Enterprise Bargaining

Concurrent Session Paper

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PIR

The forum for
workplace relations leaders

OVERVIEW

This paper provides background for the Concurrent Session of Ai Group's 2024 PIR Conference on 'Enterprise Bargaining'.

This paper is organised into three (3) parts:

Part 1: Outcomes under enterprise agreements

Part 2: Changes to enterprise bargaining laws during this term of Government

Part 3: FWC enterprise bargaining cases

PART 1: OUTCOMES UNDER ENTERPRISE AGREEMENTS

WAGE OUTCOMES IN ENTERPRISE AGREEMENTS

On 28 June 2024, the Department of Employment and Workplace Relations released its *Trends in Federal Enterprise Bargaining Report* for the March 2024 quarter. Average annualised wage increases (**AAWI**) for enterprise agreements approved in the quarter are summarised in the table below.

The AAWI for agreements approved in the March quarter 2024 was 3.9 per cent. This can be compared with 4.4 per cent in the December quarter 2023 and 3.7 per cent in the March quarter 2023.

The industries with the highest AAWIs were Administrative and Support Services (4.9 per cent), Electricity, Gas, Water and Waste Services (4.8 per cent), Construction (4.5 per cent) and Transport, Postal and Warehousing (4.5 per cent). The

industries with the lowest AAWIs were Rental, Hiring and Real Estate Services (2.5 per cent), Agriculture, Forestry and Fishing (2.8 per cent) and Healthcare and Social Assistance (3.2 per cent).

Set out below is a summary of the key changes in the AAWI for enterprise agreements approved in the March 2024 quarter versus the December 2023 quarter.

Industry Sector or Type of Agreement	AAWI (%) for agreements approved in the March 2024 Qtr.	Change from December 2023 Qtr. (%)
All sectors	3.9%	Down 0.5% (from 4.4%)
Private sector	3.6%	Down 0.3% (from 3.9%)
Manufacturing	3.8%	Down 0.3% (from 4.1%)
Metals manufacturing	3.8%	Down 0.2% (from 4.0%)
Non-metals manufacturing	3.8%	Down 0.3% (from 4.1%)
Construction	4.5%	Down 0.6% (from 5.1%)
Mining	3.5%	Down 0.4% (from 3.9%)
Wholesale trade	3.9%	Up 0.1% (from 3.8%)
Retail trade	3.8%	Up 0.3% (from 2.9%)
Accommodation and food services	3.4%	Up 1% (from 2.4%)
Transport, postal & warehousing	4.9%	Up 0.6% from (3.5%)
Information media and telecommunications	4.1%	Down 0.5% (from 4.6%)
Professional, scientific and technical services	4.2%	Up 0.8% (from 3.4%)
Administrative & support services	4.9%	Down 0.1% (from 5%)
Health care and social assistance	3.2%	Down 0.2% (from 3.4%)
Single Enterprise Greenfields	2.9%	Up (from 3.1%)

Single enterprise non- Green-fields	3.3%	Up 0.2% (from 3.1%)

We are seeing a very slight cooling down of the wage increases in agreements approved to date when compared to last year. The agreement increases are varied in most industries with some reflecting rates that taper down in the final year/s.

TERMS IN UNION ENTERPRISE BARGAINING MEETINGS

A review of agreements negotiated with the AMWU, ETU, and/or UWU this year identified terms that provided for:

- Penalty payments for contacting workers outside of working hours unless it's an emergency.
- Recognition of prior service when a transfer of business occurs.
- Income protection insurance.
- Contributions to worker entitlement funds.
- Recognition of First Nations People.
- Recognition and commitments to diversity and inclusion.
- Preference for permanent full-time employment.
- Full time employees to be provided preference for overtime.
- Untrained employees must be supervised by trained employees.
- Paid union meetings.
- No probation period for permanent employees.
- Overtime provisions applying to casuals working outside the spread of hours.
- Restrictions on engagement of fixed term employees (only for unique work with a maximum period of 12 months).
- Transition to retirement provisions e.g. access to part-time hours.
- All overtime is double time.
- Double time paid on call outs until the employee arrives at home.
- Time off in lieu of overtime at double time (i.e. each hour of overtime

results in two hours of time off).

