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INDUSTRY ADVISORY – Enterprise Bargaining (Vol 1, 2023)

The purpose of an Industry Advisory is to provide APTIA members with an understanding of industrial issues which may impact upon their businesses.

Following the passing into legislation, on 12 December 2022, of the "Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022", a new system of enterprise bargaining was introduced. The new system now provides for multiple industry bargaining.

Multiple bargaining is not due to commence until 6 June 2023. This does not prevent members from considering their position as their agreements expire.

Set out in this advisory is a simple explanatory matrix of how the new systems will work.

Operator members of APTIA will perhaps fall into one of these categories:

- **"Employer A" has an enterprise agreement in place, which has been renegotiated several times and has not exceeded its nominal expiry date. Whilst Employer A's workplace has trade union representation it does not wish to become involved in a multiple industry agreement, even when its current agreement expires.**
- **"Employer B" has in place an expired enterprise agreement in place, which has been negotiated several times. Operator B has employees with Union membership and its workforce does wish to become part of the multiple industry agreement.**
- **"Employer C" does not have an enterprise agreement in place, but its employees do wish to become part of a multiple industry agreement. There is limited trade union representation.**
- **"Employer D" is happy to negotiate with the trade union for a co-operative agreement, for which the trade union is also agreeable to negotiate an agreement.**

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Employers A & B & C & D operate in the public transport sector, under passenger transport service contracts with a single regulator. The terms and conditions of the contracts are similar or identical.

There is a history in the urban regions, particularly, of industry negotiations with trade unions.

The new legislation raises interpretation issues, which will require the FWC to make decisions with respect to a range of matters, including:

- **What constitutes an 'identifiable common interest' or 'comparable interest' in determining whether one or more employers should become parties to a multiple agreement bargaining?**
- **What is the nature of the 'public interest' test that applies to make an authorization to join employers to a multiple agreement bargain?**
- **To what extent does there have to be trade union representation for an authorization to be made and is that trade union membership limited to employees entitled to be represented by the specific trade union?**
- **Does the FWC intend to issue a 'statement of principles' and how prescriptive will the FWC be in determining whether the employees have sufficient knowledge of the terms of an agreement and are satisfied that the appropriate mix of employees have genuinely agreed to the agreement.**
- **In making an 'intractable bargaining' order will the FWC take a 'winner takes all' approach or will they take a 'middle of the road' approach when deciding which arguments to accept from the parties?**
- **How will the FWC determine whether an employer has deliberately sought to avoid a multiple bargain or has genuinely sought to negotiate for a single agreement with the workforce?**
- **How will the FWC apply the common interest test differently, at all, in relation to SBs and SIAs. What makes a SB different from an SIA? Is it the nature of the wages because the SB was formerly a 'low paid' procedure?**

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ENTERPRISE AGREEMENTS – A detailed comparison

	Single Enterprise Agreement (SEA)	Supportive Bargaining Agreement (SB)	Single Interest Employer Agreement (SIE)	Co-operative Workplace Agreement (CWA)
Eligibility and variations (Roping in)	The SEA is the traditional method of enterprise bargaining between an employer and employee. It is still possible for an employer to agree with their workforce to bargain for a single enterprise agreement.	The SB replaces the previous 'low paid bargaining' agreements in which industries could seek to negotiate as an industry with the Ministers approval. Subject to the exceptions and to the 'common interest' test all employers may be eligible either to become part of the original application or to be roped in once their existing agreements expired, provided the employees agree. Eligibility is not clear as it may apply to employers who are not franchises, subsidiaries but who have a clear common interest.	The SIE appears to broaden the concept of a single interest employer and a SIE authorization may be more appropriate for the industry and more likely to be made by the FWC. The eligibility test to determine a common interest will include the geographical location of the businesses, the regulatory regime, the nature of the enterprises and the terms and conditions of employment. Some of the employees must also be represented by the relevant trade union.	The CWA will apply when both the employers and employees along with their trade union representative agree to bargain without the ability to seek the intervention of the FWC or to take protected action.
Exclusions for types of agreement	An employer would be excluded from negotiating for a SEA if they were the subject of an application to vary an existing multiple agreement or were the subject of an authorization from FWC. This would be the case if the current SEA had expired its nominal expiry date and they were not engaged in a genuine attempt to negotiate a new agreement.	Employers would be excluded if their current single enterprise agreements have not expired, and their current agreements were not entered into with a view to avoiding an SB. In any event the existing workforce, who are eligible to vote, would have to approve the commencement of bargaining.	If an employer has less than 20 employees or there is an existing single enterprise agreement in place or the parties are bargaining for a new single interest agreement, having a history of bargaining and a 9 month period has not elapsed from the previously expired agreement or the employees do not wish to participate then exclusions apply. The FWC must also be satisfied there is a common interest and a comparable purpose for an Employer to included. If	The most relevant exclusion to the making of such a CWA would be the employer or the employee or the employees' trade union simply not agreeing to the process. In any event the employee must still vote in favour of any final agreement.

