Fair Work Commission

Discussion paper:

Statement of principles on genuine agreement

This paper has been prepared by staff of the Fair Work Commission to promote discussion and facilitate the consultation process. It does not represent the views of the Commission on any issue.

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Introduction

Purpose of this discussion paper and development of the statement of principles

[1] On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (**Secure Jobs Better Pay Act**) received Royal Assent.

[2] The Secure Jobs Better Pay Act makes a number of amendments to Part 2-4 of the *Fair Work Act 2009* (**FW Act**), including inserting new s 188B which requires the Commission to 'make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement' (**statement of principles**). These amendments will commence on 6 June 2023, or an earlier date fixed by proclamation.

[3] This discussion paper is concerned with the Commission's development of the statement of principles. Pursuant to new s 188(1) of the FW Act, the Commission must take into account the statement of principles 'in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement' for the purposes of s 186(2)(a).

[4] The Acting President issued a Statement on 30 January 2023 setting out the process and timetable for the Commission to make the statement of principles. The purpose of this discussion paper is to promote discussion at the conferences being held on 14 and 15 February 2023, so as to inform the development of a draft statement of principles. In particular, this paper is intended to:

- provide an overview of and some initial commentary on the amendments to Part 2-4 of the FW Act relevant to new s 188B
- compare the current 'genuine agreement' requirements under s 188 and those under new s 188, and
- raise questions for interested parties to consider as to the purpose and scope of the statement of principles.

The statement of principles

[5] New s 188B provides:

> **188B Statement of principles on genuine agreement**
>
> (1) The FWC must, by legislative instrument, make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement.
>
> (2) The FWC must publish the statement on the FWC's website and by any other means that the FWC considers appropriate.
>
> (3) The statement must deal with the following matters:
>
> (a) informing employees of bargaining for a proposed enterprise agreement;
>
> (b) informing employees of their right to be represented by a bargaining representative;
>
> (c) providing employees with a reasonable opportunity to consider a proposed enterprise agreement;
>
> (d) explaining to employees the terms of a proposed enterprise agreement and their effect;
>
> (e) providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote;
>
> (f) any matter prescribed by the regulations for the purposes of this paragraph;
>
> (g) any other matters the FWC considers relevant.
>
> (4) The statement is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the statement.

[6] Amended s 598(1) provides that the statement of principles will not constitute a decision of the Commission for the purposes of Part 5-1 of the FW Act.

[7] The Secure Jobs Better Pay Act does not prescribe how the statement of principles is to be developed or approved. However, the *Legislation Act 2003* (Cth) (**Legislation Act**) requires consultation with affected persons before the statement of principles is made (Legislation Act s 17). After being made, the statement of principles must be registered on the Federal Register of Legislation and laid before Parliament (*Legislation Act* ss 15G and 38). Section 4 of the *Acts Interpretation Act 1901* (Cth) (as it was in force on 25 June 2009) permits the Commission to take steps now to make the statement of principles, so that it will take effect when the new ss 188 and 188B of the FW Act come into operation on 6 June 2023.

[8] The Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Bill 2022* (**Revised EM**) states at [742]:

> 'New subsection 188B(4) provides that the statement of principles is a legislative instrument to which section 42 of the Legislation Act (disallowance) does not apply ... The statement is intended to assist parties in moving from more prescriptive pre-approval requirements to the principles-based approach to genuine agreement proposed by these amendments. Making the statement would therefore be divorced from the broader political process and largely explanatory and facilitative (i.e. directed at assisting persons to comply with the new provisions). The statement would be independent of Parliament and not require additional Parliamentary scrutiny.'

[9] The general provisions of the FW Act relating to the performance of the Commission's functions will also apply to the making of the statement of principles.[1] The amendments confer on the Commission a new function of: 'promoting good faith bargaining and the making of enterprise agreements' (new s 576(2)(ab)). Section 578(a) provides that in performing functions and exercising powers under a part of the FW Act the Commission must take into account the object of the FW Act and any particular objects of the relevant part. The object of the FW Act is set out in s 3. The objects of Part 2-4 are set out in s 171 as follows:

> **171 Objects of this Part**
>
> The objects of this Part are:
>
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and
>
> (ii) dealing with disputes where the bargaining representatives request assistance; and
>
> (iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

[10] Sections 577, 578 and 3 are reproduced at **Attachment 1**.

Current FW act provisions relating to genuine agreement

[11] Part 2-4 of the FW Act is about the making, approval, variation and termination of enterprise agreements. Relevantly for present purposes, Division 4 of Part 2-4 deals with the approval of proposed enterprise agreements by employees and sets out when an enterprise agreement is made (Subdivision A). Subdivision B of Division 4 deals with the approval of

[1] FW Act ss.577-578.

enterprise agreements by the Commission. The remaining Subdivisions of Division 4 deal with certain approval requirements, including in relation to genuine agreement by employees and the better off overall test.

[12] Section 186 of the FW Act provides that the Commission must approve an enterprise agreement if the requirements in ss 186 and 187 are met.[2] Among these requirements, s 186(2)(a) requires that the Commission be satisfied that the agreement (if it is not a greenfields agreement) 'has been genuinely agreed to by the employees covered by the agreement'.

[13] The current s 188 defines 'genuinely agreed' as follows:

> **188 When employees have genuinely agreed to an enterprise agreement**
>
> (1) An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:
>
> (i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);
>
> (ii) subsection 181(2) (which requires that 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 has not been genuinely agreed to by the employees.
>
> (2) An enterprise agreement has also been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the agreement would have been ***genuinely agreed*** to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and
>
> (b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.

[14] In brief, current s 188(1) provides that an enterprise agreement has been 'genuinely agreed' to by the employees covered by the agreement if the Commission is satisfied that:

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[2] The Secure Jobs Better Pay Act inserts a new s 186(2A) that could potentially be relevant for present purposes (see Attachment 2). The Act does not amend s 187.

- the employer, or each of the employers, covered by the agreement complied with the pre-approval steps in ss 180(2), (3) and (5), and the 'notice of employee representational rights' (**NERR**) timing requirement in s 181(2) (s 188(1)(a))

- the agreement was made by an employee vote in accordance with s 182(1) or s 182(2) (s 188(1)(b)), and

- there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees (s 188(1)(c)).

[15] The pre-approval steps covered by s 188(1)(a) were summarised in *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others*[3] (***Huntsman***):

- section 180(2): the employer must take all reasonable steps to ensure that during the 'access period'[4] the 'relevant employees'[5] are given a copy of the text of the agreement and any material incorporated by reference into it, or have access throughout the access period to a copy of those materials
- section 180(3): the employer must take all reasonable steps to notify the relevant employees by the start of the access period of the time and place at which the vote will occur and of the voting method
- section 180(5): the employer must take all reasonable steps to ensure that the terms of the agreement and their effect are explained to the relevant employees in an appropriate manner taking into account their particular circumstances and needs, and
- section 181(2): the employer must not request employees to approve the agreement by voting on it until at least 21 days after the day on which the last NERR under s 173(1) is given.[6]

[16] Further, to meet the approval requirements under s 188(1)(a), and to meet the further approval requirement under s 188(1)(b) that the agreement be properly made, the employer must also strictly comply with the NERR timing and form and content requirements in ss 173 and 174.[7]

[17] Section 173 sets out the requirements for giving the NERR to employees:

- the employer must take all reasonable steps to give the NERR to each employee who will be covered by the agreement and is employed at the 'notification time'[8]

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[3] [2019] FWCFB 318.

[4] Defined in s 180(4) as the 7-day period ending immediately before the start of the voting process.

[5] Defined in s 180(2) as: 'during the access period … the employees … employed at the time who will be covered by the agreement'.

[6] *Huntsman* [23].

[7] See *Peabody Moorvale Pty Ltd v CFMEU* [2014] FWCFB 2042, *Uniline Australia Limited* [2016] FWCFB 4969, *AMWU v Broadspectrum (Australia) Pty Ltd* [2018] FWCFB 6556 and *Huntsman* [64]–[65].

[8] Defined in s 173(2) as the time when the employer agrees to bargain or initiates bargaining for the agreement, or a majority support determination, scope order, or low paid authorisation comes into operation.

(unless a NERR was already given a reasonable period before the notification time) (ss 173(1) and (4)), and

- the employer must give the NERR as soon as practicable, and not later than 14 days, after the notification time (s 173(3)).

[18] Section 174 sets out content and form requirements for the NERR:

- the NERR must contain the content prescribed by the regulations and no other content, and be in the form prescribed by the regulations[9] (s 174(1A)), and
- the NERR must include the content prescribed in ss 174(2)-(5) — which includes specifying that the employee may appoint a bargaining representative to represent the employee in bargaining for the agreement and in a matter before the Commission that relates to bargaining for the agreement (s 174(2)).

