

CONFIDENTIAL

This Business Briefing Note has been provided as an addendum to the presentation to The RWTA Conference 2023. The information contained herein is general in nature and should serve as a starting point for discussions based on the realities in the business.

Overview

There have been significant changes to the operation of bargaining in Australia. From 6/6/2023 there are three new 'streams' of bargaining, two of which are 'forced', which is to say that the business can be forced into the position of having to bargain with the union and other businesses.

There are some protective actions businesses can take to mitigate the risk of forced bargaining, that include internal review (auditing) to correct common issues, activating standard Enterprise Bargaining or Cooperative Bargaining.

Bargaining Changes Review

Primary changes are the creation of three new bargaining streams;

- Supported
- Single interest
- Cooperative

The **Supported Bargaining** stream allows the union to apply to Fair Work to force a business (or group of businesses, or whole industry) to bargain – called a Supported Bargaining Order.

There is NO OPT OUT based on business size.

There is NO FIRM PROTECTION because the business has or is in the process of negotiating an EBA.

There is no protectionary approach for this stream of bargaining. The usual protections of business size or the presence of an agreement are not available if this particular stream of bargaining is activated by the union.

For businesses that have an existing EBA that are caught up in a Supported Bargaining Order, if the business loses an application to be removed from the Order, then its existing EBA will cease to exist and will no longer be able to be applied to the employees.

Businesses subject to an Order are able to apply to be removed from it, but it is up to Fair Work if they will remove the business or not at its discretion. These applications will be considered by the Commission. Business size, operations and current agreement status are likely to be areas that will be considered by the Commission, however it is clear that simple status, such as a being a small business, or having an existing EBA will not automatically be considered grounds for removal from the Order – indeed the specific structure of the law indicates that these grounds are unlikely to be persuasive at all once an Order is issued.

It is likely that such applications for removal from Supported Bargaining Orders will become a feast for lawyers. Given the importance of these ACAPMA would not engage in creating these applications, however ACAPMA could provide assistance to the members external legal representative if required.

It should be noted that all government commentary during the tabling and progress of the changes was clear that this was a stream that was to be targeted at low paid (eg childcare, healthcare). This commentary was to soothe the opposition to this stream. On face value this commentary has been taken to mean that Supported Bargaining will not be used in the fuel retail and wholesale industry, or the broader freight industry, **however there is nothing in the Act itself that prevents it being used in any place in the Australian economy – which makes Supported Bargaining a significant risk to all businesses that must be understood.**

The **Single Interest Bargaining** stream allows the union to apply to Fair Work to force a group of businesses who are 'similar enough' to bargain together. Aimed at similar, semi connected (like franchise/co-op businesses) this stream also results in the issuing of an Order and allows businesses to apply to Fair Work to remove them from the Order.

There IS AN OPT OUT for businesses that employ 20 or fewer employees. These businesses can apply to Fair Work Commission to be removed from a Single Interest Bargaining Order and they WILL AUTOMATICALLY BE REMOVED without opposition on proving their size.

There is SLIDING PROTECTION against being forced into an Order where there is a presence of a current (or advance negotiation for) Enterprise Agreement. It is important to note that this is not a guarantee, but it is a level of confidence, particularly for recent Agreements.

Like the Supported Bargaining stream under the Single Interest Bargaining stream even a business employing more than 20 people can apply to the Fair Work Commission to be removed from a Single Interest Bargaining Order. These applications will be considered by the Commission.

It is likely that such applications for removal from Single Interest Bargaining Orders will become a feast for lawyers. Given the importance of these ACAPMA would not engage in creating these applications, however ACAPMA could provide assistance to the members external legal representative if required.

This approach is targeted at franchise, and franchise like operations – where there is extensive similarity of either operations or systems. On the plus side this new bargaining stream opens the opportunity to make setting a network wide agreement and then adding new operators – an approach that has not been an option prior to now due to the restriction on businesses bargaining together. On the minus side, given the target is franchise/franchise like networks, the visibility of these increases the likelihood that these businesses will be targeted by the unions.

Variation of an Agreement is available with the consent of all parties.

While the default for Single Interest Bargaining is as a forced bargaining, this stream is also available as a choice based option, where franchise/franchise like groups can come together to choose to enter into Single Interest Bargaining.

The protection of opt out based on small size or existing agreement, and the need for the union to prove a single interest and common operation or system makes Single Interest Bargaining less of a risk to some businesses but more to others.