			an employer has over 50 employees a presumption will exist that the criteria is met.	
Initiating bargaining	A bargaining representative or a trade union representative can now make a written request to an employer to commence bargaining provided the request is to replace a previously expired agreement inside of 5 years from the nominal expiry date of the agreement. It will still be necessary to issue a NERR and for employer to be able to meet the existing criteria for approval.	Bargaining is initiated when the FWC makes a SB authorization on the application of an employer, trade union or bargaining agent. To do so the FWC must be satisfied that there is a 'clearly identifiable common interest' which looks at the geographical location of the businesses, pay and conditions, how the business is funded and whether there is trade union representation. It is untested as to what constitutes 'an identifiable common interest' and whether an authorization would be granted in a set of circumstances where the employers compete against each other in a tender arrangement or where high wages are paid.	Bargaining for a SIE is the same as a SB in that an application can only be made by an employer, a bargaining representative or a trade union who would represent some of the employees. It would be easiest for both the employer and other parties to agree to an authorization being made to avoid a hearing as to whether the criteria has been met. No doubt until such time as the FWC has determined some of the basic criteria to making an authorization it will be challenging to employers to decide to support an application or otherwise.	To initiate bargaining the employer and employees make a joint application to the FWC for authorization to negotiate and implement a new agreement.
Bargaining	Once negotiations have commenced the employer will be required to meet series of obligations known as a 'statement of principles' which will replace the current onerous obligations and require at least an employer to provide adequate explanations of the agreement, to only require relevant employees to vote on the approval.	Once an authorization is granted the parties to the original application will have to bargain in good faith for an SB, be subject to orders of the FWC if they don't and to be prevented from entering a SEA once the authorization is made. The statement of principles will apply to the employers who are party to the negotiations. In the case of an SB a potential agreement can only be put to a vote if the trade union agrees or in its	Once an SIE authorization is granted the parties to the original application will have to bargain in good faith for an SIE, be subject to orders of the FWC if they don't and to be prevented from entering a SIE once the authorization is made. The statement of principles will apply to the employers who are party to the negotiations. In the case of an SIE a potential agreement can only be put to a vote if the trade union agrees or in its absence	Whilst the bargaining for a CWA is required to involve the principles of fair bargaining principles there is no mechanism whereby the FWC will intervene to make bargaining orders.

