UFU Submission to the Senate Inquiry into the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*

The effects of Intractable Bargaining laws on the Fair Work Commission, federal bargaining processes, and workers' rights

3 November 2023

CONTENTS

Overview of the deficiencies in the current intractable bargaining provisions of the *Fair Work Act 2009* (Cth)

- Since the passing of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, and since the 6 June 2023 introduction of the changes, a number of unintended consequences have become apparent in the application of the **intractable bargaining** legislation.

- First, the provisions have become recognised as a method for employers to wind back or remove, partially or wholly, workers' existing conditions of employment. This strategy or tactic can be used by any bargaining representative to avoid bargaining and commence a process that leads to arbitration of all conditions of employment.

- A further unintended consequence of the legislation appears to allow the employer/a bargaining party to change the 'status quo' regarding "agreed terms" *after* an intractable bargaining application has been made. This gives little to no incentive in truly engaging in enterprise bargaining, as a range of matters that have previously been agreed can simply be 'unagreed' after an intractable bargaining application is made.

2022 amendment to Section 226 which closed the previous loophole regarding termination of enterprise agreements which was used to avoid bargaining (assented to 6 December 2022)

- Whilst the Secure Jobs, Better Pay Bill was in part designed to prevent employers moving to unilaterally terminate enterprise agreements to avoid bargaining, the new intractable bargaining legislation as it is currently drafted has inadvertently provided employers with a new pathway to terminate enterprise agreements and long-standing conditions of employment through the backdoor.

- The amendment to prevent termination to avoid bargaining in the Secure Jobs, Better Pay Bill closed the loophole regarding s.226 of the Fair Work Act however, the intractable bargaining provisions has effectively provided the same avenue – albeit under a different legislative structure under s. 234 of the Fair Work Act.

- This clearly could not have been the intention of the Federal Government to close one loophole but inadvertently create a new pathway for an employer to achieve the same outcome as a result of what we respectfully submit is a drafting flaw.

Intractable Bargaining legislation (commenced 6 June 2023)

- Intractable bargaining legislation is required for some workers and industries. Therefore, the legislation itself should not be removed but, rather, should be

amended to make clear that existing conditions of employment cannot be unwound unless agreed between the bargaining parties during bargaining.

- By amending the intractable bargaining legislation, it would result in the same remedial action as was put in place under s. 226 to prevent the avenue for an employer to avoid bargaining by instead seeking arbitration.

- For an employer to avoid bargaining outcome, under the current intractable bargaining legislation they simply have to meet the following criteria:

    - Bargain in good faith (does not mean a bargaining party has to agree)
    - Give genuine consideration to each party's views
    - Attend meetings
    - Bargain for more than 9 months
    - Utilise the section 240 process as a mechanism to seek the assistance of the Fair Work Commission (conciliation only)

- If a bargaining party meets the above criteria, which essentially is just a test of time, then they are eligible to make an application for an intractable bargaining declaration, resulting in a strategy to avoid bargaining and enter into arbitration through extensive litigation.

- Essentially, an employer by taking advantage of the current drafting could enter into a process of arbitration to facilitate removing conditions of employment, of which could be described as a "Ground Zero" approach.

Proposed amendment to rectify the current flaw in the intractable bargaining legislation

- Without removing any element of the current legislation, the UFU proposes that a small amendment be made to ensure the integrity of current conditions of employment. The amendment would restore the integrity of bargaining by emphasising that bargaining is the predominant vehicle for replacing an enterprise agreement, rather than unilateral arbitration.

- Additionally, there is an additional flaw and unintended consequence with the current intractable bargaining legislation where a party can change the status quo of what has been agreed during bargaining *after* a party has made an application for an intractable bargaining declaration.

- Based on the UFU Victoria's experience, an agreed term should be one that the parties have negotiated *prior to* an intractable bargaining application being made, rather than a bargaining party seeking to have all matters arbitrated by changing the status quo of agreed terms *after* an intractable bargaining application has been made.

