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Opinion Piece by Stephen Smith, Principal of Actus Workplace Lawyers

'Single interest' bargaining trap

Workplace legislation

The new criteria on which companies can be bundled into multi-employer deals are ridiculously broad, and could see overseas rivals benefit from destructive competition.

Stephen Smith

The federal government's Secure Jobs, Better Pay Bill contains many retrograde provisions that, far from leading to more secure jobs, will smash economic growth, business investment and job creation. Numerous provisions in the bill are blatantly anti-business and obviously designed to substantially increase union power and reduce employer rights.

Of all the legislative amendments in the bill, the "single interest" bargaining provisions will be the most damaging if passed by parliament.

These provisions would enable unions to organise protected strikes across hundreds of workplaces and tens of thousands of employees, so long as the businesses have a so-called "common interest".

In determining whether the employers have a "common interest", the Fair Work Commission (FWC) would be required to consider the geographical location of the enterprises, the regulatory regime applying to the enterprises, the nature of the enterprises, and the terms and conditions of employment in those enterprises.

These criteria are ridiculously broad. For example, many hundreds of manufacturers in metropolitan Melbourne are in this same broad geographical location, they are covered by the same regulatory regime (the Fair Work Act), and those without an enterprise agreement are covered by the same set of minimum wages and conditions in the manufacturing award.

Unions would be able to achieve restrictive, pro-union multi-employer agreements across hundreds of businesses. The agreements would stifle innovation and leave no room for employers to reach agreement with their employees on mutually beneficial outcomes.

Even if an employer is not covered by an initial multi-employer agreement, the unions will be able to apply to the FWC to extend the agreement to rope in additional employers. This is clearly designed to enable the unions to find a few accommodating employers that are prepared to agree to the terms of an excessively generous, inflexible and pro-union multi-employer agreement.

After the agreement is made, the unions will apply to the FWC to extend it to hundreds of other employers. This is a typical union industry bargaining tactic, but this time around the tactic will be supported and facilitated by the Fair Work Act and the FWC.

The proposed new bargaining provisions are intended to replace the current "single interest" bargaining stream in the Fair Work Act. The government has chosen to keep the same name for this bargaining stream even though the provisions will no longer be restricted to those with a "single interest" on any reasonable interpretation of such an expression. The name of the stream will become a misnomer. The proposed new provisions have nothing in common with the current single interest provisions.

Under the current single interest bargaining provisions, parties are able to apply to the FWC for a single interest employer declaration enabling them to bargain for a multi-employer agreement in very limited circumstances (for example, where all the employers are franchisees within the same franchise group).

One of the key current considerations is that the businesses do not operate competitively. This criterion is removed in the bill. Australian businesses would be forced to compete on equally unproductive terms, but of course overseas competitors would have none of these impediments. Overseas firms would be given yet another advantage over Australian companies. The result will be less investment, fewer jobs and more businesses moving offshore.

The FWC's 2021-22 annual report shows there were only seven applications for a single interest employer declaration in the past year, which highlights the narrow operation the Rudd Labor government intended for this stream in 2009.

Even though small business employers (those with fewer than 15 employees) and those with existing enterprise agreements will not be forced to be covered by "single interest" agreements, this is no comfort for the many thousands of businesses that will be exposed.

This will also be no comfort to thousands of employees whose jobs will become less secure as a result of the economic effects of the proposed legislative amendments.

The Productivity Commission recently warned that any changes to the Fair Work Act to expand multi-employer bargaining must be subjected to detailed, rigorous and transparent analysis.

It is vital that crossbench senators take the time to consider the implications of this complex 249-page bill and then vote to protect the community's interests by rejecting the proposed "single interest" bargaining provisions. In the current challenging economic environment, the last thing that the community needs are these unbalanced and unfair bargaining laws.

Stephen Smith is the principal of Actus Workplace Lawyers and was the head of the Australian Industry Group's national workplace relations policy for more than 20 years.