[19] Prior to the insertion of s 188(2) (see below), the Full Bench majority in *Ostwald Bros Pty Ltd v CFMEU*[10] described the operation of s 188(1) (then numbered s 188) in broad terms as follows:

> '[78] … "*Genuinely agreed*", in s.188 is expressed in terms of satisfaction that particular bargaining provisions within the Act have been complied with (ss.188(a) and (b)) and satisfaction of a more general criterion in s.188(c), rather than in terms of a general consideration of whether in the circumstances of a particular agreement a member is satisfied that the agreement has been genuinely agreed to by the employees.
>
> [79] As the Full Bench in *Galintel* noted "Section 188 establishes a set of requirements, each of which must be satisfied if the necessary finding is to be made under s186(2)(a)".
>
> [80] Section 188 of the Act does not provide a wide general discretion for determining whether employees have genuinely agreed to an enterprise agreement focussed at the point of approval. Rather it requires specific actions to have been undertaken (in ss.188(a) and (b) at specified times in advance of approval), with s.188(c) then requiring satisfaction that there are no <u>other</u> reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees. Section 188(c) of the Act, although itself a broad discretionary consideration, is an additional matter about which [the Commission] needs to be satisfied and relates to grounds other than those arising in relation to the ss.188(a) and (b) matters.
>
> [81] Section 188 of the Act is different, in that respect, from some previous statutory provisions concerning genuine agreement or genuine approval of agreements which were cast in general terms. For example, s.170LT (Certifying an Agreement) of the *Workplace Relations Act 1996* ...' [Citations omitted]

[20] Sections 173, 174, 180, new 180A, 181, 182 and 186 of the FW Act are reproduced at **Attachment 2**. The Attachment contains the current provisions with the amendments made

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[9] See *Fair Work Regulations 2009* (Cth) reg 2.05 and the prescribed NERR in Schedule 2.1.

[10] [2012] FWAFB 9512.

by the Secure Jobs Better Pay Act marked-up. The content and form of the NERR is prescribed in *Fair Work Regulations 2009* (**Regulations**) reg 2.05 and Schedule 2.1. A copy of Schedule 2.1 is at **Attachment 3**.

Section 188(2) and Commission performance in dealing with approval applications

[21] Section 188(2) was inserted into the FW Act by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth), with effect from 12 December 2018. In short, s 188(2) allows the Commission to approve an agreement despite the employer having made 'minor procedural or technical errors' with the pre-approval steps, provided employees have not been disadvantaged by the errors in terms of the underlying objects of the pre-approval steps.[11]

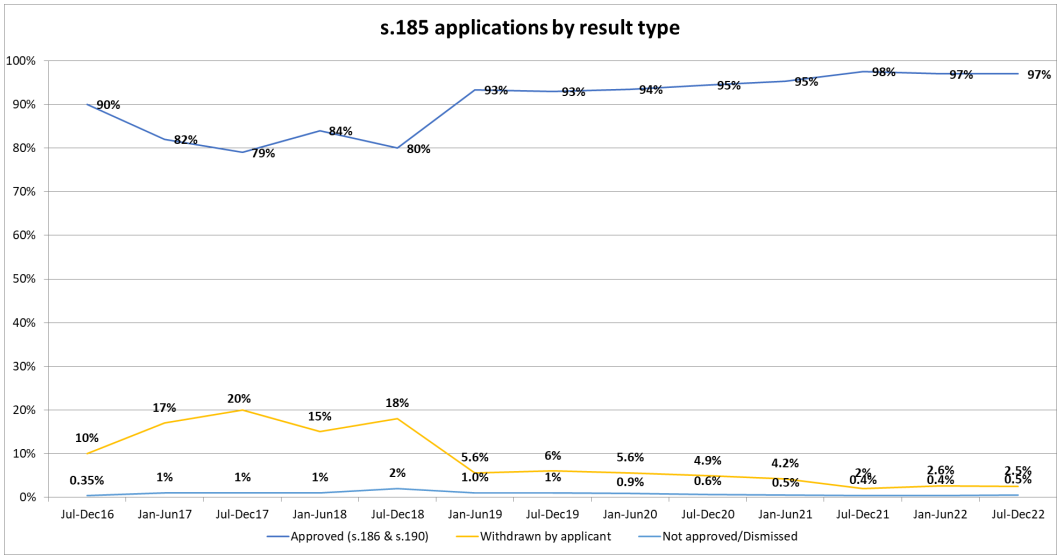
[22] The introduction of s 188(2) reflected a 2015 recommendation of the Productivity Commission. The Revised Explanatory Memorandum for the amending Act described it as follows:

> '46. The effect of new subsection 188(2) is that an enterprise agreement will have been genuinely agreed to despite any minor procedural or technical error if the employees (as a whole) were not likely to have been disadvantaged by those errors.
>
> 47. Examples of minor procedural or technical errors could include (without limitation):
>
> - employees being informed of the time and place for voting on the proposed enterprise agreement or the voting method that will be used for the agreement just after the start of the access period rather than by the start of the access period (subsection 180(3));
> - employees being requested to approve a proposed enterprise agreement on the 21st day after the last Notice was given, rather than at least 21 days after the day on which the last Notice was given (subsection 181(2));
> - the inclusion of the employer's company logo or letterhead on a Notice;
> - the inclusion of additional materials that are stapled with a Notice; or
> - minor changes to the text of the Notice that had no relevant effect on the information that was being communicated in it (for example, the Notice may say to contact a particular person in the human resources department rather than 'contact your employer').
>
> 48. When considering whether the employees were not likely to have been disadvantaged by an error, in relation to the relevant procedural requirements, the FWC could take into account, for example, the effect of the error and the circumstances of the error.'

[11] *Huntsman* [95].

[23] Since the introduction of s 188(2) in December 2018, the number of applications for approval of an enterprise agreement that are rejected by the Commission (including because of failure to comply with the pre-approval steps) has decreased from a high of 2% in the period from July to December 2018 to 0.5% in the period from July 2022 to December 2022. The number of applications that are withdrawn has fallen even more markedly following the introduction of s 188(2), from 18% in the period from July 2018 to December 2018, to 2.5% in the period from July 2022 to December 2022. This is illustrated in Chart 1 below:

Chart 1 – s 185 applications by result type



[24] There has also been a significant improvement in the Commission's timeliness in approving enterprise agreements in recent years. Table 1 below shows that between 1 July 2022 and 31 December 2022, all agreements approved (with or without undertakings) were approved within a median of 15 calendar days. This is consistent with the Commission's 2021-22 results. For 2021-22, all enterprise agreements were approved within a median of 15 calendar days, and agreements not requiring undertakings were approved within a median of 12 calendar days:

Table 1 – Time taken to approve and number of s 185 applications

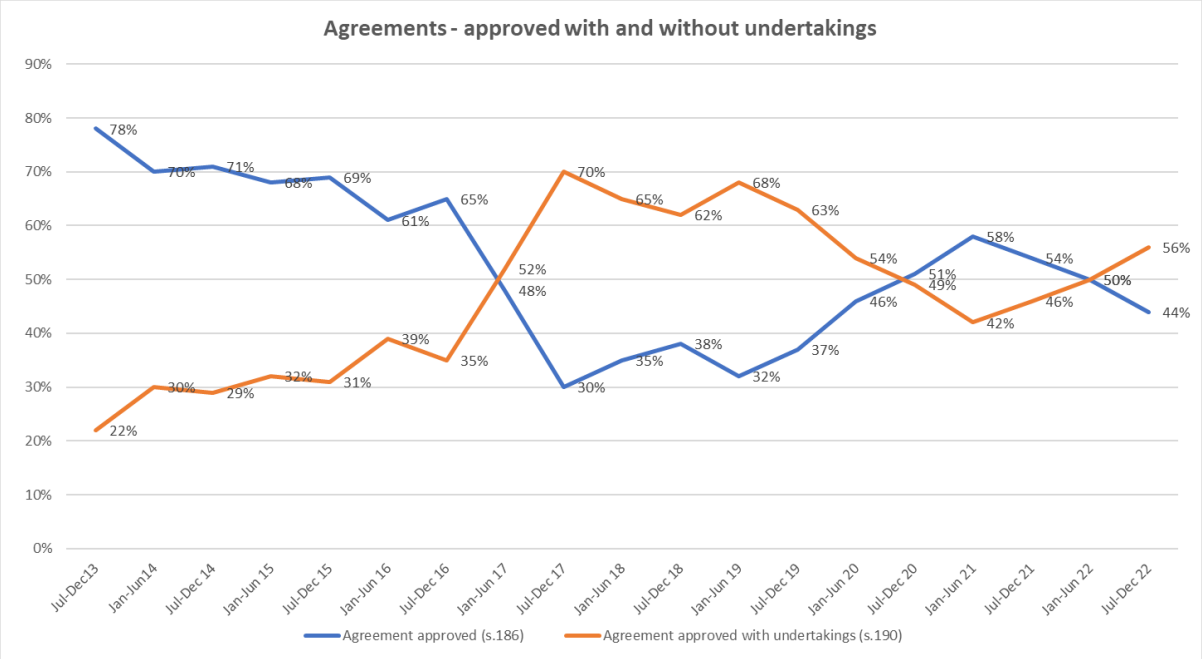
Median calendar days from lodgment to approval	PBS KPI	2017-18	2018-19	2019-20	2020-21	2021-22	1 July 2022 – 31 Dec 2022
Agreement approved without undertakings (PBS KPI [a])	32 days	32 days	30 days	17 days	14 days	12 days	12 days
All agreements approved (with & without undertakings)	–	76 days	79 days	33 days	20 days	15 days	15 days
s 185 applications lodged	–	5,287	4,932	3,795	3,753	4,516	2,405**