No disadvantage as a result of the unintended flaw

- To ensure there is no disadvantage to unions and working people, we respectfully submit that a proper way to resolve the matter is that any such amendment should operate from the date the intractable bargaining legislation came into effect (6 June 2023) rather than the date the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* received Royal Assent (6 December 2022).

  This approach would ensure that the unintended consequences would not have an effect without effecting the other amendments contained within the Secure Jobs, Better Pay Bill.

An example of removing a pathway that facilitates the avoidance of bargaining: 2022 amendment to section 226 of the Fair Work Act

Prior to the introduction of the Secure Jobs, Better Pay Bill, section 226 of the Fair Work Act read as follows:

> *226 When the FWC must terminate an enterprise agreement*
>
> *If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:*
>
> *(a) the FWC is satisfied that it is not contrary to the public interest to do so; and*
>
> *(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:*
>
> *(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and*
>
> *(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.*

In consideration of the above previous section, Minister Burke identified a deficiency in the Fair Work Act, which allowed an employer to apply to unilaterally terminate an enterprise agreement during a bargaining period to avoid bargaining.

Accordingly, Minister Burke via the Secure Jobs, Better Pay Bill introduced amendments to repeal section 226 in its entirety and to replace it with a new section that prevented employers misusing section 226 by prescribing a criteria that preserved bargaining.

Amendment to section 226 (assented to 6 December 2022)

Section 226 of Fair Work Act now reads, in part:

…

> *(4) In deciding whether to terminate the agreement (the existing agreement), the FWC must have regard to:*

(a) whether the application was made at or after the notification time for a proposed enterprise agreement that will cover the same, or substantially the same, group of employees as the existing agreement; and

(b) whether bargaining for the proposed enterprise agreement is occurring; and

(c) whether the termination of the existing agreement would adversely affect the bargaining position of the employees that will be covered by the proposed enterprise agreement.

…

The 2022 amendment was designed to prevent an employer misusing section 226 to avoid bargaining, and instead unilaterally applying to terminate the existing enterprise agreement as a tactic to facilitate arbitration.

However, whilst the section 226 loophole was closed, another loophole was inadvertently opened with the passing of the current intractable bargaining. Again, this new loophole clearly could not have been the intention of the Federal Government.

Introduction

The United Firefighters Union of Australia is a registered federal union of career firefighters and others employed by fire services in Australia. The Victorian Branch of the United Firefighters Union of Australia represents professional firefighters, emergency call centre employees and fire agency corporate, administration, hospitality, technical and mechanical employees across Fire Rescue Victoria and Defence (employed by Ventia/Broadspectrum).

The intractable bargaining declaration provisions were, as their name suggests, designed to deal with circumstances where parties are unable to make an enterprise agreement. Primarily this can be seen to be of benefit to unions who have little or no bargaining power. Employers are, in the main, advantaged by the use of safety net awards or old expired agreements. Under pre-existing provisions where an employer refused to make a new agreement, employee bargaining representatives had few resources under the Fair Work Act to achieve improvements in the terms and conditions of employment.

The intractable bargaining provisions created an opportunity for such deadlocks to be broken by arbitration, in much the same way that workplace determinations made as a result of the consequences of protected industrial action had been used i.e endangerment to public safety.

However, because of the way the intractable bargaining determination provisions have been drafted and now operate, an opportunity has arisen for employers to exploit the provisions to seek to reduce or eliminate long standing – or all - conditions of employment in circumstances where they would never be able to do so through bargaining prior to the 6 June 2023 commencement of the intractable bargaining provisions.

Additionally, the real effect of the current legislation as it stands is that there is no incentive for an employer to bargain for a new enterprise agreement but, rather, employers can now avoid a bargaining outcome by entering a process of meeting the criteria for all matters to be arbitrated. This disincentive to bargain needs to be removed, as it undermines the very premise and purpose of enterprise bargaining in the workplace.

