



Full Bench statement

Approval of enterprise agreements – genuine agreement – Statement of Principles on Genuine Agreement

Justice Hatcher, President
Vice President Asbury
Deputy President Masson

Sydney, 12 May 2023

Background

[1] Parts 14, 16 and 18-23A of Schedule 1 to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Amending Act) amend provisions of the *Fair Work Act 2009* (Cth) (Fair Work Act) dealing with the making of enterprise agreements and the approval of enterprise agreements by the Fair Work Commission (Commission). The amendments commence on 6 June 2023 (unless proclaimed earlier).

[2] Section 188B of the Fair Work Act as amended by the Amending Act (amended Fair Work Act) provides:

188B Statement of principles on genuine agreement

(1) The FWC must, by legislative instrument, make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement.

(2) The FWC must publish the statement on the FWC's website and by any other means that the FWC considers appropriate.

(3) The statement must deal with the following matters:

- (a) informing employees of bargaining for a proposed enterprise agreement;
- (b) informing employees of their right to be represented by a bargaining representative;
- (c) providing employees with a reasonable opportunity to consider a proposed enterprise agreement;
- (d) explaining to employees the terms of a proposed enterprise agreement and their effect;
- (e) providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote;
- (f) any matter prescribed by the regulations for the purposes of this paragraph;
- (g) any other matters the FWC considers relevant.

(4) The statement is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the statement.

[3] Section 188B(1) of the amended Fair Work Act requires the Commission, by legislative instrument, to make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement (Statement of Principles on Genuine Agreement).

[4] The Fair Work Act provides that an enterprise agreement must be approved by the Commission to come into operation. Section 186 of the Fair Work Act sets out general requirements for the approval of an enterprise agreement. These requirements include, if the agreement is not a greenfields agreement, that the Commission is satisfied the agreement has been genuinely agreed to by the employees covered by the agreement.

[5] Section 188 sets out requirements that must be met for the Commission to be satisfied an enterprise agreement has been genuinely agreed to by employees. One of these requirements (in s 188(1)) is that the Commission must take into account the Statement of Principles on Genuine Agreement.

[6] The Fair Work Act also generally requires the Commission to be satisfied that a variation of an enterprise agreement has been genuinely agreed to by employees, before it can approve the variation. In determining whether it is satisfied that a variation has been genuinely agreed to, the Commission must take into account the Statement of Principles on Genuine Agreement in the manner and to the extent provided for in the Fair Work Act and the *Fair Work Regulations 2009*.

Statement of Principles on Genuine Agreement

[7] Pursuant to s 188B(1), the Commission, constituted by this Full Bench, has made the *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* (Instrument). The Instrument is published with this statement. The Statement of Principles on Genuine Agreement is at Schedule 1 to the Instrument.

[8] As set out in the President's statement of 3 March 2023, the Instrument will now be lodged with the Office of Parliamentary Counsel for registration.

[9] Following registration, the Instrument will commence operation at the same time as the commencement of Part 14 of Schedule 1 to the Amending Act, on 6 June 2023 (unless that Part is proclaimed to commence earlier).

[10] We note that, pursuant to s 33(3) of the *Acts Interpretation Act 1901* (Cth) as in force on 25 June 2009, the Statement of Principles on Genuine Agreement may be varied by the Commission from time to time.

Consultation

[11] The Commission consulted broadly during the process to make the Instrument. The consultation commenced with a [statement](#) of the President on 18 January 2023 which set out a draft timetable for the Commission to make the Statement of Principles on Genuine Agreement, including the consultation process to be conducted by this Full Bench. The statement invited parties to provide submissions and feedback regarding the proposed draft timetable by Wednesday, 25 January 2023.

[12] The President issued a further statement on 30 January varying the proposed timetable to provide parties with the opportunity to file reply submissions as requested by Australian Industry Group (Ai Group) on 25 January 2023.

[13] On 6 February 2023, the Commission published a discussion paper prepared by Commission staff to promote discussion and facilitate consultations.

[14] Conferences with interested parties were held as follows:

- Melbourne (10.00am Tuesday 14 February)
- Sydney (10.00am Wednesday 15 February), and
- Online via Microsoft Teams (2.00pm Wednesday 15 February).

[15] Separate consultation was undertaken with the peak councils, namely the Ai Group, the Australian Council of Trade Unions (ACTU), the Australian Chamber of Commerce and Industry (ACCI) and the Council of Small Business Organisations of Australia.

[16] A draft Instrument was published on 3 March 2023. Interested parties were invited to make submissions in response to the draft by 30 March 2023. Submissions in reply were due by 13 April 2023.

[17] Submissions were made by:

- ACCI
- ACTU
- Australian Higher Education Industrial Association
- Ai Group
- Australian Manufacturing Workers' Union
- Australian Public Transport Industrial Association
- Australian Services Union
- Australian Small Business and Family Enterprise Ombudsman
- Construction Forestry Maritime Mining & Energy Union–Manufacturing Division
- Construction, Forestry, Maritime, Mining and Energy Union–Construction and General Division (CFMMEU–Construction and General Division)
- Housing Industry Association
- Law Council of Australia
- Meerkin & Apel
- Mineral Council of Australia
- Mining and Energy Union, and
- Ventia.

[18] Submissions in reply were made by:

- ACTU
- Ai Group
- CFMMEU–Construction and General Division, and

- Mining and Energy Union.

[19] Throughout the consultation process updates have been published on the Commission's website on a dedicated webpage and via the Commission's general announcements subscription service.

[20] Some amendments were made to the draft Instrument in response to comments received through the consultation process. The Commission has taken into account all submissions in making the Statement of Principles on Genuine Agreement.

Further information about bargaining and enterprise agreements

[21] Now that the Statement of Principles on Genuine Agreement has been made, the Commission will be publishing a range of tools and resources to assist parties to comply with the relevant legislative tests over the coming weeks.

[22] Some information about changes to the Form F17 – Employer's declaration in support of an application for approval of an enterprise agreement and the Form F16 – Application for approval of an enterprise agreement (other than a greenfields agreement) was published on 8 May 2023.

[23] We understand that amendments to the *Fair Work Regulations 2009* (Cth) (Regulations) are being contemplated to further support the amendments made by the Amending Act. Further materials will be developed once any amendments to the Regulations are made. This will include further information about the notice of employee representational rights (NERR) which is set out in the Regulations.

[24] The Commission's subscription service will be used to notify subscribers as new information is published. Any feedback about the information we publish can be sent to consultation@fwc.gov.au.

PRESIDENT