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**BARGAINING FOR SECURE JOBS AND BETTER PAY: THE LATEST REFORMS TO AUSTRALIA'S *FAIR WORK ACT 2009***

Secure, well-paid jobs are a crucial element of Australia's social and economic framework. However, real wage growth in Australia has stagnated over the past decade and has not kept pace with productivity growth and the increased cost of living.

The *Fair Work Act 2009* (« Fair Work Act ») is Australia's primary legislation regulating workplace relations. The enterprise bargaining framework under the Fair Work Act aims to support businesses and employees to tailor their working arrangements to their unique circumstances. It provides an incentive for employers, employees, and unions to pursue more productive ways of working in exchange for higher wages and better conditions for workers.

However, the framework has lost its attractiveness over time. Fewer businesses have been making new agreements, and fewer workers are covered by them. The Australian Bureau of Statistics has revealed that the proportion of employees covered by agreements in Australia has decreased from 43 per cent in 2010 to 35 per cent in 2021<sup>1</sup>.

**I - THE ROAD TO REVITALISING BARGAINING**

On 1-2 September 2022, the Australian Government convened its Jobs and Skills Summit, bringing together businesses, unions, civil society and state and territory governments to address several economic challenges<sup>2</sup>. One of the outcomes of the Summit was for the Government to improve enterprise bargaining in Australia. To meet this outcome, on 2 December 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (« SJBPA Act ») was passed by the Parliament (after much debate in the Australian Senate)<sup>3</sup>.

The SJBPA Act introduces a range of reforms to the bargaining framework, as well as other matters. These include banning pay secrecy clauses in contracts and other legal documents, expanding access to flexible working arrangements, limiting the use of fixed term contracts, and abolishing the Australian Building and Construction Commission (an

- 1 Australian Bureau of Statistic, *Employee Earnings and Hours, Australia*, 2021: <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/employee-earnings-and-hours-australia/latest-release>
- 2 Australian Government, *Jobs and Skills Summit*, 2023: <https://treasury.gov.au/employment-whitepaper/jobs-summit>
- 3 « Concessions offered to win passage of Secure Jobs Bill », *Workplace Express*, 22 November 2022.

agency established by the previous government to regulate compliance with workplace laws in the building and construction industry)<sup>4</sup>.

To capture all of the changes introduced by the SJBPA Act in detail is beyond the scope of this article. However, because a key focus of the SJBPA Act was to reform and strengthen enterprise bargaining, those amendments are summarised below.

## II - REFORMS TO SINGLE AND MULTI-ENTERPRISE BARGAINING

The SJBPA Act has introduced changes to the following different streams under the Fair Work Act that employers and workers may use to bargain for agreements. Most changes are expected to take effect on 6 June 2023:

1. Single Enterprise Bargaining Stream
2. Supported Bargaining Stream
3. Cooperative Workplaces Bargaining Stream
4. Single Interest Bargaining Stream

## III - CHANGES TO THE SINGLE ENTERPRISE BARGAINING STREAM

The single-enterprise bargaining under in the Fair Work Act has been the main way bargaining has occurred in Australia in recent years<sup>5</sup>. Generally, the single-enterprise bargaining stream allows a single employer to bargain with two or more employees for terms and conditions of employment that will only apply to their enterprise<sup>6</sup>.

Before the recent reforms, an employee bargaining representative (for example, a union) was required to seek a « majority support determination » from the Fair Work Commission (Australia's independent workplace relations tribunal) (« FWC ») to require an employer to bargain for an agreement, if the employer had not agreed to bargain. This required the representative to show that a majority of employees wanted to bargain. This was usually done via a secret ballot, survey, written statements or a petition from workers<sup>7</sup>.

The SJBPA Act has changed the rules about how single-enterprise bargaining might be started.

A bargaining representative can now give an employer a written request to bargain that the employer will be bound by, rather than needing to seek a ruling from the FWC, if<sup>8</sup>:

- the proposed agreement will replace an earlier agreement that has passed its nominal expiry date<sup>9</sup>;
- no more than 5 years have passed since the nominal expiry date; and

4 Prime Minister of Australia, *Delivering secure jobs and better pay*, Media release, 2 December 2022.

5 For broader discussion on the enterprise bargaining framework, see Australian Government, *Regulation Impact Statement: Enterprise bargaining outcomes from the Australian Jobs and Skills Summit* (Report, OBPR ID 22-03169, 2022) (« SJBPA Regulation Impact Statement »).