[a] This is the Portfolio Budget Statement Key Performance Indicator set in the 2019–20 Budget Papers [at p.127]

** This figure may change in the event that matters are reclassified or deemed to be lodged in error.

[25] Currently, 44% of s 185 applications lodged are fully compliant with the approval requirements in ss 186 and 187 and can be approved without undertakings: see Chart 2 below. This is compared to a low of 30% in July to December 2017.

Chart 2 – agreements approved with and without undertakings



Statement of principles on genuine agreement

[26] The Revised EM describes the amendments to Division 4 of Part 2-4 of the FW Act as follows:

> 'Part 14 of the Bill would amend Divisions 3 and 4 of Part 2-4 of the FW Act to simplify requirements that need to be met for an enterprise agreement to be approved by the FWC, which are often regarded as overly prescriptive and complex.
>
> Various steps that an employer must currently take within strict timeframes would be removed (for example, the requirement to take all reasonable steps to provide employees with access to the agreement during a 7 day 'access' period ending immediately before the start of the voting process).
>
> The requirements to provide a NERR and to wait until at least 21 days after the last notice is given before requesting employees to vote would no longer apply to bargaining for a proposed single interest employer agreement, supported bargaining agreement or cooperative workplaces agreement but would be retained in the case of a proposed single enterprise agreement.
>
> Where pre-approval requirements are removed, they would be replaced with one broad requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.
>
> The intention is to simplify the pre-approval requirements, while retaining sufficient safeguards for employees. This would encourage enterprise bargaining and also stop the FWC from having to refuse to approve enterprise agreements because of minor technical or procedural deficiencies that did not affect how employees voted on the agreement.
>
> Some important safeguards would be included. The FWC would be required to publish a 'statement of principles' containing guidance for employers about how they can ensure employees have genuinely agreed. The statement of principles would be taken into account by the FWC when determining whether to approve an enterprise agreement.
>
> For there to have been genuine agreement, the FWC would need to be satisfied that the employees requested to vote on the agreement have a sufficient interest in its terms and are sufficiently representative, having regard to the employees the agreement is expressed to cover.
>
> The FWC would also need to be satisfied that prior to requesting employees to vote for the agreement, the employer has obtained written agreement from each bargaining representative that is an employee organisation to make that request.

Additionally, the FWC would still need to be satisfied that the employer has sufficiently explained the terms of the proposed agreement and their effect to the relevant employees, having regard to their particular needs and circumstances.'[12]

[27] Item 509 of Schedule 1 to the Secure Jobs Better Pay Act replaces s 188 of the FW Act with a new s 188. In contrast to the current s 188, the new s 188 does not define 'genuinely agreed' but rather specifies in ss 188(2)–(4A) circumstances in which the Commission cannot be satisfied that an enterprise agreement has been genuinely agreed:

> **188 Determining whether an enterprise agreement has been genuinely agreed to by employees**
>
> *Statement of principles*
>
> (1) The FWC must take into account the statement of principles made under section 188B in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.
>
> *Sufficient interest and sufficiently representative*
>
> (2) 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; and
>
> (b) are sufficiently representative, having regard to the employees the agreement is expressed to cover.
>
> Note: In *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (2018) 262 FCR 527, a Full Court of the Federal Court observed that whether an agreement has been genuinely agreed involves consideration of the authenticity of the agreement of the employees, including whether the employees who voted for the agreement had an informed and genuine understanding of what was being approved.
>
> *Agreement of bargaining representatives that are employee organisations*
>
> (2A) The FWC cannot be satisfied that an enterprise agreement to which section 180A applies has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with section 180A in relation to the agreement.
>
> *Where notice of employee representational rights was required*
>
> (3) Subsection (4) applies in relation to an enterprise agreement if an employer was required by subsection 173(1) (which deals with giving notice of employee representational rights) to take all reasonable steps to give notice in relation to the agreement.

[12] Revised EM [697]–[705].

(4) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with the following provisions in relation to the agreement:

(a) sections 173 and 174 (which deal with giving notice of employee representational rights);

(b) subsection 181(2) (which requires that employees not be requested to approve certain enterprise agreements until 21 days after the last notice of employee representational rights is given).

Explanation of terms of the agreement

(4A) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with subsection 180(5) in relation to the agreement.

Minor errors may be disregarded

(5) In determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement (including determining whether it is satisfied that an employer complied with the provisions mentioned in subsection (2A) or (4) or (4A)), the FWC may disregard minor procedural or technical errors made in relation to the following requirements if it is satisfied that the employees were not likely to have been disadvantaged by the errors:

(a) section 173 or 174 (which deal with notices of employee representational rights for certain agreements);

(aa) subsection 180(5) (which requires employers to explain the terms of agreements);

(ab) section 180A (which deals with agreement of certain bargaining representatives);

(b) subsection 181(2) (which requires that employees not be requested to approve certain enterprise agreements until 21 days after the last notice of employee representational rights is given);

(c) subsection 182(1) or (2) (which deal with the making of different kinds of enterprise agreements by employee vote).

Regulations

(6) 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 requirements (if any) prescribed by the regulations for the purposes of this subsection are met.

[28] New s 188B(3), which we have earlier set out, specifies the mandatory content of the statement of principles. The matters which must be dealt with are:

- informing employees of bargaining for a proposed enterprise agreement;

- informing employees of their right to be represented by a bargaining representative;
- providing employees with a reasonable opportunity to consider a proposed enterprise agreement;
- explaining to employees the terms of a proposed enterprise agreement and their effect;
- providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote;
- any matter prescribed by the regulations for the purposes of s 188B(3); and
- any other matters the FWC considers relevant.

[29] The extract from the Revised EM at [26] above, might suggest that one purpose of the statement of principles is to 'fill the gaps' in the genuine agreement requirements resulting from the removal of certain detailed pre-approval steps. From that perspective, one element of the mandatory content of the statement of principles that seems to stand out is the requirement that they must deal with 'explaining to employees the terms of a proposed enterprise agreement and their effect' (s 188B(3)(d)). That stands out because the current detailed requirement for giving such an explanation to employees has been retained (see new s 188(4A) and amended s 180(5)).

[30] The wording of s 188B(1) might suggest a broader purpose of the statement of principles — as 'a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement.'

[31] The Revised EM provides some further explanation of the purpose of the statement of principles, which may again suggest a broader purpose than filling gaps:

> 'The Statement of Principles will guide parties as to how the FWC will consider particular issues when determining whether the proposed enterprise agreement has been 'genuinely agreed'. These scenarios could include issues such as whether bargaining genuinely occurred prior to voting and whether employee organisation bargaining representatives were appropriately involved in bargaining.
>
> … The FWC would make the statement to provide guidance for employers about ways to ensure an enterprise agreement is genuinely agreed to by their employees. The statement would not create new rights or obligations for employers and employees but would be taken into account by the FWC when determining whether an enterprise agreement has been genuinely agreed. The statement is intended to assist parties in moving from more prescriptive pre-approval requirements to the principles-based approach to genuine agreement proposed by these amendments. Making the statement would therefore be divorced from the broader political process

and largely explanatory and facilitative (i.e. directed at assisting persons to comply with the new provisions) ...'[13]

[32] As noted earlier, in contrast to the current s 188, new s 188 does not define 'genuinely agreed' but rather specifies some circumstances in which the Commission cannot be satisfied that an agreement has been genuinely agreed. Consistent with this structural difference, new s 188 does not include any 'residual' provision corresponding to current s 188(1)(c). The statement of principles includes such a residual provision (new s 188B(3)(g)), but the extract from the Revised EM above states that 'the statement would not create new rights or obligations for employers or employees'.

