What does 'genuinely agreed' mean?

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1. The Fair Work Commission cannot approve an enterprise agreement unless it is satisfied that (*inter alia*) the agreement has been genuinely agreed to by the employees covered by the agreement.[1] This paper will address what is meant by the term 'genuinely agreed' in the context of the process for approving enterprise agreements.

Genuine agreement pre-*Fair Work Act 2009*: a brief history

2. Genuine agreement has been a feature of the process for approving collective agreements in the federal system for many years. Although, the requirement disappeared for a relatively small period during the WorkChoices era.[2]

3. The *Industrial Relations Act 1988* (Cth) required the Australian Industrial Relations Commission to approve an enterprise agreement if, amongst other things,:

> a majority of the persons who, as at the end of a day that is specified in the application and is not more than 7 days before the day when the application was made, were employees covered by the agreement have, on or before the specified day, genuinely agreed to be bound by the agreement, even if they so agreed at different times.[3]

4. Under the *Workplace Relations Act 1996* (Cth),[4] the Australian Industrial Relations Commission needed to be satisfied:

   a. if a collective agreement was made between the employer and a trade union, that a majority of the employees who were going to be covered by the agreement genuinely approved the agreement;[5] and

   b. if a collective agreement was made between the employer and a majority of the employees that would be covered by the agreement, that the employees genuinely made the agreement.[6]

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* BCom (HRM), LLB, LLM (Res). This document forms part of a CPD seminar that was delivered to the UnionsWA Industrial Officers and Lawyers Network on 7 August 2018. It has been released for educational purposed only. It should not be relied upon as legal advice.

1 *Fair Work Act 2009* (Cth) at s 186(2)(a). But this does not apply to greenfields agreements.

2 The need for genuine approval was an element of the *Workplace Relations Act 1996* (Cth) from 25 November 1996 to 27 March 2006. It was removed from the *Workplace Relations Act 1996* (Cth) on 27 March 2006 by section 168 of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

3 *Industrial Relations Act 1988* (Cth) at s 170NC.

4 Above n 2.

5 *Workplace Relations Act 1996* (Cth) at s 170LJ and s 170LT(5).

6 Ibid at s 170LK and s 170LT(6).

5. In both legislative contexts, the Commission needed to be satisfied that 'the consent of the employees was informed and there was an absence of coercion.'[7] If, for example, an employer did not fully disclose the impact of an agreement to its employees before they agreed to it, then that may have vitiated the employees' consent to the extent that the Commission could not be satisfied that there was genuine agreement.[8] Similarly, if the employees were in circumstances where they would have signed anything to keep their jobs, then they may not have genuinely agreed to the agreement.[9]

6. In *Mine Management Pty Ltd v CFMEU*, Wilcox and Madgwick JJ found that the test in section 170LT(5) of the *Workplace Relations Act 1996* (Cth) (which required that the majority of employees genuinely approved the agreement) was concerned with the 'authenticity' and 'moral authority' of the agreement.[10] The essence of their Honours' decision was (*inter alia*) that employees could not genuinely approve an agreement if they did not have actual experience in the work to be performed under the agreement or the place of its performance.[11] This was because the employees' lack of understanding of the work or the workplace increased the risk that safety net standards would be undermined through the making of an agreement.[12]

Genuine agreement under the *Fair Work Act 2009*

7. The 'basic rule' in the enterprise agreement approval process is that the Fair Work Commission must approve an enterprise agreement if the requirements in sections 186 and 187 of the *Fair Work Act 2009* (Cth) are met.[13]

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7 *Re Toys'R'Us (Australia) Pty Ltd Enterprise Flexibility Agreement 1994*, AIRC, Print L9066, 3 February 1995; *VHA Trading Company v Australian Services Union*, AIRC, Print N9390, 7 March 1997. See also: *Coles Supermarkets Australia Pty Ltd NSW Bakery Employees Agreement 1997*, AIRC, Print P5521, 3 October 1997; *Australian Protective Service National Central Monitoring Station Certified Agreement 2000- 2003*, AIRC, Print T0610, 8 September 2000.

8 E.g. *Re Toys'R'Us (Australia) Pty Ltd Enterprise Flexibility Agreement 1994*, AIRC, Print L9066, 3 February 1995; *Australian Protective Service National Central Monitoring Station Certified Agreement 2000- 2003*, AIRC, Print T0610, 8 September 2000.

