conditions that are at the top of the market in their sector, and there is the prospect of bringing the market up to the price that they pay for labour, such a situation may be attractive.

The point which underscores all of this is that particular consideration about an employer's specific operational circumstances, market pressures, ability to attract and retain skills, and medium to long term horizon, are all important considerations and warrant detailed consideration in the planning phase of any up-coming bargaining rounds. There are new roads which can be travelled as a result of the substantial legislative amendment which the Government has undertaken – determining what is the best route for any employer is not necessarily the road previously travelled.

Managing the Risk of Intractable Bargaining…

Snap Shot	How is the risk of intractable bargaining arbitration best managed?

Procedural step / issue	Explanation
Applying for an intractable bargaining declaration	
Intractable bargaining declaration and intractable bargaining workplace determination	The FWC may grant an intractable bargaining declaration in relation to a proposed single-enterprise agreement, single interest employer agreement, or supported bargaining agreement, which allows the FWC to arbitrate bargaining disputes. The arbitrated outcome is the intractable bargaining workplace determination. The FWC may make an intractable bargaining declaration if:[31] • an application has been made – the application can be made by any bargaining representative; • the FWC has dealt with the dispute under section 240 and the applicant participated in that process; • there is no reasonable prospect of the agreement being reached if the FWC does not make the declaration; • it is reasonable to make the declaration, taking into account the views of all the bargaining representatives for the agreement; and • the minimum bargaining period has ended – the end of the minimum bargaining period is the later of the day that is 9 months after the nominal expiry date of any existing agreement that covers the employees, or the day that is 9 months after the commencement of bargaining.

[31] Section 235 of the FW Act.

The Greens Amendment

In addition to the operation of the provisions which commenced on 6 June 2023, the Closing Loopholes No.2 Amendments that were passed on 12 February 2024, have further modified the arbitral discretion available to the FWC where there is an existing enterprise agreement that applies to one or more employees who will be covered by an intractable bargaining determination.

These changes to the intractable bargaining determination provisions were advanced by the Greens in exchange for their endorsement in the Senate of the Closing Loopholes No.2 Bill and mandate that if an enterprise agreement that applies to one or more employees who will be covered by an intractable bargaining determination, **any term which is included in the determination must be *"not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of the employees"* than the term of that applying enterprise agreement**. The Greens Amendment protects the existing enterprise agreement terms from reduction in a resolution of the bargaining dispute by arbitration.

The only existing enterprise agreement term which is excluded from the operation of the Greens Amendment are terms that provide for a wage increase – although even in that minor carve out, it is an exception which means that the FWC is not required to replicate or increase the quantum of any % wage increase that may have been included in an earlier enterprise agreement. It would not provide scope for the FWC to reduce actual wage rates (even if it were to form the view that the wage rates in the earlier enterprise agreement were unsustainable).

But wait, that's not all. A further amendment has been introduced to the definition of what constitutes an "agreed term" in the bargaining and cannot be modified by the arbitrated decision of the FWC. Whilst the original drafting of the intractable bargaining provisions left open for the bargaining representatives to decide what terms were "agreed" and what would be the subject of arbitration up until either the intractable bargaining declaration was made or the conclusion of the post-declaration negotiation period, the amended provisions **bring forward the timing of "agreed terms" to include any term that was agreed at the point when the application for the intractable bargaining declaration was made**. This appears to be a Government response to a concern that employers were removing claims that had been agreed during the bargaining from their "agreed terms" on the eve of arbitration and were therefore manipulating the intended effect of the intractable bargaining provisions.

What are the early indicators on the use of intractable bargaining powers?

Intractable bargaining declaration provisions were identified by the Government as a shift in policy settings concerning enterprise bargaining in order to have a mechanism to lessen the instances of interminable bargaining without an effective circuit breaker to enable parties to reach an outcome. They replaced the previous "serious breach declaration" provisions (which were only available if there had been a serious and persistent breach of good faith bargaining orders) and instead operate in circumstances where the FWC is satisfied (amongst other things) that there is no reasonable prospect of an agreement being reached if the FWC does not make the declaration.