Comparison of current s 188 and new s 188

[33] **Table 2** below compares the requirements of current s 188 and new s 188, and includes some commentary on their relevance to the mandatory content of the statement of principles:

[13] Revised EM [741]–[742].

Table 2: Comparison of current s 188 and new s 188		
CURRENT SECTION 188 **188 When employees have genuinely agreed to an enterprise agreement**	**NEW SECTION 188** **188 Determining whether an enterprise agreement has been genuinely agreed to by employees**	**STATEMENT OF PRINCIPLES (SOP) - COMMENTS**
No equivalent provision	*Statement of principles* (1) The FWC must take into account the statement of principles made under section 188B in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.	The Revised EM states that new s 188 is intended: '721. … to provide a more suitable, principles-based approach to protecting employees' rights to participate in genuine collective bargaining in good faith, rather than the current rigid, rules-based approach. … 742. … The FWC would make the statement to provide guidance for employers about ways to ensure an enterprise agreement is genuinely agreed to by their employees. The statement would not create new rights or obligations for employers and employees but would be taken into account by the FWC when determining whether an enterprise agreement has been genuinely agreed. The statement is intended to assist parties in moving from more prescriptive pre-approval requirements to the principles-based approach to genuine agreement proposed by these amendments. Making the statement would therefore be … largely explanatory and

		facilitative (i.e. directed at assisting persons to comply with the new provisions).' The SOP must deal with the following matters: • informing employees of bargaining for a proposed enterprise agreement; • informing employees of their right to be represented by a bargaining representative; • providing employees with a reasonable opportunity to consider a proposed enterprise agreement; • explaining to employees the terms of a proposed enterprise agreement and their effect; • providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote; • any matter prescribed by the regulations; • any other matters the FWC considers relevant.

No equivalent provision	*Sufficient interest and sufficiently representative* (2) 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; and (b) are sufficiently representative, having regard to the employees the agreement is expressed to cover. Note: In *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (2018) 262 FCR 527, a Full Court of the Federal Court observed that whether an agreement has been genuinely agreed involves consideration of the authenticity of the agreement of the employees, including whether the employees who voted for the agreement had an informed and genuine understanding of what was being approved.	This issue does not appear to fall under the SOP's specified mandatory content (although s 188B(3)(g) requires the SOP to deal with 'any other matters the FWC considers relevant'). New s 188(2) has no counterpart in the express requirements of current s 188, but reflects court and FWC case law relating to the residual s 188(1)(c). The Revised EM states: '724. A note to subsection 188(2) indicates that in the decision of *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 262 FCR 527, a Full Court of the Federal Court observed that whether an agreement has been genuinely agreed involves consideration of the authenticity of the agreement of the employees, including whether the employees who voted for the agreement had an informed and genuine understanding of what was being approved. 725. New subsection 188(2) is intended as a safeguard against agreements which are not the result of collective bargaining in good faith, including 'unrepresentative' and 'low voter cohort' agreements. For example, a small cohort of employees offered rates of pay above those provided in the enterprise

		agreement should not be capable of being found to have genuinely agreed (see, for example, *Re KCL Industries Pty Ltd* [2016] FWCFB 3048; (2016) 257 IR 266)). 726. New paragraph 188(2)(a) is directed at ensuring that employees must have a 'sufficient stake' in the terms of the agreement. For example, employees would not have a sufficient interest in the terms of an agreement if no genuine collective bargaining in good faith occurred as part of the agreement-making process. 727. New paragraph 188(2)(b) is intended to ensure that employees requested to vote on an agreement are sufficiently representative, having regard to the coverage terms or intended coverage of the agreement. For example, employees engaged in one industry, occupation or classification should not be capable of being found to have genuinely agreed to an enterprise agreement intended to cover employees across a substantially wider range of industries, occupations or classifications. 728. A small cohort of employees would also not be sufficiently representative where the agreement is intended to ultimately cover a much wider workforce following transfers of employment, possibly within a corporate group.'

No equivalent provision	*Agreement of bargaining representatives that are employee organisations* (2A) The FWC cannot be satisfied that an enterprise agreement to which section 180A applies has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with section 180A in relation to the agreement. New 180A provides in the case of a proposed multi-enterprise agreement (a single interest employer agreement, supported bargaining agreement or cooperative workplace agreement) that before requesting that employees vote on the agreement, an employer must obtain the written agreement of the employee organisations that are bargaining representatives or obtain a 'voting request order' from the FWC: see **Attachment 2**.	This issue does not clearly fall under the SOP's specified mandatory content, although it might have some overlap with 'providing employees with a reasonable opportunity to consider a proposed enterprise agreement'. This new requirement does not apply to a single-enterprise agreement. The Revised EM states: '718. Currently, whether an employer's failure to notify or obtain the agreement of bargaining representatives prior to putting an enterprise agreement to a vote amounts to a breach of the good faith bargaining requirements in section 228 of the FW Act depends on the particular circumstances (see, e.g., *CFMMEU v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510).'
(1) An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that: …	Rather than defining 'genuinely agreed' for the purposes of s 186 (including the residual s 188(1)(c)), new s 188 specifies circumstances in which the FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement.	
(1)(a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:	The pre-approval step in s 180(5) (as enlarged upon in s 180(6)), is retained in new s 188(4A). There is no reference to ss 180(2) and (3), as those pre-approval requirements are repealed (see below).	The changes to s 180(5) are not substantive. The Revised EM states: '705. … the FWC would still need to be satisfied that the employer has sufficiently explained the terms of the

(i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);	*Explanation of terms of the agreement* (4A) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with subsection 180(5) in relation to the agreement. Amended s 180 (with amendments to current s 180 marked in red text or struck out) is set out below: **180 Certain pre-approval requirements** ~~**180 Employees must be given a copy of a proposed enterprise agreement etc.**~~ *Pre-approval requirements* (1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section. ~~*Employees must be given copy of the agreement etc.*~~ ~~(2) The employer must take all reasonable steps to ensure that:~~ ~~(a) during the access period for the agreement, the employees (the ***relevant employees***) employed at the time who will be covered by the agreement are given a copy of the following materials:~~	proposed agreement and their effect to the relevant employees, having regard to their particular needs and circumstances.' The repeal of ss 180(2) and (3) removes the following pre-approval requirements: • during the access period the employer take all reasonable steps to give employees a copy of the EA and any incorporated materials (or access to those materials) (present s 180(2)), and • by the start of the access period the employer take all reasonable steps to notify employees of the time and place of voting and the voting method (present s 180(3)). The Revised EM states: '712. To provide greater flexibility, these detailed requirements [in ss 180(2)-(4)] would be subsumed within the overarching requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by employees. Guidance on how an employer can seek employees' genuine agreement would be included in the statement of principles published by the FWC under new section 188B.'

	~~(i) the written text of the agreement;~~ ~~(ii) any other material incorporated by reference in the agreement; or~~ ~~(b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.~~ ~~(3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:~~ ~~(a) the time and place at which the vote will occur;~~ ~~(b) the voting method that will be used.~~ ~~(4) The ***access period*** for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).~~ … *Terms of the agreement must be explained to employees etc.* (5) 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~~relevant employees~~; and (b) the explanation is provided in an appropriate manner taking into account the particular circumstances	The repealed requirements fall under the following specified mandatory content of the SOP: • providing employees with a reasonable opportunity to consider a proposed enterprise agreement, and • providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote. Section 180(5) (which is retained) falls under the SOP mandatory content of: • explaining to employees the terms of a proposed enterprise agreement and their effect. This suggests that the purpose of the SOP goes beyond 'filling gaps' left by repeal of certain current pre-approval requirements.

	and needs of those employees~~the relevant employees~~. (6) Without limiting paragraph (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 that paragraph: (a) employees from culturally and linguistically diverse backgrounds; (b) young employees; (c) employees who did not have a bargaining representative for the agreement.	
(ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and	*Where notice of employee representational rights was required* (3) Subsection (4) applies in relation to an enterprise agreement if an employer was required by subsection 173(1) (which deals with giving notice of employee representational rights) to take all reasonable steps to give notice in relation to the agreement. (4) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with the following provisions in relation to the agreement:	Section 173 is amended to confine the requirement that the employer give a NERR to employees (and the NERR form and content and timing requirements), to employers that will be covered by a 'proposed single-enterprise agreement (other than a greenfields agreement)'. Consequential amendments are made to s 174. It follows that the NERR requirements will not apply to a proposed multi-enterprise agreement. At the present time, the great majority of agreements made are single-enterprise agreements.