This submission sets out some examples of the approaches available to employers. It then recounts the experience of the United Firefighters' Union in Victoria, which, because of the existence of the intractable bargaining provisions has been driven to make its own application, which has led to an attempt by Fire Rescue Victoria to exploit the provisions to undermine – or remove - longstanding conditions due to the current drafting of the legislation in place.

Part 1: Employer law firm strategies for utilising intractable bargaining legislation to unwind and/or remove conditions of employment

Since the passing of the industrial relations reforms introducing intractable bargaining, law firms including *Herbert Smith Freehills*[1] and *Holding Redlich*[2] have published podcasts/information on the new laws.

These provide insight into how employer law firms have commenced advising clients to use intractable bargaining provisions to erode long-standing conditions of employment. For example:

- Herbert Smith Freehills encourages its IR, HR and legal professional clients to consider its bargaining strategy so as to have "good evidence" of … "what was on the table" and ensuring that employers have "proactive" claims – not just defensive – so that there is something on the table, from the employer's perspective, for an arbitration.

- Freehills also suggests the section 240 could be utilised to place the issues on the table, with the idea of those "issues" ultimately forming part of the arbitration.

- Holding Redlich also suggests that an "employer may well consider at the outset of bargaining that an industrial issue is most unlikely to be resolved by agreement, in which case it will need to consider how it will convince the FWC not to impost the unwanted outcome by arbitration". This information is not limited to claims – it is simply the "industrial issue".

The first Intractable Bargaining application was brought on by **Seyfarth Shaw** just two days after the legislation commenced operation. It became clear that this application was designed to:

- Halt Protected Industrial Action (**PIA**) and any further effects of it

- Halt any further bargaining between the negotiating parties

- Put the FWC in a position of making an agreement by way of declaration as opposed to an agreement by way of employee/member vote.

Although this application was ultimately discontinued by Seyfarth Shaw, it has paved the way for other large employers/employer firms to utilise intractable bargaining applications as a way to pressure unions/workers via a legal process with a view to avoiding the requirement to bargain. Additionally, as stipulated above, an employer simply has to meet the criteria and then apply for an intractable bargaining

[1] https://www.herbertsmithfreehills.com/insights/2023-07/inside-ir-the-australian-industrial-relations-podcast
[2] https://gateway.on24.com/wcc/eh/1667652/lp/4220196/secure_jobs_better_pay_act_understanding_implications_for_bargaining_strategy/?partnerref=on24seo

declaration, and place all matters into a process of litigation and arbitration, rather than resolve negotiations via enterprise bargaining.

Recent examples

For example, **Chevron** made three applications on 11 September against unions.[3] Another large employer, **Ventia**, has also since made an intractable bargaining application against the UFUA regarding Queensland Firefighter negotiations.

Additionally, **employer/industry bodies** are strategising the use of the intractable bargaining laws to their advantage (see **Part 3.1** below).

As can be seen above, an employer simply has to meet the criteria and then apply for an intractable bargaining declaration, and place all matters into a process of litigation and arbitration, rather than resolve negotiations via enterprise bargaining.

[3] https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/lng/091123-chevron-lodges-intractable-bargaining-declaration-for-wheatstone-gorgon-projects

Part 2: Fair Work Commission resources

Intractable Bargaining (**IB**) applications must be dealt with expeditiously. In doing so, significant Fair Work Commission resources must be utilised to deal with applications that arise.

The Fair Work Commission's general caseload is significant. In the 2022/23 FWC Annual Report, the FWC reports a clearance rate of 102%, with over 31,000 applications were received and over 32,000 applications finalised.

As noted by President Hatcher in his Introduction, "The true scope of these changes, and the extent of the work undertaken by staff and Members to implement them quickly, cannot be accurately summarised in this introduction"[4].

In reality, the number of arbitrations that FWC would have to deal with will increase substantially as a result of the intractable bargaining legislation. The duration and complexity of each case will be of a significant nature, resulting in a clear drain on the resources of the Fair Work Commission as well as a Union or bargaining party.

Effectively, an employer can simply not agree and invest money in arbitration to remove conditions of employment.

