

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Additional Estimates 2016 - 2017

Agency - Fair Work Commission

Department of Employment Question No. EMSQ17-003965

Senator Abetz provided in writing.

Question

FWC - Agreements

1. Are enterprise agreements filed or approval (but not yet approved) published on the Fair Work Commission's website?
 - a. If so, with what legislative or regulatory authority (if any) are they published?
 2. When did the practice referred to above commence?
 3. On whose suggestion was the practice referred to commenced?
 4. Why?
 5. When seeking approval for an enterprise agreement, does the relevant party need to file Forms F16 and F17?
 - a. If so, are there numerous identical requests for information on both forms?
 - b. Has consideration been given to combining forms F16 and F17?
 - i. If not why not?
 6. Was the privacy notice relating to F16 and F17 recently altered?
 - a. If so, please state when and why?
 - b. Prior to the alteration of F16 and F17, were these forms ever provided to third parties?
 - c. If so was this in breach of any relevant privacy requirements?

Answer

1. Enterprise agreements lodged for approval are published on the Fair Work Commission's (Commission's) website on the 'Agreements in progress' webpage (subject to any request from the applicant that part or all of an agreement be kept confidential). That page can be accessed at: <https://www.fwc.gov.au/awards-and-agreements/agreements/agreements-progress>
- 1.a There is no express authority under the *Fair Work Act 2009* (FW Act) to publish enterprise agreements lodged with the Commission for approval but not yet approved. Publication assists in satisfying the requirement that the Commission perform its functions and exercise its powers in a manner that is "open and transparent" (FW Act s.577(c)) and may be considered to be underpinned by a variety of Commission powers, including its powers to "inform itself in relation to any matter before it in such manner as it considers appropriate" (s.590) and to decide "how, when and where a matter is to be dealt with" (s.589).
2. The publication of enterprise agreements has been in place since at least 2010.
3. No documentation surrounding the change has been able to be located. From the recollection of senior staff involved at the time, the publication of enterprise agreements was requested by a senior Commission Member who had oversight of

enterprise agreement matters at that time, and whom retired some years ago. The recollection of senior staff is that the Member requested the change to afford interested parties (usually trade unions) an opportunity to, where relevant, make an application to be covered by an agreement pursuant to section 183 of the *Fair Work Act 2009* before the application for approval of the enterprise agreement was determined by the Commission. However, it is not known whether the Member who made the request did so based on or following any consultation or requests from stakeholders.

4. Answered in 3 above.
5. This will depend upon the identity of the entity making the application for approval of the enterprise agreement and the type of agreement concerned.

FW Act section 185 provides:

Application for approval

- (1) If an enterprise agreement is made, a bargaining representative for the agreement must apply to the FWC for approval of the agreement.

...

Material to accompany the application

- (2) The application must be accompanied by:
 - (a) a signed copy of the agreement; and
 - (b) any declarations that are required by the procedural rules to accompany the application.

Rule 8(2) of the *Fair Work Commission Rules 2013* (Rules) requires approved forms to be used. The approved form for a bargaining representative to apply for approval of a non-greenfields enterprise agreement is the F16.

Rule 24(1) of the Rules requires each employer covered by a non-greenfields enterprise agreement to lodge a statutory declaration "in support of the application for approval". The approved form for the employer statutory declaration is the F17. An employer lodging an F17 may or may not also be the bargaining representative that applied for approval using the F16.

5.a Both the F16 and the F17 forms request the following information:

- name, address etc. of the applicant/employer;
- name of the enterprise agreement; and
- details of any other enterprise agreements of which the employer/applicant is aware that have been filed or dealt with by the Commission and that have identical or substantially identical terms, and whether any such agreements were approved with undertakings.

5b & i. The Commission is currently developing a prototype 'smart form' that combines the F16 and F17. When finalised, adoption of the prototype will be considered by the Commission's Rules and Benchbooks Committee.

6. The privacy notices for the F16 and F17 were recently altered.

6.a The privacy notices were updated on 10 February 2017 following the decision of the Full Bench of the Commission in *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd [2016] FWCFB 8413*. As well as updating the notices to make it clearer that personal information in the forms may be disclosed to non-parties upon request (as discussed in the Full Bench decision), the opportunity was taken to update a number of other aspects of the notices.

- 6.b Yes. The longstanding practice pursuant to the Commission's policy on access to case files (part of the Commission's privacy policy) is that agreement approval application case files (including the F16 and F17 forms) are generally available for inspection by parties to the proceedings and the public, unless confidentiality or non-publication orders have been made by the Commission. Personal details such as residential addresses, personal phone numbers and personal email addresses may be redacted from copies of case file documents before they are released under this policy.
- 6.c Provision of access to F16 and F17 forms and related privacy issues were discussed in *Ron Southon Pty Ltd* [2017] FWC 775. That decision pre-dated the amendment of the privacy notices for the F16 and F17 forms. In the decision at [16] the Commission was "not satisfied that there is conflict between the disclosure of Forms F16 and F17 and the Commission's Privacy policy."