	(a) sections 173 and 174 (which deal with giving notice of employee representational rights); (b) subsection 181(2) (which requires that employees not be requested to approve certain enterprise agreements until 21 days after the last notice of employee representational rights is given).	New ss 188(3) and (4) expressly provide that where the NERR requirements still apply, compliance with the NERR timing and form and content requirements (ss 173 and 174) and the related timing of the EA vote (amended s 181(2)) is still required for genuine agreement. Under the present provisions this follows from FWC case law. The NERR and related EA vote timing requirements fall under the SOP mandatory content of: • informing employees of bargaining for a proposed enterprise agreement • informing employees of their right to be represented by a bargaining representative, and • providing employees with a reasonable opportunity to consider a proposed enterprise agreement. The extent to which the repeal of the NERR-related requirements in respect of multi-enterprise agreements creates a 'gap' that might be filled by the SOP, may depend upon the extent to which the new arrangements for multi-

		enterprise bargaining otherwise ensure employees are aware of the opportunity to bargain, representation in bargaining and that employees have a reasonable opportunity to consider a proposed enterprise agreement before voting. For example, for a multi-enterprise agreement, the NERR-related EA vote timing requirement might be superseded by the new requirement for agreement to a vote or a voting request order (new ss 188(2A) and 180A).
(1)(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	There is no equivalent express requirement. Despite this, new s 188(5) (see below) makes clear that the FWC may disregard minor procedural or technical errors made in relation to the requirements in ss 182(1) or (2) if it is satisfied that the employees were not likely to have been disadvantaged by the errors.	This issue does not clearly fall under the SOP's specified mandatory content, although it might have some overlap with 'providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner'.
(1)(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.	There is no equivalent 'residual' provision in new s.188, but (in contrast to current s 188) new s 188 is not drafted as a definition of 'genuinely agreed'.	Court and FWC case law has identified various circumstances resulting in an agreement not being genuinely agreed that are not expressly addressed in current s 188, but fall under the current s 188(1)(c) (including, for example, circumstances addressed by new s 188(2) as discussed above).

		The SOP might deal with such circumstances as 'other matters the FWC considers relevant'.
(2) An enterprise agreement has also been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that: (a) the agreement would have been ***genuinely agreed*** to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and (b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.	*Minor errors may be disregarded* (5) In determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement (including determining whether it is satisfied that an employer complied with the provisions mentioned in subsection (2A) or (4) or (4A)), the FWC may disregard minor procedural or technical errors made in relation to the following requirements if it is satisfied that the employees were not likely to have been disadvantaged by the errors: (a) section 173 or 174 (which deal with notices of employee representational rights for certain agreements); (aa) subsection 180(5) (which requires employers to explain the terms of agreements); (ab) section 180A (which deals with agreement of certain bargaining representatives); (b) subsection 181(2) (which requires that employees not be requested to approve certain enterprise agreements until 21 days after the last	The Revised EM states: '701. The intention is to simplify the pre-approval requirements, while retaining sufficient safeguards for employees. This would encourage enterprise bargaining and also stop the FWC from having to refuse to approve enterprise agreements because of minor technical or procedural deficiencies that did not affect how employees voted on the agreement.' The *Huntsman* decision set out the principles applying to the operation of s 188(2). These are summarised at **Attachment 4**. The new provision for the FWC to disregard certain 'minor procedural or technical errors' under s 188(5), applies to all of the steps required of employers under new s 188 (ie under ss 188(2A)–(4A), but not s 188(2)), and in addition applies to the requirements under ss 181(2) and 182(1) or 182(2). One possible function of the SOP might be to inform the FWC's consideration as to whether an employer's non-compliance with such a requirement constitutes a

	notice of employee representational rights is given); (c) subsection 182(1) or (2) (which deal with the making of different kinds of enterprise agreements by employee vote).	'minor procedural or technical error' and whether 'employees were not likely to have been disadvantaged' by such an error, for the purposes of new s 188(5).
There is no equivalent provision.	*Regulations* (6) 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 requirements (if any) prescribed by the regulations for the purposes of this subsection are met.	No regulations have been made as at 1 February 2023.

Variation of enterprise agreements

[34] The new pre-approval requirements will also apply to approval of enterprise agreement variations: see for example new s 207A (which is the equivalent to s 180A)[14] and consequential changes to s 211 ('When the FWC must approve a variation of an enterprise agreement').

[35] Divisions 7, 9 and 10 of Part 2-4 of the FW Act are amended in relation to cooperative workplace agreements, supported bargaining authorisations and agreements, and single interest employer (SIE) authorisations and agreements respectively. Section 188, as modified in those Divisions, applies to the exercise of certain Commission powers to vary agreements to extend their coverage:

- new s 216DC(1)(b)(ii) requires the Commission to approve the variation of a SIE agreement to extend coverage if it is satisfied of various matters including that, if the variation application is made by consent, the variation has been 'genuinely agreed to' by the affected employees (and new s 216DD provides for how the Commission is to apply new s 188 with modifications to decide this)
- new s 216AB(1)I provides that unless the Commission 'is satisfied that there are serious public interest grounds for not approving the variation', it must approve the variation of a supported bargaining agreement to extend coverage if satisfied of various matters including that the variation has been 'genuinely agreed to' by the affected employees (and new s 216AD provides for how the Commission is to apply new s 188 with modifications to decide this), and
- new s 216CB(1)I requires the Commission to approve the variation of a cooperative workplace agreement to extend coverage if satisfied of various matters including that the variation has been 'genuinely agreed to' by the affected employees (and new s 216CC provides for how the Commission is to apply new s 188 with modifications to decide this).

[36] New s 240A(1) provides for a bargaining representative for a proposed multi-enterprise agreement to apply to the Commission for a voting request order and new ss 240A(2)–(3) make equivalent provision in relation to variations of multi-enterprise enterprise agreements. New s 240B sets out when the Commission must make a voting request order. Relevant provisions are reproduced at Attachment 5.

Considerations and questions for the parties

[37] Section 188B(1) describes the statement of principles as being:

[14] Note: the requirement in new s 207A does not apply to variations of a supported bargaining agreement, single interest employer agreement or cooperative workplace agreement to add an employer and its employees to coverage of the agreement.

'principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement.'

[38] Section 188(1) provides that the Commission:

'must take into account the statement of principles … in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.'

[39] As related above, the Revised EM variously describes the statement of principles in terms of:

- an important safeguard in the context of the removal of some pre-approval requirements, containing guidance for employers about how they can ensure employees have genuinely agreed to an enterprise agreement
- guiding parties as to how the Commission will consider particular issues when determining whether the proposed enterprise agreement has been 'genuinely agreed' —scenarios could include issues such as whether bargaining genuinely occurred prior to voting and whether employee organisation bargaining representatives were appropriately involved in bargaining
- not creating new rights or obligations for employers and employees, but would be taken into account by the Commission when determining whether an enterprise agreement has been genuinely agreed
- being intended to assist parties in moving from more prescriptive pre-approval requirements to the principles-based approach to genuine agreement proposed by these amendments, and
- largely explanatory and facilitative (i.e. directed at assisting persons to comply with the new provisions).[15]

[40] Although the intention in introducing the statement of principles may have been to replace the present detailed prescription of pre-approval steps with broad principles, it may be noted the present NERR requirements are retained for single-enterprise agreements and the present requirements to explain the terms of an agreement to employees are retained for all types of enterprise agreements.

[41] It seems that the functions of the statement of principles might include, for example, to:

- fill any 'gaps' left by the repeal of certain current pre-approval requirements — the repealed requirements being:

[15] See Revised EM at [702], [741]–[742].

- for multi-enterprise agreements only, the NERR form and content and timing requirements, and the related vote timing requirement
- for all types of agreements, the requirement during the access period to give employees copies of or access to the agreement and any incorporated materials
- for all types of agreements, the requirement by the start of the access period to notify employees of the time and place of voting and the voting method, and
- for all types of agreements, the requirement that the agreement be made by employee vote in accordance with s 182(1) or 182(2)

- provide guidance to parties as to how to satisfy the remaining and new genuine agreement requirements in new s 188 — including the requirements that also fall under the specified mandatory content of the statement of principles, such as:
  - for single-enterprise agreements, the NERR form and content and timing requirements, and the related vote timing requirement, and
  - for all types of agreements, the requirements to appropriately explain to employees the terms of the agreement and the effect of those terms
- provide guidance to parties on genuine agreement requirements that are not expressly included in the current or new s 188, but have been found by the courts and/or the Commission to fall under the current s 188(1)(c) (other reasonable grounds for believing an agreement has not been genuinely agreed), and
- provide guidance to parties as to whether an employer's non-compliance with a requirement under new ss 188(2A)–(4A) may be disregarded by the Commission under new s 188(5).

