

Statement of Principles on Genuine Agreement

SUMMARY

The *Fair Work Act 2009* (**FW Act**) currently requires that in order to approve an enterprise agreement, the Fair Work Commission (**FWC**) must be satisfied that it was '*genuinely agreed*' to by the employees who would be covered by it. The FW Act also describes when an agreement has been genuinely agreed.

As a result of amendments made to the FW Act by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**Amendment Act**), from 6 June 2023 (unless proclaimed earlier):

- Some of the requirements prescribed by the FW Act, which must currently be satisfied for there to be '*genuine agreement*', will be amended or removed; and
- The FWC has developed a Statement of Principles on Genuine Agreement (**SOP**), which must be taken into account by the FWC when considering whether there has been '*genuine agreement*'.

What is the Statement of Principles on Genuine Agreement (SOP)?

The SOP has been created by the FWC, as required by the FW Act.

It was prepared after consulting interested parties, including Ai Group, regarding its content. Ai Group met with a Full Bench of the FWC regarding the development of the SOP and subsequently filed submissions regarding a draft of the SOP that was released by the FWC for comment.

The SOP underpins changes to the FW Act that will commence on 6 June 2023 and were intended to simplify the process for making an enterprise agreement. These amendments will remove some of the prescriptive requirements relating to the steps that an employer must take in order to have an enterprise agreement approved by employees and the FWC. This includes, for example, the removal of requirements on an employer to:

- take all reasonable steps to ensure that employees are given access to a copy of the agreement and any material incorporated by reference in the agreement during a 7 day '*access period*' ending immediately before the start of the voting process; and
- take all reasonable steps to notify employees, by the start of the access period, of the time, place and method for the vote.

The FWC will instead be given a broader discretion to determine whether an enterprise agreement was genuinely agreed. It must however take the SOP into account when considering whether to approve an enterprise agreement. The SOP is intended to provide guidance as to how an employer could obtain the genuine agreement of their employees.

A copy of the SOP is attached to this advice.

What does the SOP deal with?

The SOP does not prescribe requirements that *must* be satisfied in order to establish that genuine agreement was reached. Rather, it provides guidance as to the steps that employers *should* take to ensure that there has been genuine agreement. The FW Act requires that the FWC cannot approve an agreement unless it is satisfied that it was genuinely agreed.

The SOP deals with matters such as:

- (a) Informing employees of their right to be represented by a bargaining representative;
- (b) Providing employees with a reasonable opportunity to consider a proposed agreement before casting a vote in relation to it;
- (c) Explaining the terms of a proposed enterprise agreement and their effect to employees;
- (d) Providing employees with a reasonable opportunity to vote on a proposed agreement, in a free and informed manner;
- (e) The relevance of the role played by unions in providing information about a proposed agreement to the relevant employees; and
- (f) The weight that the FWC should give to a union's support for the approval of an enterprise agreement.

How does the SOP interact with the FW Act?

In some cases, the SOP overlaps with requirements prescribed by the FW Act. For example, the FW Act deals with the form and content of the Notice of Representational Rights, as well as how and when it is to be issued. The SOP also deals with how and when an employee should be notified of their right to be represented by a bargaining representative.

In other cases, the SOP deals with matters that will no longer be dealt with by the FW Act. This includes matters such as the provision of access to copies of the proposed agreement and the notification of arrangements for the vote, as identified above.

Any applicable requirements prescribed by the FW Act must be satisfied. The SOP does not displace the application of the FW Act.

Are there other changes to the process for seeking approval of an enterprise agreement?

It is important to appreciate that there have been other changes to the requirements for approval of an enterprise agreement by the FWC that are not dealt with in the SOP. This includes changes to the way the '*better off overall*' test is applied and new requirements that employees who vote on an agreement:

- have sufficient interest in the agreement, and
- are sufficiently representative of the coverage of the agreement.

Does the SOP apply in other circumstances?

