SUMMARY OF PART 20 SUPPORTED BARGAINING AND PART 21 SINGLE INTEREST EMPLOYER BARGAINING

PART 20 SUPPORTED BARGAINING

Supported Bargaining Authorisation

The FWC must make a supported bargaining authorisation in relation to a proposed multi‑enterprise agreement if:

(a) an application for the authorisation has been made (by either an Employer or Employee bargaining representative); and

(b) the FWC is satisfied that it is appropriate for the employers and employees that will be covered by the agreement to bargain together, having regard to:

(i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and

(ii) whether the employers have clearly identifiable common interests; and

(iii) whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and

(iv) any other matters the FWC considers appropriate; and

(c) the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation.

Common interests

For the purposes of subparagraph (b)(ii) above, examples of common interests that employers may have include the following:

(a) a geographical location;

(b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;

(c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

Supported bargaining authorisation—declared industry etc.

The FWC must also make a supported bargaining authorisation in relation to a proposed multi‑enterprise agreement if the employees specified in the application are employees in an industry, occupation or sector declared by the Minister.

Operation of authorisation

The authorisation comes into operation on the day on which it is made.

Restrictions on making supported bargaining authorisations

Employees covered by single‑enterprise agreement that has not passed nominal expiry date

The FWC must not make a supported bargaining authorisation specifying an employee who is covered by a single‑enterprise agreement that has not passed its nominal expiry date, unless the FWC is satisfied that the employer’s main intention in making the agreement with the employees covered by it was to avoid being specified in a supported bargaining authorisation.

*Employer can’t bargain for another agreement while supported bargaining authorisation in place*

While a supported bargaining authorisation that specifies an employee is in operation, an employer cannot bargain with that employee for any kind of agreement other than a supported bargaining agreement.

**Adding an employer’s name to an authorisation**

The FWC must vary the authorisation to add the employer’s name if the FWC is satisfied that it is in the public interest to do so.

The FWC must not vary the authorisation if employees covered by single‑enterprise agreement that has not passed nominal expiry date.

**Supported bargaining enterprise agreements**

Variation of supported bargaining agreement to add employer and employees by consent

A variation of a supported bargaining agreement, that has the effect that an employer that was not covered by the agreement will be covered by it, may be made jointly by the employer and the affected employees.

The variation is ***made*** when a majority of the affected employees who cast a valid vote approve the variation.

**Terms of variation must be explained to employees**

Before an employer requests that affected employees approve a proposed variation, the employer must take all reasonable steps to ensure that:

(a) the terms of the agreement as proposed to be varied, and the effect of those terms, are explained to the affected employees; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

Application for the FWC’s approval of a variation of a supported bargaining agreement to add employer and employees

Application for approval

If a variation of a supported bargaining agreement is to be made by consent, the employer to be covered by the agreement must apply to the FWC for approval of the variation.

When the application must be made

The application must be made:

(a) within 14 days after the variation is made; or

(b) if in all the circumstances the FWC considers it fair to extend that period within such further period as the FWC allows.

When the FWC must approve a variation of a supported bargaining agreement to add employer and employees by consent

If an application for the approval of a variation of a supported bargaining agreement is made by consent, the FWC must approve the variation if the FWC is satisfied that, among other things:

(a) the affected employees have voted on whether to approve the variation and, of those who cast a valid vote, a majority approved the variation; and

(b) the variation has been genuinely agreed to by the affected employees;

unless the FWC is satisfied that there are serious public interest grounds for not approving the variation.

The FWC must not approve the variation if the employer that will be covered by the agreement is specified in a single interest employer authorisation in relation to any of the affected employees.

When variation comes into operation

If a variation of a supported bargaining agreement is approved, the variation operates from the day specified in the decision to approve the variation.

Variation of supported bargaining agreement to add employer and employees (without consent of employer)

Application for the FWC to vary a supported bargaining agreement to add employer and employees without consent

Application for variation

An employee organisation that is covered by a supported bargaining agreement may apply to the FWC for a variation of the agreement that has the effect that an employer that was not covered by the agreement will be covered by it.

When the FWC must make a variation of a supported bargaining agreement to add employer and employees without employer consent

If an application for the FWC to vary a supported bargaining agreement is made without employer consent, the FWC must make the variation if the FWC is satisfied that:

(a) a majority of the employees:

(i) who are employed by the employer at a time determined by the FWC; and

(ii) who will be covered by the agreement as proposed to be varied;

want to be covered by the agreement; and

(b) it is appropriate for the employees to be covered by the agreement.

In determining whether it is satisfied that it is appropriate for the employees to be covered by the agreement:

(a) the FWC must take into account the views of:

(i) each employee organisation covered by the agreement; and

(ii) the employer that will be covered by the agreement if the variation is made; and

(b) the FWC may have regard to the matters listed above for when the FWC must make a supported bargaining authorisation.

*Restriction on making variation*

The FWC must not make the variation if the employer that will be covered by the agreement is specified in a single interest employer authorisation in relation to any of the affected employees.