- Double time for all weekend work.
- Enhanced Delegates' rights - paid time to undertake duties, attend training and attend union meetings. Pay is at ordinary and overtime rates as applicable.
- Ratios for apprentices: 1 apprentice per X employees or % of apprentices to be engaged per annum.
- Paid training or access to Drug and Alcohol Education / Family Violence / Suicide Prevention awareness courses.

Discussion questions

1. What key claims are being pursued by unions during bargaining?

2. What approaches are members adopting regarding wage structures in enterprise agreements, e.g. consistent wage increases, front loaded wage increases, a set percentage above award rates, increases linked to CPI, increases linked to the Wage Price Index, increases linked to the Fair Work Commission's Annual Wage Review decisions, etc?

PART 2: CHANGES TO ENTERPRISE BARGAINING LAWS DURING THIS TERM OF GOVERNMENT

INDUSTRIAL RELATIONS AMENDMENT ACTS

During this term of Government, three major industrial relations amendment Acts have been passed by Parliament, each of which has amended the enterprise bargaining laws:

- The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*
- The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*
- The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*.

SECURE JOBS, BETTER PAY AMENDMENTS

The Secure Jobs, Better Pay amendments introduced major change to enterprise bargaining laws, including:

- Substantially expanding the rights of unions and employees to pursue multi-enterprise agreements, including through protected industrial action.
- Introducing a requirement for bargaining representatives to attend a conference conducted by the FWC during the Protected Action Ballot Period. This is the period before voting closes on the Protected Action Ballot.
- Changing the Better Off Overall Test (BOOT) for enterprise agreements, aimed at addressing some of the problems that were arising with the Fair Work Commission (FWC) taking fanciful, hypothetical scenarios into account when applying the BOOT.

- Changing the enterprise agreement making requirements and FWC approval process, aimed at reducing technicalities.
- Limiting the circumstances in which the FWC can terminate an enterprise agreement after its nominal expiry date, other than where all parties agree to the termination.
- Giving the FWC the power to arbitrate and impose an outcome when 'intractable bargaining disputes' occur.
- Providing for the termination of 'zombie agreements'.

Bargaining streams

Following the Secure Jobs, Better Pay amendments, the *Fair Work Act 2009* (FW Act) now includes the following four bargaining streams:

- The single-enterprise agreements stream
- The single interest employer agreements stream
- The supported bargaining stream
- The cooperative workplace agreements stream

Changes to the BOOT and other enterprise agreement approval requirements

In order for a single-enterprise agreement or a multi-enterprise agreement to be approved, the FWC must be satisfied that the agreement passes the BOOT which involves a comparison, on an overall basis, between the terms of the agreement and the terms of the relevant modern award/s.

The Secure Jobs, Better Pay amendments changed the BOOT and related provisions in the following ways:

- The FWC is empowered to amend or remove terms in an enterprise agreement at the approval stage to ensure the agreement passes the BOOT.
- The previous requirement that 'each prospective award covered employee' must be better off overall has been removed and replaced with a requirement that each 'reasonably foreseeable employee' must be better off overall.
- A new section has been inserted into the FW Act to clarify the way that the FWC is required to apply the BOOT, including:
    - clarifying that the BOOT must be applied as a global assessment, not on a line-by-line basis;
    - requiring the FWC to give consideration to any views that have been expressed by the employer, the employees and the bargaining representatives about whether the agreement passes the BOOT;
    - requiring that the FWC give primary consideration to any common view expressed by the bargaining representatives for the employer and the employees; and
    - clarifying that the FWC must only have regard to patterns or kinds of work, or types of employment that are reasonably foreseeable at the 'test time', both for existing employees and 'reasonably foreseeable employees'.
- Employers, employees and unions covered by an enterprise agreement can apply to have the BOOT reconsidered by the FWC if:
    - Before approving the agreement, the FWC had regard to patterns or kinds of work, or types of employment engaged in (or that would be engaged in) by the employees covered by the agreement and 'reasonably foreseeable employees'; and

- One or more employees engaged in other patterns or kinds of work, or other types of employment, to which the FWC did not have regard.