The SOP also applies where the FWC is considering whether to approve applications to vary an enterprise agreement.

When does the SOP commence operation?

The SOP commences operation on 6 June 2023.

The new provisions of the FW Act dealing with when the FWC's assessment of whether an agreement has been genuinely agreed will apply to any enterprise agreement in respect of which the 'notification time' was after 6 June 2023.

The 'notification time' of an enterprise agreement is to be determined having regard to various circumstances. It may be, for example, when the employer agreed to bargain or initiated bargaining; or when the employer received a request to bargain from an employee bargaining representative.

Do you require further advice?

The operation of the SOP and associated amendments to the FW Act are significant. They may warrant, or facilitate, some employers adopting a different approach to seeking employee approval of a proposed agreement to that which they have previously utilised.

Ai Group can provide further advice about the changes to enterprise agreement making under the FW Act, including the SOP and how it applies to the particular circumstances of an employer and its workforce. We can also represent members undertaking enterprise bargaining or who may become involved in multi-employer bargaining.

Members are encouraged to contact the Ai Group Workplace Advice Line on 1300 55 66 77 for assistance and advice.

A handwritten signature in black ink, appearing to read 'Brent Ferguson'.

Brent Ferguson
Head of National Workplace Relations Policy



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

The Fair Work Commission, constituted by the Full Bench comprising Justice Hatcher, President, Vice President Asbury and Deputy President Masson, makes the following instrument.

Dated

PRESIDENT

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1 Name

This instrument is the *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument.	At the same time as Part 14 of Schedule 1 to the <i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i> commences.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under section 188B of the *Fair Work Act 2009*.

4 Statement of Principles on Genuine Agreement

For the purposes of section 188B(1) of the *Fair Work Act 2009*, the statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement is made as set out in Schedule 1 to this instrument.

Schedule 1—Statement of Principles on Genuine Agreement

Statement of Principles on Genuine Agreement

This Statement of Principles sets out matters that the Fair Work Commission (FWC) must take into account in determining whether it is satisfied that an enterprise agreement ‘has been genuinely agreed to by the employees covered by the agreement’.

The *Fair Work Act 2009* (Cth) (Fair Work Act) provides that an enterprise agreement must be approved by the FWC to come into operation. Section 186 of the Fair Work Act sets out general requirements for the approval of an enterprise agreement. These requirements include, if the agreement is not a greenfields agreement, that the FWC is satisfied the agreement has been genuinely agreed to by the employees covered by the agreement.

Section 188 sets out requirements that must be met for the FWC to be satisfied an enterprise agreement has been genuinely agreed to by employees. One of these requirements (in section 188(1)) is that the FWC must take into account this Statement of Principles on Genuine Agreement, which is made by the FWC under section 188B.

The Fair Work Act also generally requires the FWC to be satisfied that a variation of an enterprise agreement has been genuinely agreed to by employees before it can approve the variation. In determining whether it is satisfied that a variation has been genuinely agreed to, the FWC must take into account this Statement of Principles on Genuine Agreement in the manner and to the extent provided for in the Fair Work Act and the *Fair Work Regulations 2009*.

Informing employees of bargaining for a proposed enterprise agreement

Informing employees of their right to be represented by a bargaining representative

1. The employer should ensure that employees of the employer who will be covered by a proposed enterprise agreement and are employed at the notification time for the agreement (as defined in section 173(2) of the Fair Work Act) are informed:
 - (a) that the employer is bargaining for an enterprise agreement and of the proposed coverage of the agreement, and
 - (b) of the employees’ rights to be represented in bargaining for the agreement, including by an employee organisation or by another bargaining representative of their choice, and how to exercise those rights,

at such a time and in such a manner that the employees have a reasonable opportunity to be represented in bargaining for the agreement.