Resourcing for IB applications

It has been clear since the first IB application on 8 June 2023, that IB applications require significant resourcing, and quickly. In the initial stages of an IB application, such resourcing includes for example:

- The Fair Work Commission President presiding over and programming the matter.
- A Fair Work Commission Full Bench being available for Hearings.
- The full availability of a single Commissioner in the event a Post-Declaration Negotiating Period is ordered.

The Commission's ability to deal with IB applications expeditiously is compromised in the event a bargaining party takes a position that there are a broad range of matters remaining for arbitration or alternatively, in the case of the position of Fire Rescue Victoria in **Matter B2023/771**, where there is a position that there are no agreed terms.

Our emphasis is added to the following comments in the Decision of the Fair Work Commission Full Bench:

> *However, we hold a significant concern that, because of the radical difference in the positions of the parties at the present time as to what constitute the agreed terms and the matters in issue, the arbitration required to be conducted will be considerably extended by the need to determine, as a*

> *preliminary step, which matters need to be arbitrated.* ***This may compromise the Commission's capacity under s 269(1) to make an intractable bargaining workplace determination 'as quickly as possible'.*** *We consider therefore that the specification of a post-declaration negotiating period would be useful for the purpose of giving the parties an opportunity to resolve, or at least narrow, their differences as to what matters will need to be arbitrated.*[5] (emphasis added)

Ultimately, IB applications are all but guaranteed to go to arbitration. If the bargaining parties do not reach agreement after an Intractable Bargaining Declaration (**IBD**) is made, then the FWC must make an IB workplace determination. A Determination must be made by a FWC Full Bench.

Unnecessary and unrealistic burden on the resources and finances of unions

The UFU respectfully submits that the resourcing and cost of litigation is not just contained to the Fair Work Commission. In the event that the employer takes a position to utilise intractable bargaining as a way to remove existing conditions of employment that have been built up over many years, the reality is that a Union will have no alternative but be placed in a situation where the litigious manner of such application will require substantial amounts of monies and resources.

This will result in a significant financial and resource burden on Unions.

For example, the UFU has estimated that a properly resourced legal team will cost between $600,000 to $900,000.

It should be noted that the cost to an employer who is taking the opportunity resulting from the flaw in the current legislation would more than likely be considered that the expenditure of large amounts of money in the arbitration to remove conditions of employment is a proper and worthwhile investment to achieve an outcome that could not be achieved through enterprise bargaining.

The UFU underlines this by the fact that important conditions of employment that provide protections to employees/workers, such as job security, etc. would never be traded off by a union/workers during bargaining, however an employer now has the opportunity to remove those conditions of employment via litigation through the intractable bargaining legislation.

No incentive to reach agreement in bargaining under *Fair Work Act*'s bargaining structure

The current structure of the legislation, incorporating the new intractable bargaining provisions, provides a major disincentive for a bargaining party i.e. an employer to reach agreement through bargaining.

[5] United Firefighters' Union of Australia v Fire Rescue Vicotria [2023] FWCFB 180 at para 46.

To take a real example from UFU Victoria's experience, and as detailed in **Part 3.2** of this Submission, following an extensive section 240 process (16 appearances before the Fair Work Commission) involving the bargaining parties (being United Firefighters Union and Fire Rescue Victoria), Fair Work Commissioner Wilson issued a Statement with the consent of the parties on 19 June 2023 stating that

> *"**all outstanding matters have been resolved, save for the matter of an offer for increases to wages and related monetary allowances**".*
> (emphasis added)

In the absence of any wage offer, on 28 July 2023 the Union made application under Intractable Bargaining for arbitration of wages and allowances increases only, in accordance with Commissioner Wilson's Statement. It should be noted that this Statement was by way of consent of the bargaining parties.

Some 10 days after the UFU's made the IB application, Fire Rescue Victoria (**FRV**) sent to the UFU a letter, which employed a new tactic of attempting to avoid the negotiated position and 19 June Statement of Fair Work Commissioner Wilson, that all matters were agreed other than wages and allowances.