The overall function(s) of the statement of principles

Question 1

Noting the observations at [41] above, what do you see as the function(s) of the statement of principles? In particular, how do you think the statement of principles can meaningfully assist:

a. parties in meeting their obligations under the FW Act?

b. the Commission in deciding approval applications?

Question 2

As a legislative instrument, the statement of principles must be made in accordance with the Legislation Act and could not be amended to reflect evolving Commission and court case law without following the processes required by that Act.

In view of this:

a. do you think the statement of principles should be expressed as broad, high-level principles, rather than adding further prescription, in advance of Commission authority on the new requirements?

b. alternatively—and particularly where detailed regulation has been removed—might broad principles give too little guidance to employers and the Commission?

Question 3

How are the objects in ss 3 and 171 of the FW Act relevant to the content of the statement of principles? Should the statement of principles contain an overarching object and if so, what should this be?

Question 4

Do you see a role for the statement of principles in facilitating bargaining and the making of enterprise agreements by employers, such as small business employers, who have historically not engaged in enterprise bargaining? If so, how could the statement of principles assist such employers?

Question 5

Given currently only 44% of s 185 applications lodged are fully compliant and can be approved without undertakings, how might the statement of principles assist in increasing employer compliance with pre-approval requirements?

Question 6

Charts 1 and 2 illustrate the Commission's improved timeliness and performance in dealing with enterprise agreement approval applications in recent years, including the very low incidence of applications that are rejected because of non-compliance with pre-approval requirements since the enactment of s 188(2). Given this, how do you see the statement of principles enhancing the Commission's agreement approvals process?

Specified mandatory content of the statement of principles

Question 7

The statement of principles must deal with the following matters:

- 'informing employees of bargaining for a proposed enterprise agreement', and
- 'informing employees of their right to be represented by a bargaining representative'.

For single-enterprise agreements these matters will continue to be addressed in substantively the same manner as currently pursuant to new ss 188(3) and (4), the NERR form and content and timing requirements in amended ss 173 and 174 and the vote timing requirement in amended s 181(2) (see Table 2 above and **Attachment 2**).

For multi-enterprise agreements, the extent to which removal of the NERR requirements leaves a 'gap' in the genuine agreement requirements (which might be filled through the statement of principles), may depend upon the extent to which the new arrangements for multi-enterprise bargaining otherwise address the above matters.

The NERR form and content and timing requirements might be said to be underpinned by a principle along the following lines:

> *An employer that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement must take all reasonable steps to ensure that each employee who:*
>
> - *will be covered by the agreement; and*
> - *is employed at the notification time for the agreement*
>
> *is informed:*
>
> - *that the employer is bargaining for an enterprise agreement and of the proposed coverage of the agreement; and*
> - *of their rights to be represented in bargaining for the agreement and how to exercise those rights*
>
> *at such a time and in such a manner that the employee has a reasonable opportunity to be represented in bargaining for the agreement by a bargaining representative of their choice.*

How do you think the statement of principles should deal with the above mandatory content matters? In particular:

a. Does the draft principle suggested above adequately capture the objectives of these matters in respect of single-enterprise agreements?

b. Would there be benefit in including a principle of this nature in the statement of principles? Is this draft principle too detailed or alternatively too broad? Is additional content required?

c. Do you have suggested changes to the content or wording of the draft principle suggested above?

d. Having regard to the new arrangements for multi-enterprise bargaining, what should be included in a corresponding principle in respect of multi-enterprise agreements, or could a broader single principle be directed to both single-enterprise agreements and multi-enterprise agreements?

Question 8

The statement of principles must deal with the following matters:

- 'providing employees with a reasonable opportunity to consider a proposed enterprise agreement',
- 'providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote', and
- 'explaining to employees the terms of a proposed enterprise agreement and their effect'.

The first 2 of these matters are currently addressed by ss 180(2) and (3) of the FW Act, which are removed in amended s 180 (see Table 2 above and **Attachment 2**). There are no equivalent requirements under new s 188.

The third of these matters is currently addressed by ss 180(5) and (6) of the FW Act, which are substantively retained under new s 188(4A).

The requirements in current ss 180(2), (3) and (5) might be said to be underpinned by principles along the following lines:

> *Before an employer requests that the employees employed at the time who will be covered by the agreement approve a proposed enterprise agreement by voting for it, the employer must take all reasonable steps to ensure that the employees:*
>
> - *have access to the agreement and any material incorporated by reference in the agreement; and*
> - *receive an explanation of the terms of the agreement and the effect of those terms*
>
> *at such a time and in such a manner as to enable them to make a reasonably informed decision as to whether or not to vote to approve the agreement.*
>
> *An employer that will be covered by a proposed enterprise agreement must take all reasonable steps to ensure that:*
>
> - *the employees (employed at the time who will be covered by the agreement) are informed of the arrangements for the vote on the agreement; and*
> - *the vote on the agreement is conducted*
>
> *at such a time and in such a manner that they have a reasonable opportunity to vote on the agreement.*

How do you think the statement of principles should deal with the above mandatory content matters? In particular:

a. Do the draft principles suggested above adequately capture the objectives of these matters?

b. Would there be benefit in including principles of this nature in the statement of principles? Are these draft principles too detailed or alternatively too broad? Is additional content required?

c. Do you have suggested changes to the content or wording of the draft principles suggested above?

d. Where detailed pre-approval requirements are removed (as here, in relation to ss 180(2) and (3)), if a broad principles-based approach were adopted in the statement of principles, should the statement of principles also provide that if the employer complies with the previous detailed requirements then the employer will satisfy the new broad principle (so as to give certainty to employers)?

Any other matters the FWC considers relevant

Question 9

The statement of principles must also deal with 'any other matters the FWC considers relevant'.

Do you consider that the statement of principles should deal with any matters in addition to the specified mandatory content? In particular:

a. Do you see any significant gaps in the genuine agreement requirements under new s 188? In particular, are there issues that have been identified by the courts or the Commission under current s 188(1)(c) ('other reasonable grounds for believing that the agreement has not been genuinely agreed to') that should be dealt with in the statement of principles? If so, what are these issues?

b. New s 188(2) provides that the Commission cannot be satisfied that an enterprise agreement has been genuinely agreed to unless the Commission is satisfied that the relevant employees have a sufficient interest in the terms of the agreement, and are sufficiently representative having regard to the employees the agreement is expressed to cover (see further Table 2 above).

   Would there be benefit in including additional content relating to this requirement in the statement of principles? If so, what would this be?

c. New s 188(2A) provides that the Commission cannot be satisfied that a multi-enterprise agreement has been genuinely agreed to by the relevant employees unless it is satisfied that the employer complied with new s 180A (i.e. the employer obtained the written agreement of bargaining representatives that are employee organisations to put the agreement to a vote, or obtained a voting request order).

   Would there be benefit in including additional content relating to this requirement in the statement of principles? If so, what would this be?

New s 188(5): minor procedural or technical errors that may be disregarded

Question 10

Under new s 188(5) the Commission may disregard 'minor procedural or technical errors' in relation to any of the steps required of employers under new s 188 (ie under ss 188(2A)–(4A), but not s 188(2)), or under ss 181(2) and 182(1) or (2), if the Commission is satisfied that the employees 'were not likely to have been disadvantaged by the errors' (see Table 2 above).

Given existing Commission case law on s 188(2) (summarised from *Huntsman* at **Attachment 4**) would there be benefit in the statement of principles providing guidance on what may constitute 'minor procedural or technical errors' and when employees are 'not likely to be disadvantaged' for the purposes of new s 180(5)?

Variation of enterprise agreements

Question 11

The statement of principles is also relevant to the variation of enterprise agreements (see [34]–[35] above and **Attachment 5**).

Do any different considerations arise in the context of agreement variations that should be addressed in the statement of principles?

Fair Work Commission

Attachment 1

Section 578 of the FW Act provides:

> **578 Matters the FWC must take into account in performing functions etc.**
>
> In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:
>
> (a) the objects of this Act, and any objects of the part of this Act; and
>
> (b) equity, good conscience and the merits of the matter; and
>
> (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

As stated in s.578(a), in performing functions and exercising powers under a part of the FW Act (including the approval of agreements under Part 2-4) the Commission must take into account the objects of the FW Act and any particular objects of the relevant part.