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2. Where section 173(1) of the Fair Work Act applies to the employer in relation to a proposed enterprise agreement, the employer will be taken to satisfy paragraph 1 if, subject to paragraph 3, the employer gives a notice of employee representational rights in accordance with sections 173 and 174.
 3. An employer should not mislead employees (by words, action or otherwise) as to:
 - (a) the employees' right to be represented by a bargaining representative, or
 - (b) the role of an employee organisation as the default bargaining representative of its members.

NOTE 1: Section 173(2) of the Fair Work Act provides that the *notification time* for a proposed enterprise agreement is the time when:

- (a) the employer agrees to bargain, or initiates bargaining, for the agreement; or
- (aa) the employer receives a request to bargain under section 173(2A) in relation to the agreement; or
- (b) a majority support determination in relation to the agreement comes into operation; or
- (c) a scope order in relation to the agreement comes into operation; or
- (d) a supported bargaining authorisation in relation to the agreement that specifies the employer comes into operation; or
- (e) a single interest employer authorisation in relation to the agreement that specifies the employer comes into operation.

NOTE 2: Section 173(1) applies to an employer that will be covered by a proposed single-enterprise agreement (other than a greenfields agreement). It requires the employer to take all reasonable steps to give the notice of employee representational rights to each employee who will be covered by the agreement and is employed at the notification time for the agreement (unless the employer has already given the employee the notice within a reasonable period before the notification time for the agreement).

The notice of employee representational rights is in Schedule 2.1 to the *Fair Work Regulations 2009* (Cth). Section 174(1A) of the Fair Work Act provides that the notice must contain the content prescribed by the regulations, not contain any other content, and be in the form prescribed by the regulations. Regulation 2.04 sets out how the notice is to be given to employees. Section 173(3) requires the employer to give the notice as soon as practicable, and not later than 14 days, after the notification time for the agreement.

NOTE 3: Section 188(5) provides that the FWC may disregard minor procedural or technical errors in relation to sections 173 and 174, provided that it is satisfied that the employees were not likely to have been disadvantaged by the errors.

Providing employees with a reasonable opportunity to consider a proposed enterprise agreement

4. The employer should provide employees with a reasonable opportunity to consider a proposed enterprise agreement before voting on it, so that the employees can vote in an informed manner.
5. The employer will be taken to satisfy paragraph 4 if, a reasonable time period before the start of the voting on the proposed agreement, the employer provides

to employees who are entitled to vote on the agreement:

- (a) a full copy of the agreement, and
- (b) a full copy of any other material incorporated by reference in the agreement.

6. In paragraph 5, a **reasonable time period** will include:

- (a) at least 7 full calendar days before the day on which voting starts (for example, if the voting is to start on 9 May, employees are to be given the materials on or before 1 May), or
- (b) such other reasonable time period as is agreed with one or more employee organisation(s) acting as bargaining representative(s) for a significant proportion of the employees to be covered by the agreement.

7. The employer may provide the material specified in paragraph 5 to an employee:

- (a) by giving the employee, or ensuring the employee has access to, a hard copy of the material
- (b) by electronic means (either by sending the material to the employee, or by sending the employee a link to the material or otherwise giving the employee access to the material online), or
- (c) by a combination of the above methods,

provided the employee has a reasonable opportunity to access and read the material during the whole of the period from the time the material is provided until completion of the voting process.

Explaining to employees the terms of a proposed enterprise agreement and their effect

8. Section 180(5)(a) of the Fair Work Act requires the employer to take all reasonable steps to explain the terms of a proposed enterprise agreement, and the effect of those terms, to employees employed at the time who will be covered by the agreement. This should include at a minimum explaining to employees how the proposed agreement will alter their existing minimum entitlements and other terms and conditions of employment. In explaining this, subject to paragraph 9:

- (a) where a proposed enterprise agreement will replace an existing enterprise agreement—it will generally be sufficient to explain:
 - (i) the differences in entitlements and other terms and conditions