The Secure Jobs, Better Pay amendments also removed various detailed legislative provisions which prescribed steps that an employer was required to take within strict timeframes when making an enterprise agreement (for example, the requirement to take all reasonable steps to provide employees with access to the proposed agreement during a 7 day 'access' period ending immediately before the start of the voting process). These detailed legislative requirements were replaced with one broad requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

The FWC has published a Statement of Principles on Genuine Agreement containing guidance for employers about how they can ensure employees have genuinely agreed. The Principles must be taken into account by the FWC when determining whether to approve an enterprise agreement. The Principles cover the following areas:

- Informing employees of bargaining for a proposed enterprise agreement;
- Informing employees of their right to be represented by a bargaining representative;
- Providing employees with a reasonable opportunity to consider a proposed enterprise agreement;
- Explaining to employees the terms of a proposed enterprise agreement and their effect;
- Providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing the employees of the time, place and method for the vote; and

- Other matters considered relevant.

Discussion questions

3. Have you noticed any difference in the way that the FWC is applying the BOOT since the legislative amendments?

4. Have you noticed any difference in the way that the FWC is dealing with the procedural requirements for the making of an enterprise agreement, since the Statement of Principles on Genuine Agreement were introduced?

Intractable bargaining declarations and determinations

The intractable bargaining provisions of the FW Act apply to:

- The single-enterprise agreements stream;
- The single interest employer agreements stream; and
- The supported bargaining stream.

The intractable bargaining provisions enable the FWC to arbitrate an outcome if agreement cannot be reached after at least nine months of bargaining.

The process involves the following stages:

- The FWC may make an intractable bargaining declaration on application by one or more of the bargaining parties.
- If an intractable bargaining declaration is made, the FWC may specify a post-declaration negotiating period
- If an intractable bargaining declaration has been made, a Full Bench of the FWC must make an intractable bargaining workplace determination as

quickly as possible.

- The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:
    - the merits of the case;
    - the interests of the employers and employees who will be covered by the determination;
    - the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;
    - the public interest;
    - how productivity might be improved in the enterprise or enterprises concerned;
    - the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement; and
    - the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;
    - incentives to continue to bargain at a later time.

Discussion question

5. Do you view the intractable bargaining provisions as a benefit or a threat?

   Why?

6. How have, or will, the intractable bargaining provisions change enterprise agreement negotiations? For example, do you think the provisions will encourage agreements to be reached, or will they lead to parties not making bargaining concessions due to the prospect of arbitration?

CLOSING LOOPHOLES (NO. 1) AMENDMENTS

The Closing Loopholes (No. 1) amendments introduced:

- New workplace rights and protections for workplace delegates (i.e. union delegates) who are employees and are appointed or elected under the rules of their employee organisation to represent members in a particular enterprise.
- Amendments to compulsory conciliation conferences in protected action ballots.

Workplace rights and protections for delegates

The FW Act defines a 'workplace delegate' as: "a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or a representative (however described) for members of the organisation who work in a particular enterprise."

Enterprise agreements approved in a vote of employees on or after 1 July 2024 must include a delegates' rights term. If the FWC determines that an enterprise agreement term is less favourable than the modern award term, the agreement term will have no effect and the modern award term will be taken to be a term of the agreement. This is required to be identified in the FWC's decision approving the agreement.

Modern awards now contain a delegates' rights term, which provides for workplace delegates to be able to exercise their rights. The model term is included as

an Annexure to the PIR Conference Concurrent Session Paper – *Meeting New and Emerging Compliance Challenges*.

The modern award delegates rights' term requires the following:

- **Right of representation** – Employers are required to permit a workplace delegate to represent the industrial interests of eligible employees (who wish to be represented) regarding certain matters, including consultation regarding major change, changes to rosters, dispute resolution, disciplinary processes and enterprise bargaining.

