

Agreement Approval

14 February 2023, *BN14*

Introduction

Under the *Fair Work Act 2009 (Cth)* (**FW Act**), enterprise agreements are approved by the Fair Work Commission (**FWC**) prior to their coming into operation.¹ In doing so, the FWC applies legislative tests (for example, the Better Off Overall Test or BOOT) that are aimed at making sure enterprise agreements do not undercut minimum standards.

The recently enacted *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (SJBPA Act)* amends the FW Act to change the way that the FWC considers approving enterprise agreements, as well as the pre-approval requirements. The changes, which take effect from 6 June 2023 include:

- The FWC will be required to publish a statement of principles relating to when an enterprise agreement has been “genuinely agreed” to by employees.² The statement of principles must then be taken into account during the approval process.³ This will replace the current requirements relating to genuine agreement, such as the requirement to observe a 7 day “access period” prior to a proposed enterprise agreement being voted on.
- Providing that the FWC can only be satisfied of genuine agreement:
 - if the employees who voted for the agreement are sufficiently represented and have a sufficient interest in its terms.⁴
 - If, in relation to a multi-enterprise agreement, the employer had the written consent of each employee bargaining representative, or obtained a voting authorisation, prior to holding a vote of employees.⁵
- Providing that the Better Off Overall Test (**BOOT**) is a “global assessment”.⁶
- Limiting the FWC’s application of the BOOT to reasonably foreseeable employees and scenarios.⁷

¹ FW Act s 54

² Proposed FW Act s 188B

³ Proposed FW Act s 188(1)

⁴ FW Act s 188(2); note: this is designed to address “small cohort” agreements, which are agreements that are approved by a small number of staff prior to the engagement of a much large number of staff who would also be covered by the agreement.

⁵ Proposed FW Act ss 180A, 188(2A)

⁶ Proposed FW Act s 193A(2)

⁷ Proposed FW Act ss 193, 193A

- Providing that if there is a future change to employment practises which was not considered during the approval process, an application may be made to determine whether the agreement still passes the BOOT.⁸
- Providing that the FWC must give “primary consideration” to any common views about the BOOT held by bargaining representatives.⁹

Changes in Detail

	What happens now	What will happen
<i>Pre-Approval (including Genuine Agreement)</i>		
<i>Guidance Materials</i>	-	The minister may specify requirements relating to whether there has been “genuine agreement” in the regulations. FWC must publish a “statement of principles” on genuine agreement, which must then be taken into account during agreement approval. ¹⁰
<i>Access Period</i>	There is a 7-day “access period” prior to employees voting on a proposed agreement. ¹¹ Employers must take all reasonable steps to: ¹² <ul style="list-style-type: none"> • Inform employees of where when and how they can vote on the proposed agreement at the start of the 7-day access period; • Provide a copy of the agreement and associated materials to employees during the 7-day access period. 	No longer required by legislation, however the statement of principles must cover matters such as providing a reasonable opportunity to consider an enterprise agreement and to vote (including by informing time/place/method). ¹³
<i>Explanation of terms</i>	The employer must take all reasonable steps to ensure that	No change

⁸ Proposed FW Act Part 2-4 Div 7A

⁹ Proposed FW Act s 193A(4)

¹⁰ Proposed FW Act ss 188(1),(6), 188B

¹¹ FW Act s 180

¹² FW Act s 180(2)-(3)

¹³ Proposed FW Act s 188B(3)

	the terms of the agreement and their effect are explained to employees (taking into account the needs of CALD, young and unrepresented workers). ¹⁴	
<i>Small Cohort Agreements</i>	Currently guided by case law. ¹⁵	FWC cannot consider an agreement to have been genuinely agreed unless it is satisfied that the employees who voted on the agreement were sufficiently representative and had a sufficient interest in its terms. ¹⁶
<i>Employee Approval (voting)</i>	A single-enterprise agreement is made when a majority of employees who vote on an agreement vote in favour of it. ¹⁷	No change.
FWC Approval		
<i>Genuine Agreement</i>	See above	See above
<i>Fairly Chosen</i>	FWC must be satisfied that the group of employees is “fairly chosen.” If not all employees are covered, this is determined taking into account geographic, operational and organisational distinctness. ¹⁸	No change. See also above – Small Cohort (as relevant to genuine agreement)
<i>Better of Overall Test (Assessment)</i>	In approving an agreement, the FWC must be satisfied that the agreement passes the BOOT. ¹⁹ If an agreement does not pass the BOOT, FWC may nevertheless approve it with an undertaking. ²⁰	The BOOT remains in place. Separately from its ability to accept an undertaking, FWC may now amend an agreement such that it would pass the BOOT. ²¹

¹⁴ FW Act s 180(5)

¹⁵ See *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* (2018) 262 FCR 527 at [168] on appeal from *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd* [2017] FCA 1266; *Contra Aldi Foods Pty Ltd v Shop, Distributive & Allied Employees Association* [2017] HCA 53, *CFMEU v John Holland Pty Ltd* [2015] FCAFC 16