The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* explained the intent behind the provisions in the following terms:

> *"no reasonable prospect of agreement being reached … does not require the FWC to be satisfied that an agreement could never be reached but rather that the chance of the parties reaching agreement themselves is so unlikely that it could not be considered a reasonable chance. It is unlikely that the FWC would reach such a state of satisfaction unless the parties had exhausted all reasonable efforts to reach agreement, but the provision leaves it up to the FWC to determine, in all the circumstances, whether it is satisfied that there is no reasonable prospect of the parties reaching agreement if the FWC does not make the declaration."*

As initially drafted	With the Greens amendment
If the FWC were to arbitrate an outcome, having made an Intractable Bargaining Declaration, it was possible it could determine that certain provisions that were in the current but expired enterprise agreement, ought to be changed going forward – for example more flexible rostering provisions.	The FWC is prevented form arbitrating an outcome on any bargaining item that in any way reduces an existing condition for employees (or a union).

In our view: The amendments make the provisions problematic for employers. While for employees the only way is up, it entrenches in perpetuity provisions that might have been negotiated years ago but are no longer fit for purpose.

The reason we set this out is because the decisions made to date have, for the most part, not been contested, and have all occurred within the framework of the provisions as originally passed in late 2022 as opposed to the gutted provisions of early 2024 insofar as the Commission's discretion is concerned.

The initial test of these provisions will be those employers who **are larger, who have successfully avoided enterprise bargaining for pockets of their workforce, and where a relevant union has low penetration or an inability to effectively collectivise that are going to be most susceptible to these applications**.

One of those decisions, involving the UFU, was catalyst to the Greens amendment. In the **UFU matter**, involving Fire Rescue Victoria (**FRV**) both parties agreed that bargaining was deadlocked but the area of disagreement was what had previously been agreed by the parties during bargaining. FRV had agreed certain matters in principle but

when it made its last pay offer, indicated that everything else was up for grabs. The UFU wanted the Declaration to limit what it was that could be arbitrated but the FWC declined to limit the terms of the Declaration. The UFU, working on the basis that there's more than one way to skin a cat, approached the Greens and persuaded them to put forward a change to the provisions agreed to by Labor which effectively up ends them.

In recent times in a matter involving Ventia and the UFU (again), the FWC declined to find there was no reasonable prospect of agreement being reached based on a concession made by counsel for the UFU that it might be prepared to reconsider its position on the length of the agreement, and that Ventia had become the sole tenderer for a new Defense Base Services Contract, despite a long generally fruitless period of negotiation. So far, no employer application for an Intractable Bargaining Declaration has succeeded, although, as stated earlier, a number of applications did have consensual elements to them.

Where are Intractable Bargaining Declarations most likely to reveal themselves?

Outlook:	As with so much of what has been developed by the Labor Government, these provisions provide a pathway to bargaining outcomes for a Union in circumstances where the size or will of their union membership to engage in more traditional bargaining strategies (such as the pursuit of protected industrial action) have been untapped or ineffective. Consequently, an obvious area in which employers are at greater risk of these provisions being accessed by a union is where there is low union membership or an environment where employees have previously shown a reluctance to engage in protected industrial action to further their claims.

Given that the intractable bargaining provisions are also available in the context of single interest employer agreements and supported bargaining agreements[32], where the ability for an employer to put an agreement to the vote without either union endorsement to do so or an order from the FWC to permit the vote to occur operates, these streams of multi-employer bargaining present themselves as another area where resort to arbitration by the FWC is more likely as part of a union's bargaining strategy – given that an employer's power to progress the bargaining and make an enterprise agreement is limited.

[32] Section 234(2) of the FW Act

With the introduction of the Greens amendment concerning the inability for an intractable bargaining determination to introduce less favourable conditions than those contained in an existing enterprise agreement that covers any employee to which the determination applies, there appears to be no benefit in accessing these provisions for employers. The only meagre silver lining in an intractable bargaining process is that the Dispute Settlement Procedure in an intractable bargaining determination will not be able to permit arbitration of disputes – and that may provide some limited leverage for an employer to ward off an intractable bargaining application, however that is contingent on the employer having not conceded that arbitration of disputes under a Dispute Settlement Procedure is an "agreed term" (as newly defined in the Closing Loopholes No.2 Amendments).

In our view: In a single enterprise agreement context, the obvious counter to the risk of an intractable bargaining application is to develop a strategy that enables an employer to put an enterprise agreement to a vote (and hopefully a successful vote) in advance of the expiry of the "minimum bargaining period" (being the latter of 9 months of bargaining or 9 months after the nominal expiry date of an existing enterprise agreement that applies to employees covered by the proposed agreement)[1]. Consideration therefore of the timing of an employer's commencement of negotiations, the communication strategy and potential to engage and elevate representation of independent bargaining representatives will all be relevant.