- **Reasonable communication** – Employers are required to permit a workplace delegate to communicate with eligible employees for the purpose of representing the employee's industrial interests, including discussing membership of the delegate's organisation.

- **Reasonable access to the workplace and facilities** – Employers are required to provide a workplace delegate with access to or use of certain facilities. This applies unless the workplace does not have the facility, it is impractical to provide access to or use of the facility at that time or in the requested manner, or if the employer does not have access to the facility and cannot obtain it after taking reasonable steps. Types of facilities listed in the model term include a room or area to hold discussions, a physical or electronic notice board, electronic means of communication, a lockable filing cabinet or document storage area, and office facilities and equipment (such as printers, scanners and photocopiers).

- **Reasonable access to training** – Employers with more than 15 employees are required to provide the workplace delegate with up to five days of paid time during normal working hours for initial workplace delegate training, and at least one day in each subsequent year. This is subject to several conditions, including that access is not required for more than one workplace delegate per 50 eligible employees. (Note: some awards include more generous training provisions).

Under the model clause, workplace delegates are required to take certain steps, including providing written notice to their employer of their appointment as a workplace delegate, before exercising any entitlements as such.

The FW Act already provides protections against adverse action taken on the basis of certain industrial activities. The Closing Loopholes amendments introduced further protections which prohibit an employer from:

- unreasonably failing or refusing to deal with a workplace delegate;
- knowingly or recklessly making a false or misleading representation to a workplace delegate; or
- unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate. The protections only apply in relation to the workplace delegate acting in that capacity.

The burden of proving that the conduct is not unreasonable lies on the employer.

The Explanatory Memorandum for the legislation explains that employers will still be able to undertake reasonable management action, carried out in a lawful way.

Amendments to compulsory conciliation conferences in protected action ballot order matters

As mentioned above, the Secure Jobs, Better Pay amendments introduced a new requirement that when making a protected action ballot order (PABO), the FWC must make an order directing the bargaining representatives for the agreement to attend a compulsory conference on or before the day on which voting in the protected action ballot closes.

The Closing Loopholes amendments have clarified that it is only the bargaining representative(s) who applied for the PABO who must attend the conciliation conference for the subsequent industrial action to be protected. Although all bargaining representatives will still be required to attend the conference, non-compliance with the attendance requirement by non-applicant bargaining representatives will not affect whether any subsequent industrial action authorised by the PABO is protected industrial action.

CLOSING LOOPHOLES (NO. 2) AMENDMENTS

The Closing Loopholes (No. 2) amendments introduced:

- Changes to intractable bargaining workplace determinations;
- Provisions enabling transitioning out of multi-enterprise agreements; and
- Expanded bargaining options for franchisees.

Changes to intractable bargaining workplace determinations

The union movement raised concerns that the initially implemented intractable bargaining scheme:

- Enabled employers to change their position on matters that had been 'agreed' during the bargaining; and
- Could result in arbitrated outcomes whereby employees were worse off than they would be under their current agreement.

To address the first of the above concerns of the unions, the meaning of an 'agreed term' for an intractable bargaining workplace determination has been amended. Agreed terms are not subject to arbitration but must be included in the determination. The new definition of an 'agreed term' is:

- a term that the bargaining representatives for the proposed enterprise

agreement concerned had agreed, at the time the application for the intractable bargaining concerned was made, should be included in the agreement;

- any other additional term that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and
- if there is a post-declaration negotiating period for the declaration – any other additional term that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.

To address the second concern of the unions, the FW Act was amended to require that where an enterprise agreement applies to one or more employees who will be covered by an intractable bargaining workplace determination dealing with a particular matter, the determination cannot include terms less favourable to the employees or their bargaining representatives as compared to the particular term in the enterprise agreement dealing with that matter.

Transitioning out of multi-enterprise agreements

The amendments facilitate a pathway to exit single interest employer agreements and supported bargaining agreements.

Employers are able to exit in-term multi-enterprise agreements if they enter into a new single enterprise agreement. However, employees can only be asked to vote for the new single enterprise agreement if:

- The employer has obtained a written agreement from each employee organisation that is a party to the relevant multi-employer agreement; or
- The employer obtains a voting request order from the FWC, where one or all the employee organisation parties fail to provide a written agreement.