The object of the FW Act is set out in s 3:

> **3 Object of this Act**
>
> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
>
> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of

statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized businesses.

Section 577 is also relevant; it provides:

577 Performance of functions etc. by the FWC

(1) The FWC must perform its functions and exercise its powers in a manner that:

(a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).

(2) In performing its functions under paragraph 576(2)(b), the FWC must have regard to:

(a) the need for guidelines and other materials to be available in multiple languages; and

(b) the need for community outreach in multiple languages.

Attachment 2

Sections 173, 174, 180, new 180A, 181, 182 and 186 of the FW Act are reproduced below. The current provisions have marked-up changes to reflect the amendments made by the Secure Jobs Better Pay Act:

173 Notice of employee representational rights

Employers for single-enterprise agreements ~~Employer~~ to notify each employee of representational rights

(1) An employer that will be covered by a proposed single-enterprise agreement (other than a greenfields agreement) ~~proposed enterprise agreement that is not a greenfields agreement~~ must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:

(a) will be covered by the agreement; and

(b) is employed at the notification time for the agreement.

Note: For the content of the notice, see section 174.

Notification time

(2) 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 subsection (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 ~~low-paid~~supported bargaining authorisation in relation to the agreement that specifies the employer comes into operation~~.~~;

(e) a single interest employer authorisation in relation to the agreement that specified the employer comes into operation.

Note: An employer that is required to give a notice under subsection (1) ~~The employer~~ cannot request employees to approve the agreement under section 181 until 21 days after the last notice is given (see subsection 181(2)).

(2A) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement (other than a greenfields agreement) may give the employer who will be covered by the proposed agreement a request in writing to bargain for the proposed agreement if:

(a) the proposed agreement will replace an earlier single-enterprise agreement (the ***earlier agreement***) that has passed its nominal expiry date; and

(b) a single interest employer authorisation did not cease to be in operation because of the making of the earlier agreement; and

(c) no more than 5 years have passed since the nominal expiry date; and

(d) the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

When notice must be given

(3) The employer must give the notice as soon as practicable, and not later than 14 days, after the notification time for the agreement.

Notice need not be given in certain circumstances

(4) An employer is not required to give a notice to an employee under subsection (1) in relation to a proposed enterprise agreement if the employer has already given the employee a notice under that subsection within a reasonable period before the notification time for the agreement.

How notices are given

(5) The regulations may prescribe how notices under subsection (1) may be given.

174 Content and form of notice of employee representational rights

Application of this section

(1) This section applies if an employer that will be covered by a proposed enterprise agreement is required to give a notice under subsection 173(1) to an employee.

Notice requirements

(1A) The notice must:

(a) contain the content prescribed by the regulations; and

(b) not contain any other content; and

(c) be in the form prescribed by the regulations.

(1B) When prescribing the content of the notice for the purposes of paragraph (1A)(a), the regulations must ensure that the notice complies with this section.

Content of notice—employee may appoint a bargaining representative

(2) The notice must specify that the employee may appoint a bargaining representative to represent the employee:

(a) in bargaining for the agreement; and

(b) in a matter before the FWC that relates to bargaining for the agreement.

Content of notice—default bargaining representative

(3) ~~If subsection (4) does not apply, the~~The notice must explain that:

(a) if the employee is a member of an employee organisation that is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement; and

(b) the employee does not appoint another person as his or her bargaining representative for the agreement;

the organisation will be the bargaining representative of the employee.

~~*Content of notice—bargaining representative if a low-paid authorisation is in operation*~~

~~(4) If a low-paid authorisation in relation to the agreement that specifies the employer is in operation, the notice must explain the effect of paragraph 176(1)(b) and subsection 176(2) (which deal with bargaining representatives for such agreements).~~

Content of notice—copy of instrument of appointment to be given

(5) The notice must explain the effect of paragraph 178(2)(a) (which deals with giving a copy of an instrument of appointment of a bargaining representative to an employee's employer).

Section 179 ('Disclosure by organisations that are bargaining representatives') and ss 180(4A)–(6) (which require an employer to give employees copies of union disclosure of interest documents and employer disclosure of interest documents during a prescribed period) are amended in consequence of the repeal of the 'access period' for a proposed enterprise agreement.

180 Certain pre-approval requirements

~~**180 Employees must be given a copy of a proposed enterprise agreement etc.**~~

Pre-approval requirements

(1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

~~*Employees must be given copy of the agreement etc.*~~

~~(2) The employer must take all reasonable steps to ensure that:~~

~~(a) during the access period for the agreement, the employees (the ***relevant employees***) employed at the time who will be covered by the agreement are given a copy of the following materials:~~

~~(i) the written text of the agreement;~~

~~(ii) any other material incorporated by reference in the agreement; or~~

~~(b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.~~

~~(3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:~~

~~(a) the time and place at which the vote will occur;~~

~~(b) the voting method that will be used.~~

~~(4) The ***access period*** for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).~~

Employees must be given copy of disclosure documents etc.

(4A) If an organisation gives the employer a document under section 179 before the voting process referred to in subsection 181(1) starts for the agreement~~by the end of the fourth day of the access period for the agreement~~, the employer must take all reasonable steps to ensure that the employees employed at the time who will be covered by the agreement~~relevant employees~~:

(a) are given a copy of the document as soon as practicable after it was given to the employer; or

(b) are given access to a copy of the document as soon as practicable after it was given to the employer and have access to that copy until the voting process starts~~throughout the remainder of the access period for the agreement~~.

Note: This subsection is a civil remedy provision (see Part 4-1).

(4B) If the employer is required to prepare a document under section 179A, the employer must take all reasonable steps to ensure that the employees employed at the time who will be covered by the agreement~~relevant employees~~:

(a) are given a copy of the document a reasonable time before the voting process referred to in subsection 181(1) starts for the agreement~~by the end of the fourth day of the access period for the agreement~~; or

(b) are given access to a copy of the document a reasonable time before the voting process starts and have access to that copy until the voting process starts.

~~(b) are given access to a copy of the document by the end of that fourth day and have access to that copy throughout the remainder of the access period for the agreement.~~

Note: This subsection is a civil remedy provision (see Part 4-1).

(4C) The employer must not knowingly or recklessly make a false or misleading representation in the document that ~~the relevant~~ employees are given a copy of or access to under subsection (4B).

Note: This subsection is a civil remedy provision (see Part 4-1).

Terms of the agreement must be explained to employees etc.

(5) 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~~relevant employees~~; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees~~the relevant employees~~.

(6) Without limiting paragraph (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 that paragraph:

(a) employees from culturally and linguistically diverse backgrounds;

(b) young employees;

(c) employees who did not have a bargaining representative for the agreement.

180A Agreement of bargaining representatives that are employee organisations

(1) This section applies to a proposed enterprise agreement that is a multi-enterprise agreement.

(2) An employer must not request under subsection 181(1) that employees approve the enterprise agreement by voting for it unless:

(a) 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

(b) a voting request order permits the employer to make the request.

Note: Voting request orders can be made where failure to provide written agreement to the making of a request is unreasonable in the circumstances (see section 240B).

181 Employers may request employees to approve a proposed enterprise agreement

(1) 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.

(2) If the employer is required by subsection 173(1) (which deals with giving notice of employee representational rights) to take all reasonable steps to give notice in relation to the agreement, the request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) in relation to the agreement is given.

~~(2) The request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) (which deals with giving notice of employee representational rights) in relation to the agreement is given.~~

(3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

182 When an enterprise agreement is made

Single-enterprise agreement that is not a greenfields agreement

(1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve the agreement.

Multi-enterprise agreement that is not a greenfields agreement

(2) If:

(a) a proposed enterprise agreement is a multi-enterprise agreement; and

(b) the employees of each of the employers that will be covered by the agreement have been asked to approve the agreement under subsection 181(1); and

(c) those employees have voted on whether or not to approve the agreement; and

(d) a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement;

the agreement is ***made*** immediately after the end of the voting process referred to in subsection 181(1).

Greenfields agreement

(3) A greenfields agreement is ***made*** when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover (which need not be all of the relevant employee organisations for the agreement).

(4) If:

(a) a proposed single-enterprise agreement is a greenfields agreement that has not been made under subsection (3); and

(b) there has been a notified negotiation period for the agreement; and

(c) the notified negotiation period has ended; and

(d) the employer or employers that were bargaining representatives for the agreement (the ***relevant employer or employers***) gave each of the employee organisations that were bargaining representatives for the agreement a reasonable opportunity to sign the agreement; and

(e) the relevant employer or employers apply to the FWC for approval of the agreement;

the agreement is taken to have been ***made***:

(f) by the relevant employer or employers with each of the employee organisations that were bargaining representatives for the agreement; and

(g) when the application is made to the FWC for approval of the agreement.