What can be done if you think you might be exposed to an Intractable Bargaining Declaration?

The great problem with the provisions as they will now operate, is that if an employer only commences thinking about the management of an intractable bargaining application at the point that it arrives, or as it approaches 9 months of bargaining, the game is all but over.

- ✓ Managing the timing of concessions provided in the bargaining room, including identifying that any concessions are subject to the "total package" of terms and conditions being agreed (to ensure an employer is not locked into certain positions if it is faced with arbitration of the dispute in any event) is important.
- ✓ As was also evident in the Ventia matter, the ability to make concessions or reconsider positions in the context of an application being made for an intractable bargaining declaration, can also be useful in demonstrating that there is a "reasonable prospect" of agreement being reached – and that accordingly, the FWC should not exercise its discretion to make the declaration.
- ✓ Using the FWC's section 240 bargaining disputes jurisdiction (noting, however, that a s240 application is a prerequisite for an Intractable Bargaining Declaration) may be a beneficial strategy.

- ✓ Hold bargaining representatives accountable for conducting themselves in accordance with the good faith bargaining obligations under the FW Act. Whilst historically, there may have been only limited utility in an employer resorting to allegations of breach of the good faith bargaining provisions (because the benefit of seeking a serious breach declaration and corresponding arbitration of a bargaining dispute was unattractive), that the FWC is required in considering whether to make an intractable bargaining declaration whether "it is reasonable in all the circumstances to make the declaration"[33], potentially engages with a need to develop evidence of the conduct of a union in bargaining, including whether the protracted nature of bargaining has been caused by a union's capricious or obstructionist conduct.

[33] Section 235(2)(c) of the FW Act

Is PIA still likely to be as relevant or is arbitration the 'new black'…

Snap Shot	**How will the changes to PIA and access to arbitrated bargaining change the tactics of Unions in bargaining?**

Procedural step / issue	Explanation
The PABO Process	
PABO for single interest employer agreements and single enterprise agreements	A protected action ballot order (**PABO**) is available in relation to a proposed single interest employer agreement[34] and continues to be requires in relation to single enterprise agreements also. When the FWC receives an application for a PABO in respect of a proposed single interest employer agreement that would affect employees of different employers, it will deal with the PABO application as if it were a separate application from each employer named in the authorisation.[35] Therefore, depending on the outcome of the ballot at each employer, it may be that industrial action is protected in relation to the employees of one or some of the employers. If the FWC makes a PABO, it will also make an order directing all bargaining representatives for the proposed single interest employer agreement to attend a conference before the Commission at a specified time during the ballot period[36], however it is only those bargaining representatives who have applied for the PABO that must attend the conference in order the industrial action to be protected[37]. • In multi-enterprise bargaining, bargaining representatives must provide at least 120 hours' notice before commencing industrial action.[38] • For single enterprise agreements the notice period remains 3 working days[39]. • If there are exceptional circumstances which justify a longer period of notice this notice can still be extended to up to 7 working days (for either a single enterprise agreement or a multi-enterprise agreement)[40].

[34] Section 437(1) of the FW Act.
[35] Section 437A of the FW Act.
[36] Section 448A of the FW Act.
[37] Section 409(6A) of the FW Act
[38] Section 414(2)(a)(ii) of the FW Act.
[39] Section 443(5)) of the FW Act
[40] Section 443(5)) of the FW Act

Procedural step / issue	Explanation
Balloting Agents	
Who can conduct the vote?	The AEC is no longer the presumptive balloting agent for the purposes of conducting a PABO. Instead, a person or entity that has been identified as an "*eligible ballot agent"* is able to be specified in the PABO as the person or entity that will conduct the PABO.[41] For the purpose of being approved as an eligible ballot agent, the person or entity: • needs to be a fit and proper person[42]; • the person must be capable of ensuring secrecy and security of votes cast, ensuring the ballot will be fair and democratic, conducting the ballot expeditiously, must comply with the *Privacy Act 1988* in relation to handling of information relating to the PABO[43]; and • agreed to be a protected action ballot agent.

Will union tactics change concerning PIA given greater access to an arbitrated bargaining outcome?