Further, post the UFU's IB application seeking an arbitration on wages and allowances increases only, FRV then commenced propagating the position that there were no agreed terms for the purposes of a workplace determination, in an attempt to change the status quo of what was to be arbitrated. This was, and remains, an opportunistic attempt to force an arbitration on every condition of employment – including long-standing, existing conditions of employment.

It cannot be the case that it was intended that the intractable bargaining provisions could be utilised in this way. Rather, intractable bargaining was designed to narrow the outstanding claims between the bargaining parties.

Section 240 of the Fair Work Act

With respect to the utilisation of the section 240 process, FRV made application under Section 240 of the *Fair Work Act*. FRV (and UFU) engaged in conciliation conferences, and meetings away from the FWC, and provided report backs of progressive agreement on matters.

On 19 June 2023, FRV (and UFU) by consent informed the FWC of the status of bargaining – being that all matters had been agreed other than the increase to wages and allowances. The same day, the FWC issues a Statement to that effect.

However, despite the above fact, once the UFU files an IB application to deal with the sole outstanding matter of quantum increase to wages and allowances (in accordance with the 19 June FWC Statement), FRV then employs a tactic that attempts to place all current entitlements and conditions into a process of arbitration, by stating that no matters are agreed.

It should be noted that FRV's position comes after an extensive process of bargaining, which consisted of:

- At least 76 face-to-face bargaining meetings;
- 16 Fair Work Commission appearances (section 240)
- 2 Fair Work Commission Statements.

Comparison with previous Section 170MX awards

It is likely that with more sophisticated employer strategy, more and more IB applications will be made with every intention of arbitrating the agreement.

This can be contrasted with the previous section 170MX of the *Workplace Relations Act 1996* (Cth) and the ability of the AIRC to arbitrate in certain, restricted circumstances.

The circumstances that led to a section 170MX Award arbitration were confined. Section 170MX defined the circumstances in which the Commission could make a workplace determination, most of which related to the termination of a bargaining period due to industrial action. Some of these features (such as termination of bargaining in the context of endangerment to community) remain.

By 1999, there were only a few cases that had been arbitrated under section 170MX since its January 1997 introduction. Overall, in the 10-year period, there were no more than 2 dozen MX Award cases. Therefore, the section 170MX Award cases were not a heavy load on the Commission at the time.

By way of contrast, the current IB legislation is considerably broader/wider in scope and, as such, it is much easier for employers (not just unions/workers) to make an IB application. Unless there is a disincentive for employers who wish to use the IB laws to wind back or remove current/existing conditions of employment, then these provisions will be abused and will undermine decades of progressively building upon workers' entitlements in industrial instruments. The effects that this will have on the FWC's caseload, considering in particular the various elements/resources that must be drawn upon (and drawn upon quickly) are significant.

Part 3.1: The Employer Strategies in Action

Even though the IBD provisions have only been operative for a few months there have been ever-increasing signs of employers seeking to take advantages of the unintended consequences referred to above. In each case the unions involved have obtained good conditions for their members and have built on these through successive agreements.

- In March 2023, a leaked **Australian Higher Education Industrial Association** (**AHEIA**) document revealed a strategy road map with respect to the industrial relations reforms. This document encouraged universities to bypass unions in putting enterprise agreement offers directly to employees. Relevantly, this strategy road map also detailed how IB declarations and arbitrations could be accessed.

- Dr Damien Cahill, NTEU General Secretary, is quoted as saying in response to the leaked AHEIA document:

    - *"In this document, AHEIA explicitly nominates arbitration after achieving an intractable bargaining declaration as a path to 'success' in winding back clauses in agreements on key employment conditions like redundancies and staff reviews of management decisions."*[6]

- In September 2023, global company Chevron made three IB applications in the FWC. These applications were made just as the workers/members were to escalate their protected industrial action to two weeks of 24-hour stoppages.