¹⁶ Proposed FW Act s 188(2)

¹⁷ FW Act s 182

¹⁸ FW Act s 186(3), (3A)

¹⁹ FW Act s 186(2)(d)

²⁰ FW Act s 190

²¹ Proposed FW Act s 191A

Many of the parameters that determine how the BOOT is conducted are determined by case law.	The FW Act now stipulates that the BOOT is specified as a global assessment of whether each employee is better off, having regard to more and less beneficial terms under the relevant award. ²²
<p>Conducting the BOOT involves assessing: ‘that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee’.²³</p> <p>This assessment involves consideration of possible patterns of work that could arise.²⁴</p>	The BOOT must be conducted in relation to ‘each reasonably foreseeable employee’ rather than ‘each prospective award covered employee’. ²⁵ FWC can only have regard to patterns of work which are reasonably foreseeable. ²⁶ This limits FWC’s consideration of possible future employees and circumstances.
The FWC may approve an agreement which doesn’t pass the BOOT if it is satisfied that there are “exceptional circumstances” and it is not contrary to the public interest to do so. ²⁷	No change.
The FW Act has general provisions relating to how matters are conducted by the FWC.	In addition to the general provisions, FWC will be required to consider the views of bargaining representatives in relation to the BOOT and must give primary consideration to any views held in common. ²⁸

Post Approval

²² Proposed FW Act s 193A(2); Note: this was generally understood to be the current interpretation of the BOOT, see *Re Armacell Australia Pty Ltd* [2010] FWA 9985 at [41]

²³ FW Act s 193

²⁴ *Loaded Rates Agreements* [2018] FWCFB 3610

²⁵ Proposed FW Act s 193A(2), 193A(7)

²⁶ Proposed FW Act s 193A(6)

²⁷ FW Act s 189(2)

²⁸ Proposed FW Act s 193A(3)-(4)

<i>Correcting errors etc.</i>	-Enterprise Agreements may be varied by agreement, however there is no specific power for correcting errors.	<p>In addition to the provisions for varying an agreement, FWC will have the power to correct mistakes in an enterprise agreement after it has been approved.²⁹ This is similar to an existing mechanism which currently exists in relation to modern awards.³⁰For more on this, see Errors in EBs briefing note.</p> <p>If an application to approve an agreement (or variation) is made using an incorrect draft of the agreement, FWC will have the power to retrospectively supplant the correct version.³¹</p>
<i>Better of Overall Test (Reconsideration)</i>	-	<p>FWC may (on application) reconsider whether the agreement continues to pass the BOOT in light of subsequent patterns or kinds of work, or types of employment which have emerged post-approval (for example, a change of roster).³²</p>

Genuine Agreement

The exact nature of when there has been “genuine agreement” in relation to an enterprise agreement, and how the FWC will go about determining this is changing.

Certain aspects, such as the safeguards against the use of “small cohort agreements” will form part of the legislation, however a number of matters – such as the bulk of the procedural requirements prior to an approval application - are left to the discretion of the FWC. This discretion will be significantly guided by the Statement of Principles, which the FWC is required to develop prior to these changes coming into operation on 6 June 2023.

Statement of Principles

The FWC is required to make and publish “a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement.” The statement of principles must cover:

- Informing employees of bargaining for a proposed agreement,
- Informing employees of their right to be represented by a bargaining representative,

²⁹ Proposed FW Act s 218A

³⁰ FW Act s 160

³¹ Proposed FW Act ss 602A, 602B

³² Propose FW Act Part 2-4 Div 7A

- Providing employees with a reasonable opportunity to consider a proposed enterprise agreement,
- Explaining to employees the terms of a proposed enterprise agreement,
- Providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including informing employees of the time, place and method of the vote,
- Any matter prescribed by the regulations for the purpose of this paragraph, and
- Any other matter the FWC considers relevant.³³

The statement of principles will be a legislative instrument, however disallowance provisions do not apply to it.³⁴

The ultimate terms of the Statement of Principles will have a large bearing on agreement approvals, as the FWC is required to take the statement into account 'in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.'³⁵

The FWC will consult the ACTU and unions on the Statement of Principles prior to them coming into operation on 6 June 2023.

Small Cohort Agreements

Under the new provisions, FWC will be unable to satisfy itself that an enterprise agreement has been genuinely agreed unless it is able to satisfy itself that the employees who voted for the agreement have a sufficient interest in its terms and are sufficiently representative of the employees covered by the agreement.³⁶ This is designed to prevent employers from sidestepping the greenfields and other bargaining provisions by locking in agreements with a handful of workers and before then engaging many more workers who are covered by the same agreement and cannot then bargain for fair working conditions until it expires or is terminated.³⁷

Reasonable Opportunity

A major change to the way the approval process currently operates is the removal of procedural requirements such as the "access period" and the steps that must be taken during that period. As described above, this is replaced by guidance in the form of the Statement of Principles which must cover matters such as giving workers a reasonable opportunity to consider a proposed agreement, as well as to vote on that agreement.