6 Fair Work Act, ss 172(2), (6).

7 *Ibid.*, ss 236-39.

8 *Ibid.*, s. 523.

9 Usually, a date 3-4 years after the agreement was first approved.

- the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

These amendments aim to improve access to single-enterprise agreements by reducing barriers to commencing bargaining. This is one of the few changes that has already commenced and is already being used to start bargaining in some sectors<sup>10</sup>.

## IV - CHANGES TO THE SUPPORTED BARGAINING STREAM

The SJBPA Act has reformed the existing low-paid bargaining stream, which has been renamed the supported bargaining stream. The low-paid bargaining stream was originally intended to assist employees in low-paid industries to access enterprise bargaining. However, it was not often used due to the complex criteria placed on accessing the stream<sup>11</sup>.

As a result of the SJBPA Act, the FWC can now make a supported bargaining authorisation, requiring multiple employers to bargain together, if the FWC is satisfied it is appropriate to do so, having regard to several factors<sup>12</sup>. One of those factors is whether low rates of pay prevail in the industry or sector.

Other considerations include whether the employers proposed to be covered by the authorisation have clearly identifiable common interests (which may include geographic location, the nature of the businesses, and whether the businesses are substantially funded - directly or indirectly - by government; for example, the aged and childcare sectors).

The SJBPA Act also gives the Minister for Workplace Relations the power to declare an industry, occupation or sector eligible for the supported bargaining stream. The FWC must make a supported bargaining authorisation if an application is made regarding employees in an industry, occupation or sector specified in the Minister's declaration<sup>13</sup>. However, an employer cannot be covered by a supported bargaining authorisation regarding employees covered by an agreement that has not nominally expired, unless the employer's main intention in making the agreement was to avoid being specified in a supported bargaining authorisation<sup>14</sup>.

Within the supported bargaining stream, the FWC can help bargaining representatives, and make binding workplace determinations to set terms and conditions of employment if the parties are unable to reach agreement<sup>15</sup>.

Overall, the SJBPA Act allows the FWC to provide greater support to parties seeking to access multi-enterprise bargaining, particularly in low-paid industries.

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10 The provision commenced on 7 December 2022. See for example, A. Thompson, « Supermarket giant Coles forced to bargaining table under new IR laws », *The Sydney Morning Herald*, 6 January 2023: <https://www.smh.com.au/politics/federal/supermarket-giant-coles-forced-to-bargaining-table-under-new-ir-laws-20230105-p5cah6.html>

11 See, eg, *United Voice v The Australian Workers' Union of Employees, Queensland* [2011] FWA 2633.

12 SJBPA Act, s. 611.

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*, s. 543.

## V - CHANGES TO THE COOPERATIVE WORKPLACES BARGAINING STREAM

The SJPB Act has also made changes to what was known as the multi-employer bargaining stream under the Fair Work Act and has renamed it the Cooperative Workplaces Bargaining Stream. In this stream, employers can voluntarily make a cooperative workplaces agreement together.

To incentivise employers to voluntarily participate in this multi-employer bargaining stream, strike action is not available to employees, and bargaining disputes can only be escalated to the FWC for conciliation and arbitration with the consent of all parties. However, employers and employees performing certain types of building and construction work are also excluded from this stream<sup>16</sup>.

For employers to be able to bargain under this stream, at least some employees involved must be represented by a registered employee organisation (for example, a union). Cooperative workplaces agreements must also be approved by a majority of employees employed by each employer, and the agreement must pass the Better Off Overall Test (« BOOT ») in the Fair Work Act<sup>17</sup>.

The BOOT ensures each employee covered by an enterprise agreement is better off overall when compared to the terms and conditions in their relevant modern award (an industrial instrument made under the Fair Work Act that provides a safety net of minimum employment conditions for employees in particular industries and sectors)<sup>18</sup>.

## VI - CHANGES TO THE SINGLE INTEREST BARGAINING STREAM

The SJPB Act has removed barriers to the existing single interest bargaining stream under the Fair Work Act. This stream is different to the supported bargaining stream (focussed on helping low-paid industries) and the cooperative workplace bargaining stream (focussed on encouraging employers to bargain together voluntarily).

