



## President's statement

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### *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022*

Acting President Hatcher

Sydney, 18 January 2023

[1] On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (the Secure Jobs Better Pay Act) received Royal Assent. Relevantly, the Secure Jobs Better Pay Act amends the *Fair Work Act 2009* (FW Act), the *Fair Work (Registered Organisations) Act 2009* (RO Act) and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

[2] On 8 December 2022, I issued a [Statement](#) setting out the Commission's approach to implementation of the Secure Jobs Better Pay Act changes. That Statement noted that there are a number of significant changes to the enterprise bargaining and enterprise agreement approval processes that will commence on 6 June 2023, or an earlier date to be fixed by proclamation.

[3] This Statement deals with the changes to making enterprise agreements. It sets out a draft timetable for the Commission to make the new Statement of Principles required by Schedule 1, Part 14 of the Secure Jobs Better Pay Act.

### **Current FW Act provisions relating to genuine agreement**

[4] Part 2-4 of the FW Act is about Enterprise Agreements. Division 4 of Part 2-4 deals with the approval of proposed enterprise agreements by employees and sets out when an enterprise agreement is made (Subdivision A). Subdivision B of Division 4 deals with the approval of enterprise agreements by the Commission. The remaining Subdivisions of Division 4 deal with certain approval requirements, including in relation to genuine agreement by employees and the better off overall test.

[5] Section 186 of the FW Act currently provides that the Commission must approve an enterprise agreement if the requirements in ss 186 and 187 are met. Among these requirements, s 186(2)(a) requires that the Commission be satisfied that the agreement (if it is not a greenfields agreement) has been 'genuinely agreed' to by employees.

[6] 'Genuinely agreed' is defined in s 188:

#### **188 When employees have genuinely agreed to an enterprise agreement**

(1) An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:

(a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:

(i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);

(ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and

(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

(2) An enterprise agreement has also been genuinely agreed to by the employees covered by the agreement if the FWC is satisfied that:

(a) the agreement would have been genuinely agreed to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and

(b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.

[7] The pre-approval steps covered by s 188(1)(a) were summarised in *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others*<sup>1</sup> (**Huntsman**):

- section 180(2): the employer must take all reasonable steps to ensure that during the ‘access period’<sup>2</sup> the ‘relevant employees’<sup>3</sup> are given a copy of the text of the agreement and any material incorporated by reference into it, or have access throughout the access period to a copy of those materials;
- section 180(3): the employer must take all reasonable steps to notify the relevant employees by the start of the access period of the time and place at which the vote will occur and of the voting method;

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<sup>1</sup> [2019] FWCFB 318

<sup>2</sup> Defined in s.180(4) as the 7-day period ending immediately before the start of the voting process.

<sup>3</sup> Defined in s.180(2) as: ‘during the access period ... the employees ... employed at the time who will be covered by the agreement’.

- section 180(5): the employer must take all reasonable steps to ensure that the terms of the agreement and their effect are explained to the relevant employees in an appropriate manner taking into account their particular circumstances and needs;
- section 181(2): the employer must not request employees to approve the agreement by voting on it until at least 21 days after the day on which the last NERR under s 173(1) is given.<sup>4</sup>

[8] Further, to meet the approval requirements under s 188(1)(a), and to meet the further approval requirement under s 188(1)(b) that the agreement be properly made, the employer must also strictly comply with the NERR timing and form and content requirements in ss 173 and 174.<sup>5</sup>

[9] Section 188(2) was inserted into the Act by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018*, with effect from 12 December 2018. In short, s 188(2) allows the Commission to approve an agreement despite the employer having made ‘minor procedural or technical errors’ with the pre-approval steps, provided employees have not been disadvantaged by the errors in terms of the underlying objects of the pre-approval steps.<sup>6</sup>

### Statement of Principles on Genuine Agreement

[10] The Secure Jobs Better Pay Act makes a number of amendments to Division 4 of Part 2-4 of the FW Act. These amendments will commence on 6 June 2023, or an earlier date fixed by proclamation. The Explanatory Memorandum describes the amendments as follows:

Part 14 of the Bill would amend Divisions 3 and 4 of Part 2-4 of the FW Act to simplify requirements that need to be met for an enterprise agreement to be approved by the FWC, which are often regarded as overly prescriptive and complex.

...

