



## **[DRAFT] Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023**

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The Fair Work Commission makes the following instrument.

Dated

Name of maker **DRAFT ONLY—NOT FOR SIGNATURE**

Title

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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Note: This table relates only to the provisions of this instrument as originally made.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 Definitions

Note: A number of expressions used in this instrument are defined in definitions section of the *Fair Work Act*, including the following:

- (a) *bargaining representative*;
- (b) *employee*;
- (c) *employee organisation*;
- (d) *employer*;
- (e) *enterprise agreement*;
- (f) *Fair Work Commission* or *FWC*;
- (g) *genuinely agreed*;
- (h) *made*;
- (i) *modern award*;
- (j) *notification time*;
- (k) *organisation*.

In this instrument:

*employee organisation* means an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009*;

*Fair Work Act* means the *Fair Work Act 2009*;

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*notice of employee representational rights* means the notice in Schedule 2.1 to the *Fair Work Regulations 2009*.

## **5 Statement of Principles on Genuine Agreement**

For the purposes of section 188B(1) of the Fair Work Act, 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.

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## Schedule 1—**[DRAFT]** Statement of Principles on Genuine Agreement

### **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 2009* (Cth) (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.

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.

#### **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

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before the start of the voting on the proposed agreement, the employer gives employees who are eligible 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. An employee may be given the material specified in paragraph 5:
- (a) in hard copy, or
  - (b) by electronic means, provided the employee has a reasonable opportunity to read the material both during and outside working hours.
7. 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.

**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**

8. 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 eligible to vote with a fair and reasonable opportunity to cast a vote.
9. 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

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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.

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

10. Under section 180(5) 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)).
11. 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.
12. In section 180(5)(a), taking all reasonable steps to explain the terms of the agreement, and the effect of those terms, should include at a minimum explaining to employees how the proposed enterprise agreement will alter their existing minimum entitlements and other terms and conditions of employment. In explaining this:
  - (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 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

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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.
13. 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 agreement or its effect.
  14. In determining whether section 180(5) has been complied with, the Fair Work Commission (the FWC) may have regard to any explanation of the proposed 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.
  15. An employee may be provided with the explanation required by section 180(5):
    - (a) in hard copy
    - (b) by electronic means, provided the employee has a reasonable opportunity to read the materials both during and outside working hours, or
    - (c) orally, but the FWC may take into account whether there is a written record kept of the oral explanation.
  16. In determining whether the explanation of the agreement was given in an appropriate manner as required by section 180(5)(b), 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 locations(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)



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- (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.

**Other matters considered relevant**

- 17. 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)).
- 18. In considering the criteria in sections 188(2)(a) and 188(2)(b), the FWC may take into account:
  - (a) whether the employees who voted on the agreement are to be paid the rates of pay provided for in the agreement, and
  - (b) the extent to which the employees who voted on the 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.
- 19. 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.
- 20. In considering whether an enterprise agreement has been genuinely agreed to by the employees covered by the agreement, significant weight will be given to the

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views of one or more employee organisation(s) acting as bargaining representative(s) for a significant proportion of the employees covered by the agreement, where the organisation(s):

- (a) supports the approval of the agreement, and
- (b) does not have concerns that the agreement was not genuinely agreed.

### **Variations of enterprise agreements**

- 21. The above principles apply to variations of enterprise agreements as provided for under sections 211, 216AD(2), 216CC(2) and 216DD(2) of the Fair Work Act.