[6] "Leaked document exposes universities' plan to drive down staff wages", HR Leader, 1 March 2023 (https://www.hrleader.com.au/law/23798-leaked-documents-exposes-universities-plan-to-drive-down-staff-wages).

Part 3.2: UFU's Intractable Bargaining Application

Summary

- UFU and Fire Rescue Victoria (**FRV**) have been bargaining – both informally and formally – for over 3 years.

- This culminated in approximately 76 bargaining meetings, over 16 FWC Conciliation Conferences (via two separate section 240 bargaining disputes), and 2 Fair Work Commission Statements the last of which, on 19 June 2023, Commissioner Wilson said:

> *[2] Bargaining has progressed very well to the point that the UFU and FRV now report that since the last conciliation conference held on 27 April 2023* ***all outstanding matters have been resolved, save for the matter of an offer for increases to wages and related monetary allowances.***

- After waiting for an offer on the monetary increase to wages and allowances, with no offer forthcoming, on 28 July 2023 the UFU filed an intractable bargaining application to have wages and allowances increases arbitrated only. The UFU was acutely aware at this time of the possibility of an intractable bargaining application being brought by FRV. Accordingly, the UFU made the decision to make an application itself, given the position of the bargaining parties that all matters were agreed other than the quantum increase to wages and allowances.

- On 7 August, after the IB application was made, FRV sent to the UFU a wages offer. However, this wages offer was conditional upon firefighters trading off long-standing conditions (which had previously been agreed in the bargaining). The UFU rejected the offer.

- The employer has attempted to avoid the negotiated position and has submitted that, in effect, no matters in bargaining have been agreed.

- The FRV's position is based on technical legal propositions. It is clearly at odds with the direct statement by Commissioner Wilson quoted above.

- Because the FRV's position seeks to unwind three years of bargaining, it undermines one of the key objectives of the Fair Work Act.

- The FWC has now been required to list the question of what is agreed for a two day hearing in December. This itself delays the making of any IB determination in circumstances where the FWC is required to make a determination as quickly as possible (s.269).

- In the event the employer succeeds in their argument, there will be negative consequences for all unions that engage in the *Fair Work Act's* bargaining processes.

Timeline of key events prior to UFU's IB application

- Between July 2020 and 26 April 2022, there were **32 informal (pre-bargaining) meetings between UFU and FRV bargaining representatives** for a new FRV/UFU Operational Staff Agreement.

- Between 26 April 2022 and end of 2022, there were approximately **32 bargaining meetings** held with FRV bargaining representatives.

- In 2023, there were a further 12 bargaining meetings held with FRV bargaining representatives.

- Additionally, there have been **over 16 s.240 FWC conciliation conferences** held before Fair Work Commissioner Wilson:
    - 6 conferences before Commissioner Wilson in the UFU's 2021 s.240 application
    - Over 10 conferences before Commissioner Wilson in FRV's 2022 s. 240 application

- The second s.240 matter produced two Fair Work Commission Statements by consent which demonstrated total progress in narrowing the issues down to the increase to wages and allowances only.

Timeline

28 July 2023	UFU application filed. In the application, UFU made the following request: 1. The Applicant requests that the Commission make an intractable bargaining declaration pursuant to section 235 of the *Fair Work Act 2009* in relation to the proposed Fire Rescue Victoria, United Firefighters Union Operational Staff Agreement 2022
7 August 2023	On this date FRV wrote to UFU with a "settlement offer". This offer was contingent upon UFU and members trading off hard-fought conditions of employment. The UFU rejected the offer on the same day. In a 4 page response letter, the UFU stated: *"This offer is rejected because it is not a genuine offer, it is nothing more than a cynical, disingenuous and transparent attempt to reframe the issues that will be liable to be arbitrated in an intractable bargaining workplace determination. It is seen by the UFU as such and is rejected out of hand."*
9 August 2023	Fair Work Commission Mention. During this Mention, FRV requested 3 weeks to file its material, being 1 September 2023. It then took until 5 September (an additional 4 days) for FRV to file its Materials.