9 E.g. *Mansfield Mt Buller Bus Lines Pty Ltd Enterprise Flexibility Agreement [1994]*, AIRC, Print L5430, 23 September 1994.

10 *Mine Management Pty Ltd v CFMEU* (1999) 93 FCR 317 at [126].

11 Ibid.

12 Ibid.

13 *Fair Work Act 2009* (Cth) at s 186(1).

8. Subsection 186(2)(a) requires the Fair Work Commission to be satisfied that the enterprise agreement has been genuinely agreed to by the employees covered by the agreement. This requirement does not apply to greenfields agreements.[14]

9. The term 'genuinely agreed' is defined in section 188 of the *Fair Work Act 2009* (Cth). It requires the Fair Work Commission to be satisfied that:

    a. the employer complied with:

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

        ii. subsection 181(2) (which requires that the 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 was not genuinely agreed to by the employees.

Subsections 180(2), (3) and (5): pre-approval steps

10. Before an employer can ask a group of employees to vote to approve an agreement, the employer needs to comply with section 180 of the *Fair Work Act 2009* (Cth).[15]

11. Section 180 makes use of the term 'relevant employees'. For that section, the relevant employees are those employees who are employed at the time and who will be covered by the agreement.[16]

12. Subsection 180(2) requires the employer to take all reasonable steps to ensure that, during the access period, the relevant employees have been given a copy of the written text of the agreement and any other material incorporated by reference in the agreement. The access period is the 7-day period before the start of the voting process for the agreement.[17]

13. Subsection 180(3) requires the employer to, before the start of the access period, take all reasonable steps to notify the relevant employees of the time and place of the vote for the agreement, and the method of voting.

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[14] Ibid at s 186(2)(a). Note: A greenfields agreement is made between an employer and a trade union when the employer has no employees that will be covered by the agreement.

[15] *Fair Work Act 2009* (Cth) at s 180(1).

[16] Ibid at s 180(2).

[17] Ibid at s 180(4).

14. And finally, subsection 180(5) requires the employer to take all reasonable steps to ensure that:

    a. the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and

    b. the explanation is provided in an appropriate manner that takes into account the particular circumstances and needs of the relevant employees.

Subsection 180(5): a word of caution

15. The purpose of section 180(5) is to 'enable the relevant employees to cast an informed vote: to know what it is they are being asked to agree to and to enable them to understand how wages and working conditions might be affected by voting in favour of the agreement.'[18]

16. Whether the employer has taken all reasonable steps to ensure that the effect of the terms of the proposed agreement was explained in an appropriate manner is 'a question of substance, not form'.[19] Whether an employer has complied with the obligation in subsection 180(5) will depend on the circumstances of the case.[20]

17. There is no obligation on an employer to call the employees who voted for an enterprise agreement as witnesses in agreement approval proceedings. The absence of employee witnesses would not, by itself, be enough to draw an inference that there was no genuine agreement.[21]

18. However, it is not sufficient for an employer to simply state in its Form F17 declaration that it explained the terms of the enterprise agreement and the effect of those terms to its employees.[22] The Fair Work Commission cannot reach the requisite state of satisfaction required by section 186(2)(a) and section 188 with only that type of evidence.[23]

19. Instead, the Commission needs to consider 'the content of the explanation and the terms in which it was conveyed, having regard to all the circumstances and needs of

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[18] *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [115].
[19] Ibid at [112]
[20] *BGC Contracting Pty Ltd* [2018] FWC 1466 at [76], [86].
[21] *Maritime Union of Australia v MMA Offshore Logistics Pty Ltd* [2017] FWCFB 660 at [76].
[22] *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [111]-[112]
[23] Ibid.

the employees and the nature of the changes made by the Agreement.'[24] This is a mandatory consideration.[25]

20. The obligation in subsection 180(5) requires the employer to explain to the employees the effect of the whole proposed agreement, not just the effect of the terms in the proposed agreement that are relevant to those employees.[26] An explanation of the effect of the whole of the proposed agreement is necessary to ensure that the employees give informed consent when voting for the agreement.[27]

21. As to the required depth of the explanation, if the relevant employees were not working in, or did not have experience in, the work or classifications provided under the agreement, then those factors may require the employer to provide a more comprehensive explanation to the employees to facilitate genuine agreement.[28] Similarly, if the employees are from culturally and linguistically diverse backgrounds, or are young, or did not have a bargaining representative for the agreement, then that may oblige the employer to provide a more detailed explanation about the effect of the proposed agreement.[29]