Under the old version of this stream, franchisees and employers with common interests could bargain together for a single interest enterprise agreement to cover employees across multiple businesses, if the employers obtained permission from the FWC to bargain together. Only employers could apply to the FWC to seek permission, and before doing so, they needed to obtain a declaration from the Minister for Employment and Workplace Relations. This process was detailed and restrictive, and few enterprise agreements were made this way.

The SJPB Act now allows employee organisations (such as unions), as well as employers, to apply to the FWC for a « single interest employer authorisation », which would order certain employers to bargain together<sup>19</sup>. The FWC may also now make an authorisation covering an employer without the employer's consent. This means employers can be

<sup>16</sup> *Ibid.*, s. 651A-B.

<sup>17</sup> Fair Work Act, s 186(2)(d).

<sup>18</sup> Commonwealth of Australia, *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, xxi-ii; 137-42.

<sup>19</sup> SJPB Act, s 597.

compelled to bargain with other employers for a single interest agreement under this stream, if they choose not to do so voluntarily under a different stream.

However, the FWC can only make an authorisation if the employer has at least 20 employees<sup>20</sup>, and is not covered by an existing enterprise agreement that has not yet expired. As with the Cooperative Workplaces Bargaining Stream, employers and employees performing certain building and construction work are excluded.

Before making an authorisation, the FWC must be satisfied that most employees employed by each employer wants to bargain, and that the employers have clearly identifiable common interests (like the test applying to the supported bargaining stream). A « public interest » test also applies, meaning the FWC must be satisfied that it would not be contrary to the public interest for certain employers to bargain together<sup>21</sup>.

That said, the FWC may decide to exclude an employer from an authorisation if the employer has a history of effectively bargaining for single-enterprise agreements, and less than 9 months have passed since the expiry date of a previous agreement. This gives employers an opportunity to make a single-enterprise agreement before being forced to bargain for a multi-enterprise agreement.

The reforms to this stream also impact the way strike action can be taken by employees. Strike action continues to be available in this stream, however parties must participate in conciliation before action is taken, and employees must give their employer at least 120 hours' notice before the action occurs<sup>22</sup>. Parties who bargain in this stream also have access to a new « intractable bargaining » process in the FWC, which allows parties to seek conciliation and arbitration if bargaining is going for too long or the parties cannot agree<sup>23</sup>.

Overall, these reforms aim to provide access to the benefits of bargaining for employers with a common interest, and aim to remove barriers to obtaining a single interest employer authorisation, including by facilitating better access to the stream for employees and unions.

## Conclusion

Bargaining in Australia can often be complex, with different rules applying to different types of bargaining, and some parties needing more assistance than others. The amendments to the Fair Work Act introduced by the SJBPA Act seek to address some of these difficulties and complexities, by making it easier for employers and employees to bargain. In the words of the Minister for Employment and Workplace Relations, these changes are intended to get wages in Australia moving<sup>24</sup>.

This is not to say, however, that the SJBPA Act is without criticism. Some have suggested the Act will be « negative for Australia's workplace relations », on the basis that « low wages growth » in Australia will not (they say) be solved by more bargaining<sup>25</sup>. However, with other

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20 *Ibid.*, s. 633A.

21 *Ibid.*, s. 634A.

22 *Ibid.*, s. 579.

23 *Ibid.*, ss 543-53.

24 T. Burke, Ministers' Media Centre, *Secure Jobs, Better Pay bill amendments*, Media release, 7 November 2022.

25 See, eg, I. Willox, « The government's IR bill is based on an entirely flawed premise », *Australian Financial Review*, 9 November 2022.

reports released recently suggest the decline in enterprise bargaining in Australia over the last decade is responsible for slow wages growth<sup>26</sup>, it is clear the data around jobs and workplace relations is hotly contested.

With most of these amendments coming into effect in June 2023, there is not yet any case law to demonstrate how these amendments will work in practice, and it remains to be seen whether the SJBPA Act will lead to an increase in bargaining and wages for working Australians, or whether detractors of the Act will be proven correct by minimal changes to wage growth. Time will tell.

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<sup>26</sup> See F. Macdonald and L. Raynes, « Collective Bargaining and Wage Growth in Australia », *Centre for Future Work*, Report, November 2022.