The **Cooperative Bargaining** stream allows business to CHOOSE to bargain together if they like.

This choice based optional stream where businesses can choose to bargain together. Any agreement must meet the BOOT requirements and be voted up by the employees of each business.

There are no protected industrial action options with this stream.

Variation of an Agreement is available with the consent of all parties.

The Cooperative Bargaining stream must be accessed with the involvement of a Registered Organisation, that is a union or employer association (like ACAPMA) that is an approved and Registered Organisation under the Fair Work Act.

The completely choice based approach of the Cooperative Bargaining Stream affords businesses an opportunity to bargain together, with the involvement of a dedicated industrial advocate, and to enter or exit those bargaining activities make this stream a low risk and indeed an opportunity for businesses to collectively create agreements that address complexity and confusion in some awards.

These new streams are in addition to the existing **standard Enterprise Bargaining Agreement** stream (which is by choice of the business and applies only to that particular business).

Risks to RWTA Members

Forced Bargaining

The risk of being forced into bargaining exists from June for the cooperative members. All unions will be directed to find businesses to test these new streams of bargaining on. In the Transport industry this has the effect of putting a target on those businesses that are alike enough to be part of specialist associations – like RWTA Members, particularly those small enough not to already have its/their own Enterprise Bargaining Agreement (EBA).

The assumption that any business is a small player and surely the union will look to the large guys first is an easy one to make, but unfortunately the larger guys all have EBAs already so businesses like even smaller businesses, that can be identified as part of a group that do not have existing agreements, being one of the last of such a size in the transport industry that do not yet have agreements, will be the first targeted out of the gates when these changes come into full swing.

Director Liability and Brand Risk

In addition to the risk of being forced into bargaining there is also the risk to the individual businesses of being roped into any compliance issues that are identified – all of which has increased with the option of unions to rope in businesses to forced bargaining.

The risk to the business and Directors of practices being less than compliant has never been higher. The aggressive anti wage theft political and regulatory environment is justified, but it has also resulted in a heightened and prosecutorial approach to all errors and issues. This has resulted in the Fair Work Ombudsman actively targeting Boards who “should have known better”. The result is increase prosecutions, penalties and even jail terms.

The risk to the individual brands of issues being identified externally is quite high as there is a push within the union movement and the government to identify and take credit for rectification of such issues as a ‘result’ of the introduction of the new bargaining streams.

Protection and mitigation strategies

The risk of forced bargaining and liability and brand risk is real but able to be mitigated by entering into a bargaining process voluntarily. Either as a cooperative bargaining approach where a number of members come together to implement a cooperative agreement or in a series of single business EBAs there is a protection for those businesses that are ‘actively in the process of their own Agreement’ from being forced into an Agreement.

An Agreement (of any type) will never save the business money – but there is a real opportunity for the business to streamline employment and payroll processes and smooth off the complex elements of the Award but implementing an Agreement. As a bonus this would also protect the business from being forced into an Agreement outside of their own timeline.

The broader brand risk is able to be mitigated by taking ‘reasonable steps to satisfy itself that its operations are complying with the law’. In the initial stages this would include independent external auditing.

ACAPMA Assistance Available

ACAPMA can provide assistance in the auditing of current situation, addressing of current issues and the process of either cooperative or enterprise bargaining.

These services are available at a cost.

Transport Operations Audits are available from ACAPMAs Employment Professionals.

These Audits review business practices, payments and record keeping, assessing compliance against the Road Transport and Distribution Award / Warehousing Award (and any existing Agreement in place), and the provide assistance with guidance, template and custom made documents and communications to address any identified Gaps.

This Audit process allow businesses to safely identify any issues and rectify, with the assistance and templates of professionals in the field, before they are found by inspectors or unions.

ACAPMA Transport Operation Audits are offered at \$2,700 inc GST per business.

Bargaining Assistance is available from ACAPMA's Employment Professionals. This entails;

- assistance in preparing draft agreements,
- pay and condition modelling for Better Off Overall Testing and Fair Work Commission lodgement,
- Agreement communications drafting
- Acting as the business representative in the Bargaining Meeting (running the meeting and negotiations),
- Assistance with the Voting Process
- Preparation of the Agreement Application documents for the Fair Work Commission

Typically only available to ACAPMA Distributor and Retailer Members, this service is being made available on a scoped case by case basis for RWTA Members on request.

General information is always available on request.

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