22. If the only evidence that the Fair Work Commission has before it is a bald statement from the employer that asserts compliance with section 180(5), then there may be a positive obligation on the Commission to make further inquiries with the employer.[30] It is a matter that employee bargaining representatives should be alive to and actively investigate before they sign a Form F18 declaration confirming that they agree with an employer's Form F17 declaration. As Gostencnik DP said in *BGC Contracting Pty Ltd*, 'employers, or more properly those completing a Form F17, cannot be expected to be completely objective and absolutely knowledgeable, and as a consequence mistakes and omissions in the information provided in a Form F17 will occur.'[31]

Subsection 181(2): 21-day notice period

23. Subsection 181(2) prevents the employer from asking its employees to vote to approve an agreement until at least 21 days after the employer provided its most recent notice

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[24] Ibid at [112], [142].
[25] Ibid at [142].
[26] *BGC Contracting Pty Ltd* [2018] FWC 1466 at [96]-[97].
[27] Ibid at [97].
[28] See for example: *BGC Contracting Pty Ltd* [2018] FWC 1466 at [99].
[29] *Fair Work Act 2009* (Cth) at s 180(6).
[30] *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [117], [120].
[31] *BGC Contracting Pty Ltd* [2018] FWC 1466 at [89].

of representational rights to its employees in relation to the proposed agreement. There will be no genuine agreement if that timeframe is not complied with.

Subsection 182(1) and (2): the employee vote

24. Subsections 181(1) and (2) are concerned with the actual making of the agreement between the employer(s) and the employees by way of a vote.

25. The employees that are entitled to vote are those who:

    a. are currently employed by the employer; and
    b. will be 'covered' by the agreement if it is made.[32]

    In terms of an employee's eligibility to vote, it does not matter that the agreement may not 'apply' to that employee until some future point in time, or that the employee may not yet be performing the role or work that will be covered by the agreement.[33]

26. Subsection 181(1) applies to single-enterprise agreements. It provides that an agreement is 'made' when the employees that will be covered by the proposed agreement have been asked by the employer to approve the agreement, and a majority of the employees who cast a valid vote approve the agreement.

27. Subsection 181(2) deals with multi-enterprise agreements. A multi-enterprise agreement involves more than one employer. To make a multi-enterprise agreement:

    a. the employers need to ask the employees that will be covered by the proposed agreement to approve the agreement;
    b. the employees need to vote; and
    c. a majority of the employees of at least one of the employers who cast a valid vote approve the agreement.

    If those criteria are met, then the multi-enterprise agreement will be made immediately after the end of the voting process.[34]

Subsection 188(c): further genuine agreement considerations

28. Subsection 188(c) requires the Fair Work Commission to be satisfied that there are no other reasonable grounds for believing that the agreement was not genuinely agreed to by the employees.

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[32] *Aldi Foods Pty Limited v SDA* [2017] HCA 53 at [34], [42], [48]-[49], [58], [77], [82], [83].
[33] Ibid.
[34] *Fair Work Act 2009* (Cth) at s 181(2).

29. In *One Key Workforce Pty Ltd v CFMEU*,[35] the employer argued that the words 'genuinely agreed' in subsection 188(c) did not enable the Commission to consider the 'authenticity' and 'moral authority' of the proposed agreement.[36] The Full Court of the Federal Court rejected that argument.[37]

30. The Full Court found that:

    a. The use of the word 'genuinely' in the phrase 'genuinely agreed' indicated that mere agreement was not enough.[38] The word 'genuinely' meant that a higher quality of consent was required than mere agreement.[39]

    b. Subsection 188(c) is cast in very broad terms.[40] Its scope captures any circumstance which may be relevant to whether the agreement of the employees was genuine.[41] Four examples of relevant considerations include:

        i. whether the employer provided misleading information to the relevant employees;

        ii. whether the employer fully disclosed the effect of the proposed agreement to the relevant employees;

        iii. the likelihood that the relevant employees understood the operation of the various awards that would be affected by the agreement; and

        iv. the extent to which the employees' working conditions would change by moving from the award to the proposed agreement.[42]

    c. The concept of authenticity goes to the very heart of subsection 188(c).[43]

When a small number of employees vote for an agreement which has a large number of classifications

31. A common issue that arises from time to time is where a small group of employees makes an agreement with their employer that covers a wide variety of classifications.

