



Law Council
OF AUSTRALIA

Office of the President

30 March 2023

The Hon. Justice Adam Hatcher
President
Fair Work Commission
Level 11, Terrace Tower
80 William Street
EAST SYDNEY NSW 2011

By email: consultation@fwc.gov.au

Dear President Hatcher

Draft Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023

The Law Council is grateful for the opportunity to provide a submission to the Fair Work Commission (**Commission**) in relation to the Draft Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023 (**Draft Statement of Principles**). This submission has been prepared with the assistance of the Industrial Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section and the Law Society of New South Wales.

Overarching comment

The Draft Statement of Principles is designed to provide additional guidance for employers to ensure that employees have genuinely agreed to an enterprise agreement, in accordance with the Commission's obligations under section 188B of the *Fair Work Act 2009* (Cth) (**FW Act**), as amended by the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (Cth).

The Law Council's primary concern with the Draft Statement of Principles is that it is not drafted as a 'statement of principles', but rather as a proscriptive legislative instrument which largely—but not completely—replicates the provisions of the amended FW Act. In doing so, the document introduces new terms that do not appear in the sections that it purports to replicate (see, for example, the discussion of Principle 19 below). The Law Council considers this could lead to confusion and additional disputes.

The Law Council considers, a statement of principles should be a short document which states principles to assist in interpreting the legislation. The Law Council suggests that a statement of principles in the form of a general guide as to what is likely to be considered by the Commission as giving (or not giving) rise to genuine agreement may better reflect the intention of the Parliament in inserting section 188B into the FW Act.

However, the Law Council is cognisant that this is not a simple exercise. Therefore, if the current approach to the drafting is to be applied, the Law Council suggests that consideration be given to the following amendments.

Proposed amendments

Principle 8(a)

Principle 8(a) effectively requires voting on an enterprise agreement to be conducted in a manner ‘that ensures the vote of each employee is not disclosed to or ascertainable by the employer.’ The requirement for a secret ballot does not currently exist in the FW Act and may not align with common voting practices. The Law Council is aware that voting on enterprise agreements is commonly conducted by a show of hands, or by email to the employer, particularly in the context of roll-over agreements. While a secret ballot may be considered the ‘gold-standard’ in voting practices, secret ballots may not be necessary or appropriate in all circumstances.

Accordingly, the Law Council suggests that Principle 8(a) be amended by effectively removing the requirement to hold a secret ballot. It should instead stipulate that voting processes must be free from undue influence or coercion by the employer.

The Law Council also considers that removing the requirement for a secret ballot under Principle 8(a) would significantly assist employers in complying with Principles 17 and 18. If a vote is not permitted to be disclosed to, or ascertainable by, the employer, the employer will need to rely on a third party to collect and provide evidence in satisfaction of Principles 17 and 18. This may be unnecessarily burdensome, particularly for small- and medium-sized enterprises.

Principle 19

As noted above, the Statement of Principles introduces some terms not otherwise included in the FW Act. One example is the use of the term ‘authentic exercise’ in Principle 19. Principle 19 states:

An enterprise agreement will generally not have been genuinely agreed to by the employees covered by the agreement unless the agreement was the product of an authentic exercise in enterprise bargaining.

The underlined words are almost certain to create an area for further dispute, given that the Statement of Principles will be a legislative instrument. For example the relatively common situation where an enterprise agreement is prepared by the employer and voted up by employees, even though the parties did not ‘bargain’ over the agreement—such as a rollover of a previous enterprise agreement which provides for annual wage increases in a context of no conflict over the terms of the previous enterprise agreement. Such an agreement ought nevertheless to be capable of being ‘genuinely agreed’.

In light of the other proposed principles, the Law Council considers Principle 19 to be superfluous and suggests the Commission give consideration to removing it in developing the final Statement of Principles. Should it be retained, the Law Council suggests that the principle could be amended along the following lines:

In considering whether an enterprise agreement has been genuinely agreed to by the employees covered by the agreement, weight will be given to the presence or absence of an authentic exercise in enterprise bargaining.

Contact

Please contact Mr John Farrell, Senior Policy Lawyer, on (02) 6246 3714 or at john.farrell@lawcouncil.asn.au in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Luke Murphy', with a large, stylized flourish at the end.

Luke Murphy
President