The FWC must make a voting request order if the failure by each employee

organisation to provide written agreement to the making of the request was unreasonable in the circumstances and it would not undermine good faith bargaining for the agreement.

Bargaining for franchisees

Under previous provisions in the FW Act, franchisees:

- could make a single-enterprise agreement if they were related employers; and
- could make a multi-enterprise agreement if they were not related employers.

Franchisees only satisfied the definition of 'related employers' if they could show they were engaged in a common enterprise.

The FW Act now provides that two or more employers will also be related employers if the employers carry on similar business activities under the same franchise. This gives employers in franchise groups the option of having a single-enterprise agreement or a multi-enterprise agreement (particularly a single interest employer agreement, which specifically refers to franchisees).

PART 3: FWC ENTERPRISE BARGAINING CASES

FIRST SINGLE-INTEREST EMPLOYER AGREEMENT

On 14 June 2024, the FWC approved a single interest employer agreement covering the AMWU and eight employers in the Heating, Ventilation and Air-Conditioning (HVAC) industry in New South Wales – the *AMWU On-site Construction HVAC Workers NSW Enterprise Agreement 2023-2027*.

The approval of this agreement followed a single interest employer authorisation that was made by the FWC in February this year: [2024] FWC 395.

The agreement has very generous and inflexible conditions which will be problematic for other employers if an application is made to extend the agreement to cover other employers (as is likely).

The agreement includes provisions dealing with the following:

- Very generous wage rates;
- 6% per annum wage increases;
- Contributions of between $120 and $150 per employee per week into the PROTECT redundancy fund;
- Ordinary hours of work of 36 per week;
- A meal allowance for employees working more than 2 hours' overtime;
- Double time for overtime, for the period where the employee works through a normal meal break until they go on break and for weekend work;
- Daily fares and travel allowance;
- Quarterly four-hour paid union meetings, with the union being deemed to be invited onto the premises by the company;
- 10 days' per year of union training leave for delegates;
- Union picnic day;
- Casual conversion after three months;
- A shared labour pool between the 8 companies with each company required to give priority to using labour supplied by the other companies to deal with short term demand before engaging supplementary labour;

- The agreement (and relevant award conditions) are incorporated as express terms into each employee's contract of employment as at the date the agreement is signed.
- Annual audits of compliance with industrial instruments and legislative requirements under the FW Act, NSW Workers Compensation Act, NSW WHS Act, Superannuation laws and long service leave laws – and in response to a request of an employee based on a reasonable suspicion of non-compliance. An employee-elected representative must be involved in any audit and a comprehensive record must be created and provided to employees.
- A delegates' rights clause which provides rights to advise and represent members in relation to rights, grievances, disciplinary issues and pay and conditions and which is broader than the model term.

FIRST INTRACTABLE BARGAINING DECLARATION

On 4 October 2023, a Full Bench of the FWC made the first intractable bargaining declaration: *United Firefighters' Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180.

The Full Bench decision addresses the key statutory requirements for the making of an intractable bargaining declaration.

With regard to the requirement that there is no reasonable prospect of agreement being reached, the Full Bench emphasised that "*no reasonable prospect*" does not mean *"no prospect"* but rather *"requires an evaluative judgment that it is rationally improbable that an agreement will be reached"*.

In respect of the requirement that it be reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives, the Full Bench said "the *'reasonable in all the circumstances' criterion requires an assessment of what is 'agreeable to reason or sound judgment' in the*

context of the relevant matters and conditions accompanying the case. The Bench cited the examples in the Revised Explanatory Memorandum for the legislation which refer to: the dispute in the context of the whole of the relationship of the parties, the history of the bargaining, the conduct of the parties, the prevailing economic conditions, and the bargaining environment.

The Full Bench stated that the "*requirement to take into account the views of the bargaining representatives means that their views must be treated as a matter of significance, but not necessarily a determinative consideration",* in the assessment of whether it is reasonable in all the circumstances to make the determination sought.