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35 [2018] FCAFC 77.
36 *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [131], [139].
37 Ibid at [132], [143].
38 Ibid at [141].
39 Ibid.
40 Ibid at [142].
41 Ibid.
42 Ibid.
43 Ibid at [143].

32. There is nothing in the *Fair Work Act 2009* (Cth) that prohibits a small group of employees from making an enterprise agreement with their employer that might cover a larger group of people in the future.[44]

33. However, section 188 'harbours a concern directed at agreements made by a small number of employees where the agreement covers a wider range of employee classifications.'[45] The explanatory memorandum to the *Fair Work Bill 2009* contained the following note:

> Note that where an agreement covers a large number of classifications of employees in which no employees are actually engaged there may be a question as to whether the agreement has been genuinely agreed – see clause 188.[46]

34. In *CFMEU v John Holland,* the Full Court of the Federal Court indicated in obiter that it may not be fair for an enterprise agreement made with a small number of existing employees to cover a wide range of other classifications and jobs in which they may have no conceivable interest.[47]

35. The Full Court of the Federal Court in *One Key Workforce Pty Ltd v CFMEU* seized on the point made in *CFMEU v John Holland*.[48] It found that 'genuine agreement' requires employees to have an informed and genuine understanding of what is being approved in terms of a collective agreement.[49] The Court also said that 'the legislative objective of achieving "fairness through an emphasis on enterprise-level collective bargaining" could be undermined if the employees who vote on the agreement have no basis for appreciating its nature and terms.'[50]

36. By way of example, the Full Bench of the Fair Work Commission in *Re KCL Industries Pty Ltd*,[51] took issue with what it described as 'an obvious disjunction between the content of the Agreement and the characteristics of those who entered into it'.[52] In that case, three employees who held tradesperson positions under the *Manufacturing and Associated Industries and Occupations Award 2010* made an enterprise agreement with their employer which covered a wide variety of

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44 *Aldi Foods Pty Limited v SDA* [2017] HCA 53 at [84], [87]; *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [152].
45 *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [154]. See also: *Explanatory Memorandum to the Fair Work Bill 2009* (Cth) at [824].
46 *Explanatory Memorandum to the Fair Work Bill 2009* (Cth) at [824].
47 *CFMEU v John Holland* [2015] FCAFC 16 at [83].
48 *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [155]-[156].
49 Ibid at [155].
50 Ibid.
51 [2016] FWCFB 3048.
52 *Re KCL Industries Pty Ltd* [2016] FWCFB 3048 at [31].

classifications which had no relevance to their own. Those unrelated classifications included clerical staff, surveyors, safety officers, geologists, chemists and productions supervisors. The Full Bench found that:

> In those circumstances we do not consider that any authenticity could attach to the agreement of the two employees to the rates and conditions in the Agreement. The employees had no "stake" in the Agreement's rates of pay, since they were assured that their existing, higher rates of pay would remain in place (subject to "operational needs and satisfactory performance"), and they could not have given informed consent in relation to occupations and industries in which they did not work and presumably had no experience.[53]

That extract from *Re KCL Industries Pty Ltd* was cited with approval by the Full Court of the Federal Court in *One Key Workforce Pty Ltd v CFMEU*.[54]

Conclusion

37. The term 'genuinely agreed' is largely, although not exhaustively, defined in section 188 of the *Fair Work Act 2009* (Cth). The genuine agreement criterion aims to ensure that there is authenticity and moral authority underpinning enterprise agreements that are approved by the Fair Work Commission.

38. Ensuring authenticity and moral authority requires the Fair Work Commission to focus on the act of making the enterprise agreement (e.g. the process that was followed by the employer and the employees), and the quality of the employees' consent in approving the enterprise agreement (e.g. did the employees properly appreciate what they were agreeing to, and did they have a stake in the outcome?).

39. Because of the broadness of the test in subsection 188(c) (the need for the Fair Work Commission to be satisfied that there were no other reasonable grounds for believing that the agreement was not genuinely agreed), the old authorities on the concept of genuine approval that arose under the *Industrial Relations Act 1988* (Cth) and the *Workplace Relations Act 1996* (Cth) appear to remain relevant considerations in the current enterprise agreement approval process.

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53 Ibid at [36].

54 *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77 at [164]-[165].