As discussed above, the creation of greater access to an arbitrated bargaining outcome is a welcome amendment for unions who are operating in a context where within a particular employer or facility, they have low union density or low member appetite to engage in protected industrial action. They can achieve gains in the terms and conditions of their members, without needing to convince them of the virtue of the 'pain' of protected industrial action.

One tactical shift which has become common, although not connected to the access to arbitrated bargaining outcomes, has been the regular adoption by unions of balloting agents other than the AEC to conduct the PABO process. With the introduction of more providers who can conduct the process of balloting digitally (through either SMS, email or Apps – a technological advancement that the AEC was not able to keep pace with), this has shortened the amount of time that is required for the ballot process to occur when using these other providers (down to approximately 10 days where previously almost double that would have been a conventional time period set by the AEC).

[41] Section 444(1B) of the FW Act
[42] Section 468(2A) of the FW Act
[43] Reg 3.11 of the FW Regs

In our view: Where unions however have not been afflicted with the same apathy or limited membership numbers, where they can still inflict operational pain on an employer by flexing their industrial muscle through protected action, it is likely that nothing much will change. Whilst arbitrated bargaining outcomes in this context are one more tool in the union's tool kit, the reality for a union that can mobilise an employer's workforce to take protected action is that it can create more leverage (to achieve concessions at a higher level from an employer than what they might be awarded by the FWC), and at a more rapid pace (not having to progress through a minimum of 9 months of bargaining) than what intractable bargaining provisions provide for .

The other industrial reality is that in some more militant workplaces, there is almost an expectation amongst union members that protected industrial action (or at least the imminent threat of it), is the only barometer by which an employer's maximum threshold in bargaining can be tested. In such operations, the legitimate threat or taking of industrial action is factored in as an expected cost by employees (and even that cost can be ameliorated if there are union 'fighting funds' in place to subsidise union member's wages through the period of the industrial dispute).

Delegates Rights

Snap Shot	How do legislated delegates rights change the dynamics in bargaining? Is it much the same if you have an established Union presence or is there more to consider?

Issue	Explanation
Content of enterprise agreements	
Inclusion of a delegates' rights term	An enterprise agreement must include a delegates' rights term for workplace delegates who the enterprise agreement applies to[44]. The FWC is required to develop "delegates' rights" terms within modern awards, and once this occurs, the delegates rights term in an enterprise agreement cannot be less favourable than that term. If it is, the enterprise agreement term has no effect and the most favourable term which exists in a modern award that covers the workplace delegate is taken to be a term of the enterprise agreement[45].
Workplace delegates rights	
Who is a workplace delegate?	A workplace delegate is a person appointed or elected (in accordance with the rule of a union) to be a delegate or representative for members of the union who work in a particular enterprise[46].
What are their rights?	The workplace delegate is entitled to: • reasonable communication with union members and those who are eligible to be members at the enterprise in relation to their industrial interests; • reasonable access to the workplace and workplace facilities; and • unless the employer is a small business, reasonable access during paid time and during normal working hours to training for the purposes of representing the industrial interests of members or potential members of the union[47]. In order to assess whether an employer has met these obligations: • compliance with the terms of an award or enterprise agreement that applies to the workplace delegate in respect of these rights shall be sufficient[48]; or

[44] Section 205A(1) of the FW Act
[45] Section 205A(2) of the FW Act
[46] Section 350C(1) of the FW Act
[47] Section 350C(3)of the FW Act
[48] Section 350C(4)of the FW Act

Issue	Explanation
	• what is reasonable will be assessed based on the size and nature of the employer's enterprise, the resources of the employer and the facilities available at the enterprise[49].
What additional protections apply to workplace delegates?	An employer of a workplace delegate must not, in relation to the workplace delegate seeking to discharge their role as a representative: • unreasonably fail or refuse to deal with the workplace delegate; • knowingly or recklessly make a false or misleading representation to the workplace delegate; or • unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate as provided for by the FW Act or the terms of an award or enterprise agreement that applies to the delegate[50].

[49] Section 350C(5)of the FW Act
[50] Section 350A of the FW Act

Wages and labour cost – the cost of doing business…

Snap Shot

What are we seeing in wages outcomes and how to manage the cost of living narrative?