When variation comes into operation

If a variation of a supported bargaining agreement is made without consent, the variation operates from the day specified in the decision to make the variation.

**PART 21 – SINGLE INTEREST EMPLOYER BARGAINING**

Single interest employer authorisation

Single interest employer authorisation

The FWC must make a single interest employer authorisation in relation to a proposed enterprise agreement if:

(a) an application for the authorisation has been made; (by an Employer or Employee bargaining representatives) and

(b) the FWC is satisfied that:

(i) at least some of the employees that will be covered by the agreement are represented by an employee organisation; and

(ii) the employers and the bargaining representatives of the employees of those employers have had the opportunity to express to the FWC their views (if any) on the authorisation; and

(iii) if the application was made by 2 or more employers—the requirements of subsection (1A) are met; and

(iv) if the application was made by a bargaining representative of an employee —each employer either has consented to the application or is covered by subsection (1B); and

(v) the requirements of franchisees and, more relevantly, common interest employers (for common interest see below) are met; and

(vi) if the requirements of common interest are met—the operations and business activities of each of those employers are reasonably comparable with those of the other employers that will be covered by the agreement.

*Presumption*

If:

(a) the application for the authorisation was made by a bargaining representative of an employee; and

(b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved.

Additional requirements for application by employers

(1A) The requirements of this subsection are met if:

(a) the employers that will be covered by the agreement have agreed to bargain together; and

(b) no person coerced, or threatened to coerce, any of the employers to agree to bargain together.

Additional requirements for application by bargaining representative of an employee

(1B) An employer is covered by this subsection if:

(a) the employer employed at least 20 employees at the time that the application for the authorisation was made; and

(b) the employer has not made an application for a single interest employer authorisation that has not yet been decided in relation to the employees that will be covered by the agreement; and

(c) the employer is not named in a single interest employer authorisation or supported bargaining authorisation in relation to the employees that will be covered by the agreement; and

(d) a majority of the employees who are employed by the employer at a time determined by the FWC and who will be covered by the agreement want to bargain for the agreement; and

(e) subsection (1D) does not apply to the employer. (Meaning, any existing EA has to have passed it’s nominal expiry date; or employer/employee organisation have not otherwise agreed to bargain for a single enterprise EA.)

(1C) For the purposes of paragraph (1B)(d), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

(1D) This subsection applies to an employer if:

(a) the employer and the employees of the employer that will be covered by the agreement are covered by an enterprise agreement that has not passed its nominal expiry date at the time that the FWC will make the authorisation; or

(b) the employer and an employee organisation that is entitled to represent the industrial interests of one or more of the employees of the employer that will be covered by the agreement have agreed in writing to bargain for a proposed single‑enterprise agreement that would cover the employer and those employees or substantially the same group of those employees.

Common interest employers

The requirements of this subsection are met if:

(a) the employers have clearly identifiable common interests; and

(b) it is not contrary to the public interest to make the authorisation.

For the purposes of paragraph (a), matters that may be relevant to determining whether the employers have a common interest include the following:

(a) geographical location;

(b) regulatory regime;

(c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises.

*Presumption*

If:

(a) the application for the authorisation was made by a bargaining representative of an employee; and

(b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the requirements of common interest are met in relation to that employer, unless the contrary is proved.

Calculating number of employees

For the purposes of calculating the number of employees:

(a) ***employee*** has its ordinary meaning; and

(b) subject to paragraph (c), all employees employed by the employer at the time that the application for the authorisation was made are to be counted; and

(c) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer; and

(d) associated entities of the employer are taken to be one entity.

*FWC may not make a single interest employer authorisation*

The FWC may make a single interest employer authorisation that does not specify one or more employers specified in an application for the authorisation, and the employees (the ***relevant employees***) of those employers specified in that application, if the FWC is satisfied that:

(a) the employers are bargaining in good faith for a proposed enterprise agreement that will cover the employers and the relevant employees, or substantially the same group of the relevant employees; and

(b) the employers and the relevant employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employers and the relevant employees, or substantially the same group of the relevant employees; and

(c) on the day that the FWC will make the authorisation, less than 9 months have passed since the most recent nominal expiry date of an agreement referred to in paragraph (b).

Requirement for employer specified in single interest employer authorisation

(5) If an employer is specified in a single interest employer authorisation that is in operation:

(a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement; and

(b) the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement.

**There are also processes for varying a single interest employer authorisation to remove or add an employer.**

Employers and employees that are already bargaining

The FWC may refuse to vary the authorisation if the FWC is satisfied that:

(a) the new employer is bargaining in good faith for a proposed enterprise agreement that will cover the new employer and the employees of the new employer that will be covered by the agreement, or substantially the same group of those employees; and

(b) the new employer and those employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the new employer and those employees, or substantially the same group of those employees; and

(c) on the day that the FWC will vary the authorisation, less than 9 months have passed since the most recent nominal expiry date of an agreement referred to in paragraph (b).