Where pre-approval requirements are removed, they would be 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 intention is to simplify the pre-approval requirements, while retaining sufficient safeguards for employees. This would encourage enterprise bargaining and also stop the FWC from having to refuse to approve enterprise agreements because of minor technical or procedural deficiencies that did not affect how employees voted on the agreement.

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<sup>4</sup> *Huntsman* [23].

<sup>5</sup> See *Peabody Moorvale Pty Ltd v CFMEU* [2014] FWCFCB 2042, *Uniline Australia Limited* [2016] FWCFCB 4969, *AMWU v Broadspectrum (Australia) Pty Ltd* [2018] FWCFCB 6556 and *Huntsman* [64]–[65].

<sup>6</sup> *Huntsman* [95].

Some important safeguards would be included. The FWC would be required to publish a ‘statement of principles’ containing guidance for employers about how they can ensure employees have genuinely agreed. The statement of principles would be taken into account by the FWC when determining whether to approve an enterprise agreement.

For there to have been genuine agreement, the FWC would need to be satisfied that the employees requested to vote on the agreement have a sufficient interest in its terms and are sufficiently representative, having regard to the employees the agreement is expressed to cover.<sup>7</sup>

[11] Item 509 of Schedule 1 to the Secure Jobs Better Pay Act repeals s 188 of the FW Act and substitutes the following:

**188 Determining whether an enterprise agreement has been genuinely agreed to by employees**

*Statement of principles*

(1) The FWC must take into account the statement of principles made under section 188B in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

*Sufficient interest and sufficiently representative*

(2) The FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employees requested to approve the agreement by voting for it:

(a) have a sufficient interest in the terms of the agreement; and

(b) are sufficiently representative, having regard to the employees the agreement is expressed to cover.

Note: In *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (2018) 262 FCR 527, a Full Court of the Federal Court observed that whether an agreement has been genuinely agreed involves consideration of the authenticity of the agreement of the employees, including whether the employees who voted for the agreement had an informed and genuine understanding of what was being approved.

*Agreement of bargaining representatives that are employee organisations*

(2A) The FWC cannot be satisfied that an enterprise agreement to which section 180A applies has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with section 180A in relation to the agreement.

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<sup>7</sup> Explanatory Memorandum [678]-[684].

*Where notice of employee representational rights was required*

(3) Subsection (4) applies in relation to an enterprise agreement if an employer was required by subsection 173(1) (which deals with giving notice of employee representational rights) to take all reasonable steps to give notice in relation to the agreement.

(4) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with the following provisions in relation to the agreement:

(a) sections 173 and 174 (which deal with giving notice of employee representational rights);

(b) subsection 181(2) (which requires that employees not be requested to approve certain enterprise agreements until 21 days after the last notice of employee representational rights is given).

*Explanation of terms of the agreement*

(4A) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with subsection 180(5) in relation to the agreement.

*Minor errors may be disregarded*

(5) In determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement (including determining whether it is satisfied that an employer complied with the provisions mentioned in subsection (2A) or (4) or (4A)), the FWC may disregard minor procedural or technical errors made in relation to the following requirements if it is satisfied that the employees were not likely to have been disadvantaged by the errors:

(a) section 173 or 174 (which deal with notices of employee representational rights for certain agreements);

(aa) subsection 180(5) (which requires employers to explain the terms of agreements);

(ab) section 180A (which deals with agreement of certain bargaining representatives);

(b) subsection 181(2) (which requires that employees not be requested to approve certain enterprise agreements until 21 days after the last notice of employee representational rights is given);

(c) subsection 182(1) or (2) (which deal with the making of different kinds of enterprise agreements by employee vote).

### *Regulations*

(6) The FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the requirements (if any) prescribed by the regulations for the purposes of this subsection are met.

[12] Item 511 of Schedule 1 to the Secure Jobs Better Pay Act inserts a new s 188B which provides that the Commission must, by legislative instrument make a statement of principles on genuine agreement:

#### **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.

[13] The Explanatory Memorandum provides some explanation of the purpose of the Statement of Principles as follows:

The Statement of Principles will guide parties as to how the FWC will consider particular issues when determining whether the proposed enterprise agreement has been 'genuinely agreed'. These scenarios could include issues such as whether bargaining genuinely occurred prior to voting and whether employee organisation bargaining representatives were appropriately involved in bargaining.