The BOOT

Prior to the changes, an enterprise agreement passed the Better Off Overall Test (BOOT) if the FWC was satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employees.

Amendments

The new provisions allow for the FWC to make an amendment to an agreement if doing so is necessary to address a concern that the agreement would otherwise not pass the BOOT.³⁸ If it

³³ Proposed FW Act s 188B(3)

³⁴ Proposed FW Act s 188B(4)

³⁵ Proposed FW Act s 188(1)

³⁶ Proposed FW Act s 188(2)

³⁷ See e.g. *One Key Workforce Pty Ltd v Construction, Forestry, Mining and 25 Energy Union* [2018] FCAFC 77 (2018) 262 FCR 527

³⁸ Proposed FW Act s 191A

intends to make an amendment, the FWC must seek the views of the employer, workers and bargaining representatives.³⁹ The agreement takes effect in its amended form.⁴⁰ This mechanism is similar to the FWC accepting undertakings during the approval process, with the notable exception that, unlike an undertaking which is put forward by the employer, the FWC makes the amendment on its own motion (though it is open for a bargaining representative to suggest that doing so be countenanced).

Reasonably Foreseeable and Reconsideration

The FWC's consideration in applying the BOOT is now confined to "reasonably foreseeable" employees and patterns of work as opposed to each "prospective award covered employee".⁴¹

The concept of what is reasonably foreseeable arises in many different legal contexts - from contracts to tort law - and is a species of the reasonable person (or person on the Clapham omnibus, 86 tram etc.) test. It involves a determination of which potential considerations are too far-fetched to take into account and which should not be ignored. The application of this new reasonably foreseeable test is likely to be shaped by litigation.

The corollary to the consideration of reasonably foreseeable employees and patterns of work is that if, subsequent to the approval of the agreement under the new provisions, new types of employment or patterns or kinds of work emerge, the FWC may reconsider whether the agreement passes the BOOT.⁴² This means that if (for example) an agreement is approved and FWC considers existing and likely rosters, but new rostering patterns are imposed down the track, the FWC can reconsider the agreement in light of the new rosters.

If, on reconsideration of an agreement, the FWC makes a variation with an operative date that precedes the date of the variation, then a party that has engaged in conduct before the variation is made cannot be subjected to a pecuniary penalty in relation to that conduct.

Post-Approval

Correcting Errors etc.

Unlike the situation with respect to Modern Awards, there is currently no power to correct obvious mistakes in an enterprise agreement.⁴³

Under the new provisions, the FWC will have the power to "correct or amend an obvious error, defect or irregularity (whether in substance or form)" in an operative enterprise agreement.⁴⁴

If an application to approve an agreement (or variation) is made using an incorrect draft of the agreement, the FWC will also have the power to retrospectively supplant the correct version.⁴⁵ This addresses an issue highlighted in the case of *Cragcorp Pty Ltd*, in which a single member of the FWC determined that the only way to address this situation was to file an appeal of the original approval decision.⁴⁶ Please note, unlike the other changes in this note, these provisions came into operation on 7 December 2022.

³⁹ Proposed FW Act s 191A(3)

⁴⁰ See Proposed FW Act s 191B

⁴¹ Proposed FW Act ss 193A(2), 193A(6), 193A(7)

⁴² Proposed FW Act s 227A

⁴³ For Modern Award power see FW Act s 160

⁴⁴ Proposed FW Act s 218A

⁴⁵ Proposed FW Act ss 602A, 602B

⁴⁶ *Cragcorp Pty Ltd T/A Queensland Bridge and Civil* [2020] FWC 2830

Reconsidering the BOOT

FWC will have the power to reconsider whether an operative enterprise agreement passes the BOOT if new types of employment or patterns or kinds of work emerge that weren't taken into account during the initial approval. An application for reconsideration may be made by a worker, union or employer who is covered by an agreement that has been approved under the new laws.

See Reasonably Foreseeable and Reconsideration

Making the most of new laws

The laws relating to enterprise agreement approval will change from 6 June 2023. The true application of the new legislative provisions will not be fully determined until they have been tested by the FWC, and potentially the courts. This means that it's critical that the union movement selects and runs cases which support our preferred interpretation of the legislation and defend against cases which do not. Making sure that we run the best "test cases" to make sure the laws are operating for working people will require careful co-ordination and information sharing across the union movement. Some of the key questions of interpretation that will guide how the new laws operate include:

- The meaning of 'reasonably foreseeable' with respect to employees and patterns of work, when the FWC is conducting the better off overall test;
- The weight that should be given to the views of bargaining representatives, including any common views, in respect of an approval application;
- For reconsideration post-approval what is the effect of operative date of amendments pre-dating date of FWC decision.ⁱ

ⁱ The information in this document does not constitute legal advice and should not be taken to include all requirements or obligations relevant to the entitlement.