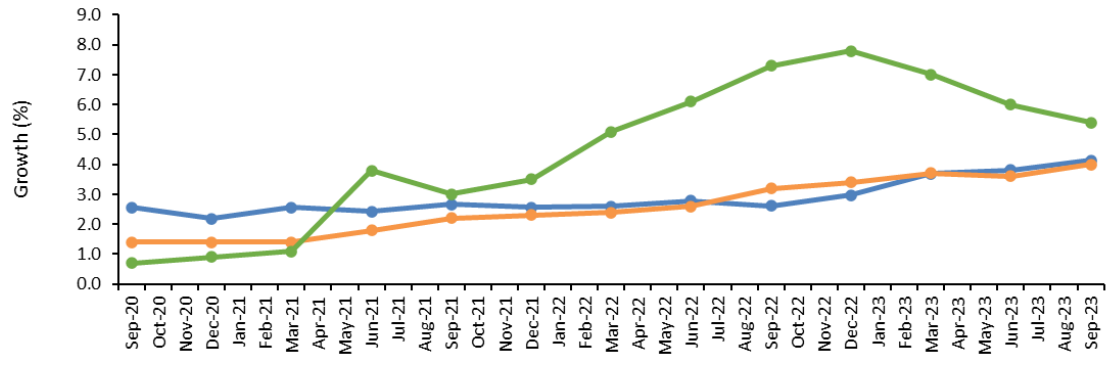
Average Annualised Wage Increases (AAWI) for agreements approved in the March, June and September quarters of 2023 which contained quantifiable wage increases[51]

Enterprise agreements approved in the quarter	March quarter 2023 (%)	June quarter 2023 (%)	September quarter 2023 (%)
All sectors	3.7	3.8	4.1
Private sector	3.9	3.9	3.9
Public sector	3.2	3.7	4.4

- The Average Annualised Wage Increase (**AAWI**) for federal enterprise agreements approved in the September quarter 2023 was 4.1 per cent. This is up from 3.8 per cent in the June quarter 2023, up from 2.6 per cent in the September quarter 2022 and up from the historic low of 2.2 per cent in the December quarter 2020.
- For the September quarter 2023, the calculated AAWI of 4.1 per cent is based on 859 agreements, covering 181,900 employees with quantifiable wage increases. This was 80.1 per cent of the 1,072 agreements approved in the quarter, covering 61.5 per cent of the 295,600 employees on those 1,072 agreements.

[51] Trends as recorded in the Federal Enterprise Bargaining Report of the Department of Employment and Workplace Relations.

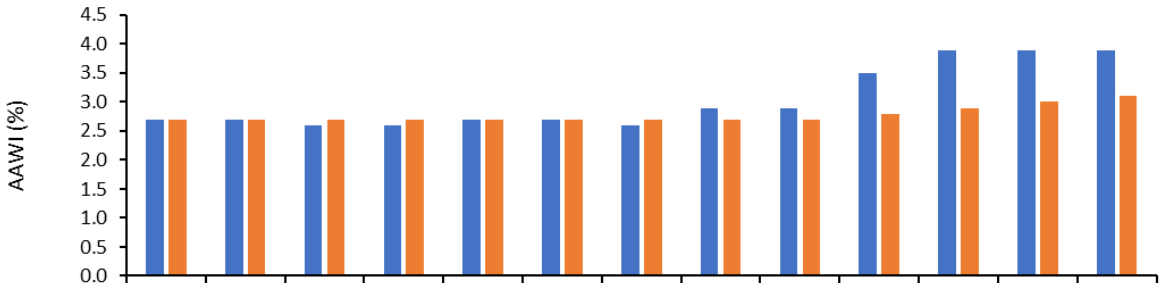
Comparison of AAWI, ABS Wage Price Index (WPI) and ABS Consumer Price Index (CPI) AAWI in approved agreements, ABS Wage Price Index (WPI) and ABS Consumer Price Index (CPI) – September quarter 2020 to September quarter 2023



	Sep-20	Dec-20	Mar-21	Jun-21	Sep-21	Dec-21	Mar-22	Jun-22	Sep-22	Dec-22	Mar-23	Jun-23	Sep-23
AAWI	2.6	2.2	2.6	2.4	2.7	2.6	2.6	2.8	2.6	3.0	3.7	3.8	4.1
WPI	1.4	1.4	1.4	1.8	2.2	2.3	2.4	2.6	3.2	3.4	3.7	3.6	4.0
CPI	0.7	0.9	1.1	3.8	3.0	3.5	5.1	6.1	7.3	7.8	7.0	6.0	5.4