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- between the proposed agreement and the existing agreement, and
- (ii) the differences in entitlements and other terms and conditions between the proposed agreement and any applicable modern award provisions that have been varied since the existing agreement was made (including award variations that have not yet come into effect), or
- (b) where a proposed enterprise agreement will not replace an existing enterprise agreement—it will generally be necessary to explain the differences in entitlements and other terms and conditions between the proposed agreement and any applicable modern award.
9. In explaining to employees how the proposed enterprise agreement will alter their existing minimum entitlements and other terms and conditions of employment, there is usually no need to explain trivial differences between the proposed agreement and an existing enterprise agreement or modern award that have no effect on employees' entitlements or obligations.
 10. Section 180(5) will generally not be satisfied if the employer makes an incorrect representation or misleads employees (by words, action or otherwise) about a significant term of the proposed enterprise agreement or its effect.
 11. In determining whether section 180(5) has been complied with, the FWC may have regard to any explanation of the proposed enterprise agreement given to employees by one or more employee organisation(s) acting as bargaining representative(s) for a significant proportion of the employees to be covered by the agreement.
 12. Subject to paragraph 13, an employee may be provided with the explanation required by section 180(5):
 - (a) by giving the employee, or ensuring the employee has access to, a hard copy of the explanation
 - (b) by electronic means (either by sending the explanation to the employee, or by sending the employee a link to the explanation or otherwise giving the employee access to the explanation online)
 - (c) orally, but the FWC may take into account whether there is a written record or summary kept of the oral explanation, or
 - (d) by a combination of the above methods.
 13. Where an employee is provided with the explanation required by section 180(5) in part or full by the method in paragraph 12(a) or 12(b), the employee should
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have a reasonable opportunity to read the explanation. Where an employee is provided with the explanation required by section 180(5) in part or full by the method in paragraph 12(c), the employee should have a reasonable opportunity to attend the oral explanation.

14. Section 180(5)(b) of the Fair Work Act requires the explanation of the proposed enterprise agreement to be provided in an appropriate manner taking into account the particular circumstances and needs of the employees. In determining whether the explanation of the proposed enterprise agreement was given in an appropriate manner, in addition to taking into account the circumstances and needs of the kinds of employees in section 180(6), the FWC may take into account:
- (a) the location(s) where employees are working
 - (b) the environment(s) in which work is performed (for example, office, workshop, field, operating equipment or machinery, driving between locations)
 - (c) facilities available at the location(s) or in the environment(s) in which work is performed (for example, internet access, computer facilities, ability for employees to access mobile telephones while working, printing/copying facilities, private space for employees to consider material or information)
 - (d) hours of work or rosters which may limit access to relevant facilities or limit the time employees have to consider materials or information
 - (e) the circumstances and needs of employees who are absent from a workplace due to their roster cycle or for other reasons, and
 - (f) the nature of the work performed by the employees.

NOTE 1: Under section 180 of the Fair Work Act, before an employer requests that employees vote on a proposed enterprise agreement, the employer must take all reasonable steps to ensure that:

- (a) the terms of the agreement, and the effect of those terms, are explained to the employees employed at the time who will be covered by the agreement (section 180(5)(a)), and
- (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees (section 180(5)(b)).

Section 180(6) provides that, without limiting section 180(5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with section 180(5)(b):

- (a) employees from culturally and linguistically diverse backgrounds
- (b) young employees, and
- (c) employees who did not have a bargaining representative for the agreement.

NOTE 2: Section 188(5) provides that the FWC may disregard minor procedural or technical errors in relation to section 180(5), provided that it is satisfied that the employees were not likely to have been disadvantaged by the errors.

Providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing the employees of the time, place and method for the vote

15. Employees should be given a reasonable opportunity to vote on a proposed enterprise agreement in a free and informed manner. This should include:
- (a) a voting process that ensures the vote of each employee is not disclosed to or ascertainable by the employer, and
 - (b) a method and period of voting that provides all employees entitled to vote with a fair and reasonable opportunity to cast a vote.
16. Employees should be informed of the time, place and method for the vote:
- (a) at least 7 full calendar days before the day on which voting starts (for example, if the voting is to start on 9 May, employees should be informed on or before 1 May), or
 - (b) by such other reasonable time before the day on which voting starts as is agreed with one or more employee organisation(s) acting as bargaining representative(s) for a significant proportion of the employees to be covered by the agreement.

NOTE 1: Section 181(1) of the Fair Work Act provides that an employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it. If the agreement is a single-enterprise agreement (so that the employer is required by section 173(1) to give employees the notice of employee representational rights), section 181(2) provides that the request must not be made until at least 21 days after the day on which the last notice is given. Section 180A requires that, in relation to a multi-enterprise agreement, the employer must not make a request under section 181(1) unless each bargaining representative for the enterprise agreement that is an employee organisation has provided the employer with written agreement to the making of the request, or a voting request order made by the FWC permits the employer to make the request.

Section 182(1) provides that a single-enterprise agreement that is not a greenfields agreement is *made* when the employees of each employer that will be covered by agreement have been asked to approve the agreement under section 181(1) and a majority of those employees who have cast a valid vote approve the agreement. Section 182(2) provides that a multi-enterprise agreement is *made* when the employees of each employer that will be covered by agreement have been asked to approve the agreement under section 181(1), those employees have voted on whether or not to approve the agreement, and a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement.

NOTE 2: Section 188(5) provides that the FWC may disregard minor procedural or technical errors in relation to sections 180A, 181(2), 182(1) or 182(2), provided that it is satisfied that the employees were not likely to have been disadvantaged by the errors.

Other matters considered relevant

17. In considering whether employees have a sufficient interest in the terms of an enterprise agreement as required by section 188(2)(a) of the Fair Work Act, and whether the employees are sufficiently representative as required by section 188(2)(b), the FWC may take into account:
- (a) whether the employees entitled to vote on the enterprise agreement are to be paid the rates of pay provided for in the agreement, and
 - (b) the extent to which the employees entitled to vote on the enterprise agreement are employed across the full range of:
 - (i) classifications in the agreement
 - (ii) types of employment in the agreement (for example, full-time, part-time and casual)
 - (iii) geographic locations the agreement covers, and
 - (iv) industries and occupations the agreement covers.
18. 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 agreement-making between the employer(s) and employees in one or more enterprises, and the employees who voted for the agreement had an informed and genuine understanding of what was being approved.
19. If one or more employee organisation(s) acting as bargaining representative(s) for a significant proportion of the employees covered by the enterprise agreement:
- (a) supports the approval of the agreement, and
 - (b) does not have concerns that the agreement was not genuinely agreed to by the employees covered by the agreement,

then this should be given significant weight by the FWC in considering whether the agreement has been genuinely agreed.

NOTE: Section 188(2) provides that the FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employees requested to approve the agreement by voting for it:

- (a) have a sufficient interest in the terms of the agreement (section 188(2)(a)), and
- (b) are sufficiently representative, having regard to the employees the agreement is expressed to cover (section 188(2)(b)).

Definitions

20. In this Statement of Principles on Genuine Agreement:

- (a) ***employee organisation*** means an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009*
- (b) ***notice of employee representational rights*** means the notice in Schedule 2.1 to the *Fair Work Regulations 2009*, and
- (c) terms defined in the Fair Work Act have the meanings given in that Act, including the following terms:
 - (i) bargaining representative
 - (ii) employee
 - (iii) employer
 - (iv) enterprise agreement
 - (v) Fair Work Commission or FWC
 - (vi) genuinely agreed
 - (vii) greenfields agreement
 - (viii) made
 - (ix) modern award
 - (x) multi-enterprise agreement
 - (xi) notification time
 - (xii) single-enterprise agreement, and
 - (xiii) voting request order.