

# ACTUS WORKPLACE LAWYERS

5 March 2024

## **Intractable bargaining developments**

The Closing Loopholes (No 2) Act has amended the intractable bargaining provisions in the Fair Work Act to prevent the Fair Work Commission (FWC) from making any determination that reduces any of the entitlements in a previous enterprise agreement (other than agreed terms and terms that provide for a wage increase). The amendments are unfair upon employers and give the unions an incentive not to reach agreement with employers on enterprise agreement terms.

The intractable bargaining provisions allow the FWC to arbitrate if the parties have been unable to reach an enterprise agreement after at least nine months of negotiations. The FWC must be satisfied that there is no reasonable prospect of agreement being reached and it is reasonable in all the circumstances for the FWC to arbitrate.

The new requirement that the FWC cannot reduce employees' entitlements in a previous enterprise agreement encourages unions to make excessive and unreasonable claims and then wait for the FWC to arbitrate after the 9-month minimum bargaining period has expired.

To date there have been three applications for intractable bargaining declarations determined by the FWC. Two union applications have been granted and one employer application has been rejected.

For advice or assistance with any enterprise bargaining matters, please contact **Stephen Smith**, Principal of Actus Workplace Lawyers on 0418 461 183 or Email: [stephen.smith@actuslawyers.com.au](mailto:stephen.smith@actuslawyers.com.au).