**Single interest enterprise agreements**

Variation of single interest employer agreement to add employer and employees—joint variation

Variation by employers and employees

The following may jointly make a variation of a single interest employer agreement that will have the effect that they will be covered by the agreement:

(a) an employer that is not covered by the agreement;

(b) the employees employed by the employer at the time who will be covered by the agreement if the variation is approved by the FWC (the ***affected employees***).

Variation has no effect unless approved by the FWC

The variation has no effect unless it is approved by the FWC.

Approval by employee vote

The employer may request the affected employees to approve the proposed variation by voting for it.

The employer may request that the affected employees vote by ballot or by an electronic method.

When a variation is made

A variation under this section is ***made*** when a majority of the affected employees who cast a valid vote approve the variation.

Terms of variation must be explained to employees

Before an employer requests that affected employees approve a proposed variation, the employer must take all reasonable steps to ensure that:

(a) the terms of the agreement as proposed to be varied, and the effect of those terms, are explained to the affected employees; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

Application for the FWC’s approval of a variation of a single interest employer agreement to add employer and employees—joint variation

Application for approval

If a variation of a single interest employer agreement is made jointly, the employer to be covered by the agreement must apply to the FWC for approval of the variation.

Application for the FWC’s approval of a variation of a single interest employer agreement to add employer and employees— employee organisation

An employee organisation that is covered by a single interest employer agreement may apply to the FWC for the approval of a variation of the agreement that will have the effect that the following will be covered by the agreement:

(a) an employer that is not covered by the agreement;

(b) the employees employed by the employer at the time who will be covered by the agreement if the variation is approved by the FWC (the ***affected employees***).

When the FWC must approve a variation of a single interest employer agreement to add employer and employees

Approval of variation by the FWC

The FWC must approve a variation of a single interest employer agreement if:

(a) an application for approval of the variation has been made jointly or employee organisation; and

(b) the FWC is satisfied that:

(i) the employers and any employee organisations covered by the agreement have had an opportunity to express to the FWC their views (if any) on the application; and

(ii) if the application was made by an employer (i.e., jointly)—the variation has been genuinely agreed to by the affected employees; and

(iii) if the application was made by an employee organisation—the requirements of subsection (1A) are met; and

(iv) the requirements of franchisees and common interest employers are met; and

(v) if the requirements of common interest are met—the operations and business activities of the employer are reasonably comparable with those of the other employers who are covered by the agreement.

*Presumption*

If:

(a) the application for approval of the variation was made by an employee organisation; and

(b) the employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed for the purposes of comparability that the operations and business activities of the employer are reasonably comparable with those of the other employers that are covered by the agreement, unless the contrary is proved.

Additional requirements for application by employee organisation

(1A) The requirements of this subsection are met if:

(a) the employer that will be covered by the agreement employed at least 20 employees at the time that the application for approval of the variation was made; and

(b) a majority of the affected employees want to be covered by the agreement; and

(c) subsection (1C) does not apply to the employer.

(1B) For the purposes of paragraph (1A)(b), the FWC may work out whether a majority of the affected employees want to be covered by the agreement using any method the FWC considers appropriate.

(1C) This subsection applies to an employer if:

(a) the employer and the affected employees are covered by another enterprise agreement that has not passed its nominal expiry date at the time that the FWC will approve the variation; or

(b) the employer and an employee organisation that is entitled to represent the industrial interests of one or more of the affected employees have agreed in writing to bargain for a proposed single‑enterprise agreement that would cover the employer and the affected employees or substantially the same group of the affected employees.

Common interest employers

The requirements of this subsection are met if it is appropriate to approve the variation, having regard to:

(a) whether the employers covered by the agreement and the employer that will be covered by the agreement have clearly identifiable common interests; and

(b) whether it would be contrary to the public interest to approve the variation.

For the purposes of paragraph (a), matters that may be relevant to determining whether the employers have a common interest include the following:

(a) geographical location;

(b) regulatory regime;

(c) the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.

*Presumption*

If:

(a) the application for approval of the variation was made by an employee organisation; and

(b) the employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the requirements of common interest above are met, unless the contrary is proved.

Calculating number of employees

For the purposes of calculating the number of employees:

(a) ***employee*** has its ordinary meaning; and

(b) subject to paragraph (c), all employees employed by the employer at the time that the application was made are to be counted; and

(c) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer; and

(d) associated entities of the employer are taken to be one entity.

Employers and employees that are already bargaining

The FWC may refuse to approve the variation if the FWC is satisfied that:

(a) the employer is bargaining in good faith for a proposed enterprise agreement that will cover the employer and the affected employees, or substantially the same group of the affected employees; and

(b) the employer and the affected employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employer and the affected employees, or substantially the same group of the affected employees; and

(c) on the day that the FWC will approve the variation, less than 9 months have passed since the most recent nominal expiry date of an agreement referred to in paragraph (b).

Supported bargaining authorisation

The FWC must not approve the variation if the employer that will be covered by the agreement is specified in a supported bargaining authorisation in relation to any of the affected employees.

When variation comes into operation

If a variation of a single interest employer agreement is approved (either applied for jointly or an employee organisation), the variation operates from the day specified in the decision to approve the variation.