Private sector wages growth – September quarter 2023 - Table 3 and 4 in Trends report

Private sector AAWI – approved and current agreements – September quarter 2020 to September quarter 2023

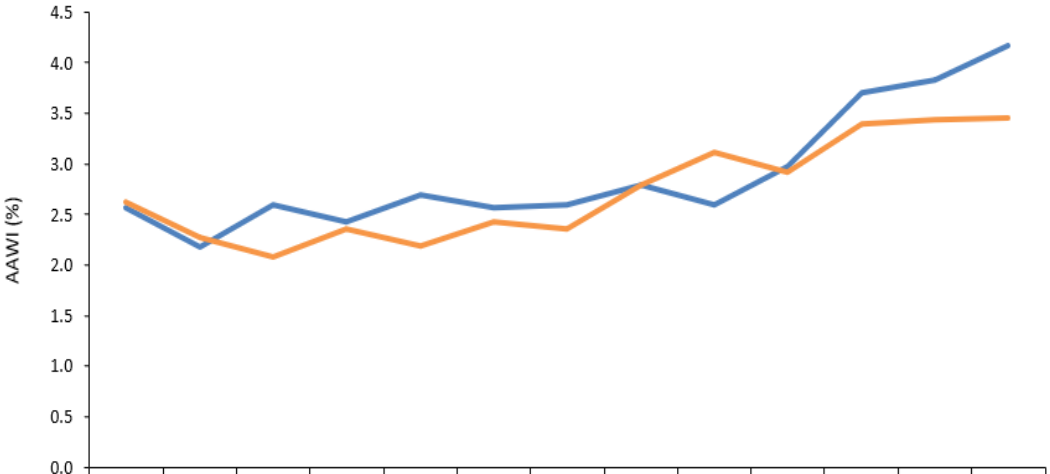


	Sep-20	Dec-20	Mar-21	Jun-21	Sep-21	Dec-21	Mar-22	Jun-22	Sep-22	Dec-22	Mar-23	Jun-23	Sep-23
Approved	2.7	2.7	2.6	2.6	2.7	2.7	2.6	2.9	2.9	3.5	3.9	3.9	3.9
Current	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.8	2.9	3.0	3.1

The AAWI for private sector enterprise agreements approved in the September quarter 2023 was 3.9 per cent, unchanged from 3.9 per cent in the June quarter 2023, and up from 2.9 per cent in the September quarter 2022.

Wages growth for agreements that cover union/s and agreements with no union/s covered – September quarter 2023	
Agreements approved in the September quarter 2023 that formally covered unions had a combined AAWI of 4.2 per cent, up from 3.8 per cent in the June quarter 2023 and up from 2.6 per cent in the September quarter 2022.	Agreements approved in the September quarter 2023 with no unions formally covered had a combined AAWI of 3.5 per cent, up from 3.4 per cent in the June quarter 2023 and up from 3.1 per cent in the September quarter 2022.

Union and non-union AAWI in approved agreements – September quarter 2020 to September quarter 2023



	Sep-20	Dec-20	Mar-21	Jun-21	Sep-21	Dec-21	Mar-22	Jun-22	Sep-22	Dec-22	Mar-23	Jun-23	Sep-23
Union AAWI (%)	2.6	2.2	2.6	2.4	2.7	2.6	2.6	2.8	2.6	3.0	3.7	3.8	4.2
Non-Union AAWI (%)	2.6	2.3	2.1	2.4	2.2	2.4	2.4	2.8	3.1	2.9	3.4	3.4	3.5

Trends as recorded in the Fair Work Commission's Statistical Report on Enterprise Agreements and Other Bargaining data 30 December 2023-12 January 2024.

AAWI for agreement approval applications lodged in fortnight which contained quantifiable wage increases by applicant type

Application lodged by a Union	16 December 2023 - 29 December 2023	30 December 2023 - 12 January 2024
Number of agreement approval applications lodged	**27**	**6**
Employees covered	**625**	**45**
Effective duration (in years)	**3.2**	**4.0**
AAWI(%)	**6.0**	**6.3**
Application not lodged by a Union		
Number of agreement approval applications lodged	**282**	**46**
Employees covered	**61134**	**7610**
Effective duration (in years)	**2.6**	**3.0**
AAWI(%)	**4.1**	**3.6**

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