New subsection 188B(4) provides that the statement of principles is a legislative instrument to which section 42 of the Legislation Act (disallowance) does not apply. The FWC would make the statement to provide guidance for employers about ways to ensure an enterprise agreement is genuinely agreed to by their employees. The statement would not create new rights or obligations for employers and employees but would be taken into account by the FWC when determining whether an enterprise agreement has been genuinely agreed. The statement is intended to assist parties in moving from more prescriptive pre-approval requirements to the principles-based approach to genuine agreement proposed by these amendments. Making the statement would therefore be divorced from the broader political process and largely explanatory and facilitative (i.e. directed at assisting persons to comply with the new provisions). The statement would be independent of Parliament and not require additional Parliamentary scrutiny.<sup>8</sup>

[14] Item 521 of Schedule 1 to the Secure Jobs Better Pay Act also amends s 598(1) to provide that the Statement of Principles will not constitute a decision of the FWC for the purposes of Part 5-1 of the FW Act. Section 4 of the *Acts Interpretation Act 1901* (Cth) (as it was in force on 25 June 2009) permits the Commission to take steps now for the purpose of enabling the exercise of the power conferred by s.188B of the FW Act once that provision comes into effect on 6 June 2023.

### **Proposed timetable for making the statement of principles**

[15] The Secure Jobs Better Pay Act does not prescribe how the statement of principles is to be developed or approved. However, the *Legislation Act 2003* (Cth) requires consultation with affected persons before the statement of principles is made (s 17). After being made the principles must be registered on the Federal Register of Legislation and laid before Parliament (ss 15G and 38).

[16] The Commission’s consultation process will be conducted by myself, Deputy President Asbury and Deputy President Masson. The Commission proposes to consult in accordance with the following timetable:

<b>Date</b>	<b>Task or event</b>
January/early February 2023	Consultation with peak councils (ACTU, Ai Group, ACCI, COSBOA)
w/c 6 February 2023	Discussion paper to be published to assist with conferences
14 and 15 February 2023	Conferences with interested parties to be held as follows: <ul style="list-style-type: none"> <li>• Melbourne (AM Tuesday 14 February)</li> <li>• Sydney (AM Wednesday 15 February), and</li> <li>• Online via Microsoft Teams (PM Wednesday 15 February)</li> </ul>

<sup>8</sup> Explanatory Memorandum [716]-[717].

<b>Date</b>	<b>Task or event</b>
w/c 27 February 2023	Statement with draft Statement of Principles to be published for comment
w/c 27 March 2023	Closing date for submissions in relation draft Statement of Principles
w/c 8 May 2023	'Final' Statement of Principles (as made) published on website and lodged with the Office of Parliamentary Counsel for registration
Late May 2023	Final Statement of Principles registered with the Federal Register of Legislation published on FWC website
6 June 2023	Statement of Principles will commence operation

[17] Any comments on the proposed timetable should be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **4pm on Wednesday 25 January 2023**. I will issue a further statement in the week commencing 30 January 2023 either confirming or adjusting the timetable based on the comments received.

### **Other changes relating to enterprise agreements and bargaining**

[18] In my Statement of 8 December 2022, I noted that the following amendments relating to enterprise agreements commenced operation on 7 December 2022:

- Sunsetting of “zombie” agreements
- Termination of enterprise agreements after the nominal expiry date
- Initiating bargaining
- Dealing with errors in enterprise agreements

[19] We have now updated the following information on the Commission’s website to reflect these amendments:

- [Sunsetting of zombie agreements](#) pages which include information about what zombie agreements are, when the sunsetting takes effect and how to apply for an extension.
- [Request to bargain for a replacement agreement](#) page which includes information about who can make a request to start bargaining, when a request can be made and the notification time.
- A new [Form F24D](#) – Declaration in response to application to terminate an agreement after the nominal expiry date has been published.
- The following forms have also been revised:
  - [Form F17](#) – Employer's declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement);



- [Form F24C](#) – Declaration in relation to termination of an enterprise agreement after the nominal expiry date;
- [Form F28](#) – Application for termination of collective agreement-based transitional instrument;
- [Form F32](#) – Application for a bargaining order.

[20] Any comments in relation to the above information can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au).

[21] In addition to the changes relating to genuine agreement set out above, the following amendments are due to commence on 6 June 2023 or an earlier date to be fixed by proclamation:

- Enterprise agreement approval and the better off overall test; and
- Bargaining disputes, industrial action, supported bargaining, single-interest employer authorisations, varying enterprise agreements to remove employers and their employees, and co-operative workplaces.

[22] The Commission will publish further information about these amendments in the coming months.

**PRESIDENT**