9 August 2023	Letter from FRV's lawyers to UFU's lawyers. The purported offer attempts to commence a process of unravelling the 'agreed terms'. The letter is an attempt to pervert the already agreed terms during the course of the bargaining process.
11 August 2023	President Hatcher issues Directions for the parties (UFU and FRV) and any intervenors to file submissions on the application.
11 and 14 August 2023	UFU files its materials: 1. Outline of Submissions; 2. Statement of Peter Marshall; 3. Statement of James Kefalas; and 4. Statement of Laura Campanaro
5 September 2023	FRV files its materials: 1. Outline of Submissions; 2. Statement of Jo Crabtree.
21 September 2023	UFU files: 1. Submissions in response; and 2. Second Statement of L Campanaro.
26 September 2023	FWC Full Bench Hearing
4 October 2023	FWC Full Bench Decision and Order. In summary, bargaining was found to be intractable and a 2-week Post-Declaration Negotiating Period (**PDNP**) was ordered.
4 October 2023	PDNP commences.
11 October 2023	First (and only) PDNP session held.
18 October 2023	PDNP ends.
20 October 2023	Directions Hearing held before FWC President Hatcher.
25 October 2023	FWC Directions published regarding the **Preliminary Questions** being what should be the agreed terms for the IB workplace determination and what are the matters at issue? A two-day Hearing is scheduled for 18 and 19 December 2023.

Summary of submissions prior to the IBD

UFU submissions: The UFU submits that bargaining is intractable; all matters have been agreed other than the quantum/increase of wages and allowances (per the *Fair Work Commission* statement dated 19 June 2023 in FRV's s.240 matter (**B2023/1676**)); a declaration should be made stating such, and wages and allowance increases should be arbitrated.

FRV submissions: FRV submits that bargaining is intractable, and a "relatively short" post-declaration negotiating period should be ordered [in the context of the 7 August offer] to "enable the parties a final opportunity … to settle the outstanding matters or, at the very least, narrow the matters that need to be determined by the Commission in making a workplace determination"[7].

Additionally, and importantly, FRV submits that it is "*unlikely that the vast majority of non-wage related matters which were subject to in-principle agreement between FRV and the UFU will satisfy the legal definition of 'agreed terms' in s 274(3) of the FW Act*".[8] The UFU sees FRV's position as a new tactic to avoid the negotiated position that all matters were agreed other than wages and allowances increases.

Essential firefighter conditions that are under attack

The current inadvertent loophole means that long-standing firefighter entitlements/conditions of employment are under attack. These include:

1. **Firefighters' Safe Staffing Levels**

Firefighters' Safe Staffing Levels go to the very heart of firefighter safety and community safety.

Under the FRV's offer, there will be NO safe staffing levels increases. This is despite the FRV and UFU's agreement via bargaining to an uplift of 583 Firefighters. This is also despite UFU and FRV's senior operational experts agreeing the number (583) and identity (by rank/position/location) of the additional Firefighters required for Fire Rescue Victoria.

FRV now say they wish to keep the current (outdated) safe staffing charts in the Enterprise Agreement, instead of the updated ones. The key issue here is that the current safe staffing charts: 1) have been out of date for approximately 5 years; 2) reflect previous fire services and districts (MFB and CFA); and 3) do not reflect the risk analysis that was undertaken by senior UFU and FRV Operational Firefighter experts.

[7] FRV Outline of Submissions dated 5 September 2023 at [6]. Accessible online: https://www.fwc.gov.au/hearings-decisions/major-cases/united-firefighters-union-australia-application-intractable
[8] Ibid [39].

2. **Firefighter Registration Board**

FRV has advised that all references to this Board must be removed from the Enterprise Agreement. This Board registers all FRV Firefighters in accordance with the federal Public Safety Training Package. The Board currently operates and is an existing condition of employment. It has registered almost every FRV professional career firefighter since its inception.

