



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELC:CBns220323

22 March 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au

Dear Dr Popple,

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

Thank you for the opportunity to contribute to a Law Council submission to the Fair Work Commission's (FWC) consultation on the draft Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023 (the Principles). The Law Society's Employment Law Committee has contributed to this submission.

The Law Society welcomes the release of the Principles, which we note have been developed through an ongoing process of consultation with peak councils and other interested parties.

We consider the Principles generally provide clear and effective guidance for employers to ensure that employees have genuinely agreed to an enterprise agreement, in accordance with the FWC's obligations under section 188B of the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022*.

We suggest consideration be given to amending Principle 8(a), which 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." We note that the requirement for a secret ballot does not currently exist in the *Fair Work Act* (the Act) and may not align with common voting practices. In the experience of our members, 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 always be necessary or appropriate in all circumstances.

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

We also consider 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, which may be unnecessarily burdensome, particularly for small and medium sized enterprises.

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We also suggest consideration be given to deleting Principle 19, which provides:

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.

We note that reference to 'an authentic exercise in enterprise bargaining' does not appear to be based on any particular provisions of the Act, and is, in our view, superfluous in light of the other proposed principles.

We hope this input is of assistance. Please contact Nathan Saad, Policy Lawyer, on (02) 9926 0174 or nathan.saad@lawsociety.com.au in the first instance if you have any queries.

Yours sincerely,

A handwritten signature in black ink that reads "CBanks". The signature is written in a cursive, flowing style.

Cassandra Banks
President