FIRST INTRACTABLE BARGAINING WORKPLACE DETERMINATION

On 16 October 2023, the Transport Workers' Union of Australia (TWU) made an application for an intractable bargaining declaration pursuant to s.234 of the FW Act in relation to the proposed Cleanaway Erskine Park Drivers Enterprise Agreement 2022. The respondent to the application was Cleanaway Operations Pty Ltd.

On 12 January 2024, the FWC issued an intractable bargaining declaration which specified a post-declaration negotiating period from 12 to 25 January 2024. The FWC held three private conferences during that time and on conclusion issued a statement identifying five matters which were still at issue: ordinary hours of work, weekend penalty rates, wage increases, consultation and the expiry date.

On 12 June 2024, the Full Bench of the FWC issued a decision in relation to the intractable bargaining workplace determination: [2024] FWCFB 287.

The Full Bench determined that the correct approach when making an intractable bargaining determination is to assess the respective positions of the parties in relation to the matters at issue and, by reference to the statutory factors, and to then arrive at a conclusion that would be regarded as appropriate in the context of the bargaining had the bargaining concluded successfully. This involves an objective assessment of the statutory factors and an overall judgment as to an

appropriate workplace determination to apply to the operations concerned until the parties replace the determination with a new enterprise agreement.

The Full Bench accepted Cleanaway's argument that it will have an increasing need to roster workers on weekends, including as a consequence of the implementation of the NSW Government Waste and Sustainable Materials Strategy 2041. This need was significant for Cleanaway as the Strategy will mandate daily organic waste collection for organisations that generate a significant amount of food waste and organic waste must be collected daily, including on weekends. Accordingly, the Full Bench determined that a Monday to Sunday ordinary hours pattern would be maintained so that Cleanaway could remain competitive.

The existing enterprise agreement, which nominally expired in September 2022, provided for Cleanaway to roster its drivers for ordinary hours Monday to Sunday from 3am to 4pm. In practice, however, Cleanaway relied on its employees to volunteer for weekend work and paid them overtime. The Full Bench maintained this prerogative for Cleanaway but introduced a new opt-out provision enabling workers to confine their ordinary hours to weekdays. All ordinary hours worked on weekends will attract overtime rates.

The TWU sought a 24% increase in wages, comprising 12% backpay and 12% in pay rises over two years, with a nominal expiry date of 30 June 2026. Cleanaway proposed an 11% increase over three years. with a nominal expiry in mid-2027.

The FWC Full Bench granted the following wage increases and nominal expiry date: 1 July 2023: 6%; 1 January 2024: 5%; 1 September 2024: 4%;1 September 2025: 4%; 1 September 2026: 4%; Nominal expiry date: 30 June 2027.

The backdated wage increases took into account that the employees had not had a wage increase since September 2021. The Full Bench also took into account Cleanaway's four months' delay in starting bargaining in 2022 (without reasonable explanation) and the high inflation which had occurred since the last pay increase.

According to the Full Bench, relevant public interest factors were job security,

increasing opportunities for permanent employment and environmental sustainability measures such as the need to reduce landfill.

FIRST SUPPORTED BARGAINING DECLARATION

On 27 September 2023, a Full Bench of the FWC made the first supported bargaining authorisation, by consent between the relevant unions and employers. The authorisation applies to the early childhood education and care sector. The decision ([2023] FWCFB 176) addresses the various statutory requirements and considerations for the making of a supported bargaining authorisation.

One of the considerations referred to in the Act is: *"the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector)"*

With regard to the above consideration, the Full Bench said:

> ***[32]*** *We consider that, prima facie, 'low rates of pay' will prevail in an industry or sector if employees are predominantly paid at or close to the award rates of pay for their classification, since this is the lowest rate legally available to pay…."*.

Discussion questions

7. Have unions sought to use, or threatened to use, multi-enterprise bargaining when bargaining with your organisation?
8. How have union bargaining strategies changed under the new bargaining laws?
9. What changes to your organisation's bargaining strategy, if any, are you planning or have implemented, as a result of the recent changes to the Fair Work Act?

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