3. **All other conditions of employment**

FRV's tactic in avoiding the negotiated position suggests that all other conditions of employment will be subject to a red-pen exercise in this arbitration.

This is a dangerous proposition in the context of firefighting as this could entail protective, essential conditions such as:

- Safe rostering
- Safe hours of work
- Safe uniform standards/requirements
- Safe equipment standards/requirements
- Work Organisation
- Peer Support
- Dispute Resolution
- Health & Safety Agreement
- Consultation
- Heath Screening
- Community Safety
  And more.

Further negative implications

- The position taken by the employer is a tactic to attempt to pervert the bargaining provisions contained in the *Fair Work Act.*

- The position that has been taken is that all matters that are agreed between the parties to the negotiations (being UFU and FRV) are agreed in-principle only and that, in effect, nothing has been agreed between UFU and FRV despite years of negotiations and despite a Fair Work Commissioner's statement that "*… all outstanding matters have been resolved, save for the matter of an offer for increases to wages and related monetary allowances*". This is a bold attempt to pervert the bargaining provisions of the *Fair Work Act.*

- The position taken by the employer runs directly counter to the purpose and intent of the intractable bargaining provisions of the Fair Work Act which are designed to narrow impasses in bargaining not provide an opportunity for employers or governments to widen the gap as a bargaining tactic. The broader ramifications for unions and workers if such a precedent is allowed, are obvious and very troubling.

Conclusion

The Intractable Bargaining provisions are an important part of the Fair Work Act. However, in light of the experience since they were introduced, they need to be modified to ensure that they are not used tactically to reduce longstanding, existing terms and conditions of employment by way of arbitration and forced litigation.

In 2022, Federal IR Minister Burke identified a deficiency in s. 226 of the Fair Work Act, which allowed an employer to apply to unilaterally terminate an enterprise agreement during a bargaining period to avoid bargaining.

Accordingly, Minister Burke via the Secure Jobs, Better Pay Bill introduced amendments to repeal s. 226 in its entirety and to replace it with a new section that prevented employers misusing s. 226 by prescribing criteria that preserved bargaining. This amendment to prevent termination to avoid bargaining in the Secure Jobs, Better Pay Bill closed the loophole regarding s.226 of the Fair Work Act.

However, the intractable bargaining provisions has unintentionally and effectively provided the same avenue – albeit under a different legislative structure under s. 234 of the Fair Work Act.

The 2022 amendment was designed to prevent an employer misusing s. 226 to avoid bargaining, and instead unilaterally applying to terminate the existing enterprise agreement as a tactic to facilitate arbitration.

However, whilst the s. 226 loophole was closed, another loophole was inadvertently opened with the passing of the current intractable bargaining. Again, this new loophole clearly could not have been the intention of the Federal Government.

There is now a clear disincentive for an employer to reach a new enterprise agreement resulting from enterprise bargaining, as the option is now there to negotiate for 9 months, utilise the section 240 process, and then simply ask for an intractable bargaining declaration to be made.

Accordingly, it is respectfully submitted that, as a matter of urgency and to reinstate the integrity of the primacy of enterprise bargaining, two modest amendments are legislated:

- First, the date of assessing when a term is an agreed term for the purposes of a IB Declaration should be the date the application for an IB Declaration is made. This would ensure that agreements made during bargaining are not revoked in an attempt to obtain a tactical advantage during the making of a determination.

- Secondly, terms and conditions under an existing agreement should not be able to be undercut in the making of a determination. This will ensure that the process is not used opportunistically, by refusing to make an enterprise agreement via bargaining and then applying for a declaration, to achieve reductions in conditions via costly and extensive arbitration.

In conclusion, prior to the 6 June 2023 commencement of intractable bargaining provisions, important conditions of employment achieved by unions and workers could only be removed by way of negotiation – not unilateral application by the employer and litigation. Hence, it is important that a line in the sand be put in place that protects the conditions that have been built up over many years, and that the integrity for bargaining parties to bargain be restored as a matter of urgency.

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Peter Marshall

3 November 2023