More than you bargained for…

Pictured: several people around at table. The Secure Jobs, Better Pay Act introduces a range of different bargaining streams that will likely result in several employers sitting around the enterprise bargaining table. Photo credit: Dylan Gillis via Unsplash.

"A bargain is something you don't need at a price you can't resist," is a quote normally attributed to US humourist Franklin P. Jones.

It's apposite under the Secure Job, Better Pay bargaining regime as employers might find themselves stuck with an enterprise bargaining agreement that they don't want. And, given that unions can compel employers to adopt a bargain struck by third parties, they really cannot resist the price.

There are four bargaining streams in the Secure Jobs Act, which amends the Fair Work Act. The first, "Single Enterprise Bargaining" is a one-employer deal. The other three are all multi-employer bargaining processes. These are: "Co-operative Workplace Bargaining"; "Supported Bargaining"; and "Single Interest Enterprise Bargaining".

Single enterprise bargaining

Single enterprise bargaining is the standard form of enterprise bargaining that has been carried out in this country since the passage of the Fair Work Act back in 2009.

Bargaining under this stream has been simplified; it can be started by a majority of workers (or their union) requesting that bargaining begin. If there wasn't an enterprise agreement previously and the employer doesn't want one, the employer might refuse to bargain. The union will then get an order from the Fair Work Commission compelling the employer to bargain. However, if the employer is receptive to bargaining, or if there was an earlier agreement that has not passed its nominal expiry date by more than five years, then the union can start the bargaining process by writing to the employer.

Co-operative workplace stream of bargaining

Co-operative workplace bargaining is aimed at, and designed for, industries with small employers who would like to have an enterprise agreement but don't know how or don't have the resources. For instance, a trade association might negotiate a template agreement behalf of their members who later adopt the agreement.

Supported bargaining

Supported bargaining is the revised "low paid" multiple employer bargaining stream. It is intended to help employers who would have problems making enterprise agreements because of a lack of know-how and resources. It is theoretically targeted at industries such as aged and disability care, early childhood education and the like. Businesses in such sectors don't necessarily control the purse strings and might receive government funding. They might like to pay more but cannot because of funding issues. Experts with Australian Business Lawyers and Advisors, a private legal company, speculate that businesses in a funded sector might need to have a multi-employer agreement to access future funding. Experts generally expect that the supported bargaining stream will be most used in government-funded sectors.

But now a warning.

Law firm Chambers Westgarth notes that, despite the supported bargaining stream being "intended to operate only in relation to workers in lower paid industries, there is no such restriction expressed in the legislation – the Commission is only required to consider the pay and conditions in the relevant industry or sector".

This stream could be attractive to unions, lawyers warn. There are differences between the Supported Bargaining Stream and the Single Interest Stream. From the union viewpoint, the Supported Bargaining Stream has some advantages.

The Fair Work Commission must grant authorisation to bargain under this stream where it is "satisfied" that it is "appropriate" to do so. The law directs the Commission to consider the "prevailing pay and conditions". The Commission will also look at whether the employers have "common interests". This is not a well-defined term but it may include geography, nature of the enterprises, terms and conditions of employment, and whether those enterprises receive government funding.

These factors could apply various supply chain entities.

And, of course, the unions will have the power to take industrial action against their bargaining partners during the bargaining process.

Single Interest Employer Bargaining

Despite the name, this is another type of multi-enterprise bargaining agreement. This stream has caused more anxiety and speculation than other streams because it's not said to be specifically aimed at the low-paid. It was designed to be generally applicable to all employer organisations. It may be that the unions opt to use the Single Interest Bargaining stream.

The "single interest" in "Single Interest Employer Bargaining" may refer to the employers having a common interest in geography, regulatory regime, the nature of enterprises and the terms and conditions of employment. The operations and activities of the businesses covered must be reasonably comparable … but there's no definition of what "reasonably comparable" actually means.

And, once again, the ability to take protected industrial action is available to the workforce.

How will the common interest test work?

In both the Supported Bargaining and the Single Interest Employer Bargaining streams, employers must have "common interests" before they can be bound into a multi-enterprise.

Stevedores are a good example of how this test might work. Stevedores are located in the similar places (around ports), they do the same kind of work, they have the same kind of maritime legislation applying to them, their workers do the same kinds of jobs and so on. But can stevedores be drawn together on a national basis? Or can an argument be made that stevedores in Fremantle are different from stevedores in Brisbane?

Will break bulk, bulk stevedores, and box stevedores be wrapped up in their own sub-sector enterprise agreements? Or will there be one multi-stevedore enterprise agreement covering all stevedores everywhere in Australia?

Let's also look at a less obvious example, say, customs brokers. They do similar work to each other, have the same kind of workers, and have the same regulatory regime. Can customs brokers be lumped together for bargaining purposes on a national basis? Can forwarders? What about warehouse operators? What about others in the supply chain?

Good questions, no answers. Only time, and the Fair Work Commission, will tell.

Demarcation disputes are possible

Incidentally, before any multi-enterprise bargaining agreement can be made, it must be put to a vote of the workers. An employer must get written approval from each union representative before asking workers to vote.

This appears to address examples – as has happened in the past – in which different unions cannot agree. In one example, the seafarers' and deckhands' union and the maritime engineers' union both represented different classes of employees working for the same employer. They were unable to agree because of conflicting interests.

The employer, wanting to resolve the situation, carried out a ballot of the workforce. As the maritime engineers were smaller in number compared to the seafarers, they were outvoted, the enterprise agreement was struck between the workforce and the employer, the bargaining period concluded and protected industrial action was no longer available. However, that type of tactic to resolve disputes between unions will no longer work.

It's also easy to see that demarcation disputes (where two (or more) sets of unions disagree on whose members should do a particular job) could break out. There would be no easy solution.

Forced in… cannot get out

After a multi-employer agreement is struck, the union can ask the Fair Work Commission to force other employers to adopt that agreement even if those employers do not want to adopt it. A "latecomer" business forced to adopt an agreement will not have been able to influence the process. That raises an interesting question as to how roped-in organisations will cope financially and operationally if the agreement has substantially different rates and substantially different terms and conditions of employment.

There are weak exemptions from the compulsion. Organisations that employ 19 people (by headcount, not full time equivalent) or less cannot be roped into a Single Interest Bargaining Agreement. Employers can't split their workforces over multiple entities to bring headcount numbers below 20 as the headcount in associated entities is included. Without naming names, we can think of organisations that have adopted structures that compartmentalise their workforce. Such structures might be defeated by the 20 plus person rule.

The 20 plus person rule doesn't apply to the Supported Bargaining Agreement stream. Unions therefore have an alternative pathway to force smaller employers into multi-employer bargaining even if the Single Interest Bargaining stream is blocked.

Another weak exemption is if an organisation is still inside the nominal term of a Single Enterprise Agreement. It cannot be roped-in to a Single Interest Employer Bargain or a Supported Enterprise Bargain. But, sooner or later, that Single Enterprise Agreement will eventually expire.

It's unlikely that unions will opt to renew a Single Enterprise Agreement with an employer instead of roping them into a multi-enterprise agreement. The benefits for the union are obvious – roping-in saves time, effort, and money.

Once an agreement is struck and once employers are roped in, then it will be difficult to change the agreement or remove employers without union consent. The unions have the right to be consulted and to put their views forward to the Fair Work Commission. They also effectively have a veto over any changes.

That's going to be tricky for some organisations in the supply chain, which will likely be covered by multiple unions. Maritime vessel operators, for instance, could simultaneously be covered by the seafarers' union, the officers' union, and the maritime engineers' union.