		absence the FWC has made a 'voting request order'.	the FWC has made a 'voting request order'.	
Protected Action	Protected action is taken similar to previously where approval of the workforce is required. 3 full days are needed, unless special circumstances exist to extend the time, before action can be taken and an order will not be made unless the parties have attended upon the FWC for a (s. 240) conciliation meeting.	Protected action is possible during the SB negotiations and this occurs when all participant businesses vote for such action. There is now a mandatory 5 day notice period between notification of action and the action. Prior to the issue of a PABO the FWC will require the parties to attend an conciliation hearing to seek resolve to the issues.	Protected action is possible during the SIE negotiations and this occurs when all participant businesses vote for such action. There is now a mandatory 5 day notice period between notification of action and the action. Prior to the issue of a PABO the FWC will require the parties to attend a conciliation hearing to seek resolve to the issues.	Protected action is not available for a CWA which will only usually be utilized in circumstances where there is agreement between employers and their representatives. Multiple bargaining is available.
Intractable Bargaining	If the parties have engaged in good faith bargaining for over 9 months and the FWC is satisfied after conducting a final conciliation hearing that there is an intractable bargaining dispute the FWC can determine the dispute by either seeking further negotiations or arbitrating an outcome to finalize the negotiations.	If the parties have engaged in good faith bargaining for over 9 months and the FWC is satisfied after conducting a final conciliation hearing that there is an intractable bargaining dispute the FWC can determine the dispute by either seeking further negotiations or arbitrating an outcome to finalize the negotiations. The concept of an 'intractable bargaining order' replaces the concept of seeking an order to terminate the protected action which would lead to a determination by the FWC of the agreement.	If the parties have engaged in good faith bargaining for over 9 months and the FWC is satisfied after conducting a final conciliation hearing that there is an intractable bargaining dispute the FWC can determine the dispute by either seeking further negotiations or arbitrating an outcome to finalize the negotiations.	An intractable bargaining order is not available for a CWA.
Variations to an agreement	The process for an SEA is the same as before. A variation to an agreement is possible with the majority support of the workplace and the recognized	A variation off a SB has the effect of joining additional employers to the terms of an agreement. An application can be made by an employer, a bargaining representative or a trade union, entitled to represent members in	A variation for an SIEA is similar the SB process except the criteria appears broader and more detailed. A variation to an agreement will only occur in circumstances where the FWC is satisfied that the incoming employer	The same principles apply to the variations of a CWA in which another employer is roped in. In this case however the only criteria is agreement by the workplace and the meeting of the public interest test.

	process of notice, explanation and voting takes place. Note for all agreements the FWC can now make their own determination as to who should conduct the ballot to take protected action once a PABO is made. There is no mechanism for roping in other employers to the agreement, although subsidiary employers of the same organization can be part of the SEA.	the workplace to the FWC which is able to make a variation if it is satisfied that it is appropriate taking into account the prevailing pay and conditions within the industry, and the factors considered when issuing the original authorization, including the existence of a common interest and that those employees who will be covered by the variation, if the application is jointly made, a majority of them vote for it, or if the application is made by an employee organization, they want to be covered by the agreement.	has a 'common interest' with, ***and*** operations reasonably comparable to, the other employers already party to the agreement, which will be presumed, provided an employer has 50 employees or more, otherwise the parties will be required to prove otherwise. The FWC also needs to be satisfied that those employees, who will be covered by the variation, have, if the application is made jointly, the variation has been genuinely agree to by them, or if the application is made by an employee organization, a majority of the employees want to be covered by it.	
Approval Process and the BOOT	The approval process has not changed for a SEA. The FWC will apply the 'statement of principles' when assessing the application. The BOOT changes in that the FWC will not need to take a line by line approach to whether an agreement meets the BOOT but will take a more global approach to be satisfied that a class of employees would be better off given the current operating circumstances of the business. Note that a change in circumstances leading to a loss of	With an SB it is not necessary to follow the formal processes. The FWC will issue a 'statement of principles' which will apply to the application for approval whereby the FWC will need to be satisfied that the employer has undertaken a process which satisfies the FWC that the employees have genuinely agreed to the proposed agreement i.e. the employees have a sufficient interest in the agreement, sufficient knowledge of its terms, are sufficiently representative of the workforce and have negotiations have taken place in good faith.	With an SIE as with the SB it is not necessary to follow the formal processes of an SEA The FWC will issue a 'statement of principles' which will apply to the application for approval whereby the FWC will need to be satisfied that the employer has undertaken a process which satisfies the FWC that the employees have genuinely agreed to the proposed agreement i.e. the employees have a sufficient interest in the agreement, sufficient knowledge of its terms, are sufficiently representative of the workforce and have negotiations have taken place in good faith.	The approval process for a CWA is the same as the other multiple agreements including the FWC being satisfied that the statement of principles had been adhered to and that the relevant employees had genuinely agreed to the agreement.

	benefits will enable the FWC to make orders to vary the agreement to enable the BOOT to be maintained.	The BOOT has changed to allow for a more global approach to assessment. However, at any time during the agreement if the employer circumstances change and the employees are deemed worse off then a bargaining agent or trade union representative can bring an action to amend the agreement with respect to that employer in which circumstances have changed.	The BOOT has changed to allow for a more global approach to assessment. However, at any time during the agreement if the employer circumstances change and the employees are deemed worse off, a bargaining agent or trade union representative can bring an action to amend the agreement with respect to that employer in which circumstances have changed.	

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