Note: See also section 185A (material that must accompany an application).

186 When the FWC must approve an enterprise agreement—general requirements

Basic rule

(1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

(a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and

(b) if the agreement is a multi-enterprise agreement:

(i) the agreement has been genuinely agreed to by each employer covered by the agreement; and

(ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and

(c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and

(d) the agreement passes the better off overall test.

Note 1: For ~~when~~ provisions dealing with determining whether an enterprise agreement has been genuinely agreed to by employees, see section 188.

Note 2: The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).

Note 3: The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).

(2AA) In applying paragraph 186(2)(b), the FWC must disregard anything done, and the effect of anything done, by a person other than one of the employers who bargained for the agreement, that is authorised by or under this Act (including protected industrial action).

Requirement relating to representation for cooperative workplace agreement (not greenfields)

(2A) If the agreement is a cooperative workplace agreement that is not a greenfields agreement, the FWC must be satisfied that at least some of the employees covered by the agreement were represented by an employee organisation in relation to bargaining for the agreement.

Requirement that multi-enterprise agreements (other than greenfields agreements) not cover employees in relation to general building and construction work

(2B) If the agreement is a multi-enterprise agreement that is not a greenfields agreement, the FWC must be satisfied that the agreement does not cover employees in relation to general building and construction work.

Requirement that the group of employees covered by the agreement is fairly chosen

(3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.

(3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

(4) The FWC must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

(4A) The FWC must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

(5) The FWC must be satisfied that:

(a) the agreement specifies a date as its nominal expiry date; and

(b) the date will not be more than 4 years after the day on which the FWC approves the agreement.

Requirement for a term about settling disputes

(6) The FWC must be satisfied that the agreement includes a term:

(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

~~Note 1: The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).~~

~~Note 2: However, this does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4).~~

Fair Work Commission

Attachment 3

Schedule 2.1—Notice of employee representational rights

(regulation 2.05)

Fair Work Act 2009, subsection 174(1A)

[Name of employer] gives notice that it is bargaining in relation to an enterprise agreement *([name of the proposed enterprise agreement])* which is proposed to cover employees that *[proposed coverage]*.

What is an enterprise agreement?

An enterprise agreement is an agreement between an employer and its employees that will be covered by the agreement that sets the wages and conditions of those employees for a period of up to 4 years. To come into operation, the agreement must be supported by a majority of the employees who cast a vote to approve the agreement and it must be approved by an independent authority, Fair Work Commission.

If you are an employee who would be covered by the proposed agreement:

You have the right to appoint a bargaining representative to represent you in bargaining for the agreement or in a matter before Fair Work Commission about bargaining for the agreement.

You can do this by notifying the person in writing that you appoint that person as your bargaining representative. You can also appoint yourself as a bargaining representative. In either case you must give a copy of the appointment to your employer.

[If the agreement is not an agreement for which a low-paid authorisation applies—include:]

If you are a member of a union that is entitled to represent your industrial interests in relation to the work to be performed under the agreement, your union will be your bargaining representative for the agreement unless you appoint another person as your representative or you revoke the union's status as your representative.

[If a low-paid authorisation applies to the agreement—include:]

Fair Work Commission has granted a low-paid bargaining authorisation in relation to this agreement. This means the union that applied for the authorisation will be your bargaining representative for the agreement unless you appoint another person as your

representative, or you revoke the union's status as your representative, or you are a member of another union that also applied for the authorisation.

[if the employee is covered by an individual agreement-based transitional instrument—include:]

If you are an employee covered by an individual agreement:

If you are currently covered by an Australian Workplace Agreement (AWA), individual transitional employment agreement (ITEA) or a preserved individual State agreement, you may appoint a bargaining representative for the enterprise agreement if:

- the nominal expiry date of your existing agreement has passed; or
- a conditional termination of your existing agreement has been made (this is an agreement made between you and your employer providing that if the enterprise agreement is approved, it will apply to you and your individual agreement will terminate).

Questions?

If you have any questions about this notice or about enterprise bargaining, please speak to your employer or bargaining representative, or contact the Fair Work Ombudsman or the Fair Work Commission.

Fair Work Commission

Attachment 4

Construction of current s 188(2)

1. The adjective 'minor' qualifies both procedural errors and technical errors, such that the expression reads 'minor procedural *errors* or *minor* technical errors'. The word minor is a limitation upon the type of errors contemplated by s 188(2)(a).

2. A failure to comply with a procedural requirement will constitute a procedural error within the meaning of s 188(2)(a).

3. A failure to comply with a technical requirement will constitute a 'technical error' within the meaning of s 188(2)(b).

4. A single error may have both procedural and technical components.

5. The impact of the errors is to be assessed by reference to the objects of the requirements in ss 188(2)(a), 188(1)(b), 173 or 174.

6. What constitutes a 'minor error' calls for an evaluative judgment having regard to the underlying purpose of the relevant procedural or technical requirement which has not been complied with and the relevant circumstances.

7. Generally speaking, the lower the level of non-compliance the more likely it is to be characterised as a 'minor error'.

8. Whether an incidence of non-compliance is characterised as a 'minor error' also depends on the nature of the requirement which has not been complied with.

9. Some species of error are unlikely to be classified as 'minor'.

10. The test in s 188(2)(b) is whether the employees covered by the agreement were 'not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174' [emphasis added]. The impact of the errors is to be assessed by reference to the objects of those requirements and not by reference to any more general sense of 'genuine agreement'.

11. Cost or inconvenience to the employer and employee covered by an agreement associated with a delay in the approval of the agreement is *not* relevant to the question of whether the employees covered by the agreement 'were not likely to be disadvantaged by the errors'.

12. The test suggested by s 188(2)(b) is whether 'the employees covered by the agreement were not likely to have been *disadvantaged* by the errors'.

13. The word 'likely' in s 188(2)(b) means 'probable' in the sense that there is an odds-on chance of it happening, rather than merely being some possibility of it happening. The word 'disadvantaged' suggests a deprivation which manifests in the employees covered by the agreement being prevented from substantively exercising their rights within the bargaining regime in Part 2-4 of the Act.

14. In assessing whether employees were not likely to have been disadvantaged by an error, it may be necessary to consider the particular circumstances of the employees concerned at the time the error occurred and the impact of the error on the subsequent course of bargaining. This may include considering any steps taken by the employer to address the adverse impact of the non-compliance.

Fair Work Commission

Attachment 5

New sections 207A, 216AB, 216AD, 216CB, 216CC, 216DC, 216DD, 240A and 240B are reproduced below, together with current s 211 with marked-up changes to reflect the amendments made by the Secure Jobs Better Pay Act:

207A Agreement of employee organisations covered by the agreement

(1) This section applies to a proposed variation of a multi-enterprise agreement.

(2) An employer must not request under subsection 208(1) that employees approve the variation by voting for it unless:

(a) each employee organisation covered by the enterprise agreement has provided the employer with written agreement to the making of the request; or

(b) a voting request order permits the employer to make the request.

Note: Voting request orders can be made where failure to provide written agreement to the making of a request is unreasonable in the circumstances (see section 240B).

211 When the FWC must approve a variation of an enterprise agreement

Approval of variation by the FWC

(1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC must approve the variation if:

(a) the FWC is satisfied that had an application been made under subsection 182(4) or section 185 for the approval of the agreement as proposed to be varied, the FWC would have been required to approve the agreement under section 186; and

(b) the FWC is satisfied that the agreement as proposed to be varied would not specify a date as its nominal expiry date which is more than 4 years after the day on which the FWC approved the agreement;

unless the FWC is satisfied that there are serious public interest grounds for not approving the variation.

Note: The FWC may approve a variation under this section with undertakings (see section 212).

(1A) Despite subsection (1), the FWC must not approve the variation if:

(a) as a result of the variation, employees who were not covered by the agreement will be covered by it; and

(b) the employees' employer is specified in a supported bargaining authorisation, or a single interest employer authorisation, in relation to those employees.

Modification of approval requirements

(2) For the purposes of the FWC deciding whether it is satisfied of the matter referred to in paragraph (1)(a), the FWC must:

(a) take into account subsections (3) and (4) and any regulations made for the purposes of subsection (6); and

(aa) if the agreement is a multi-enterprise agreement—take into account subsection (3A); and

(b) comply with subsection (5); and

(c) disregard sections 190 and 191 (which deal with the approval of enterprise agreements with undertakings); and

(d) disregard sections 191A and 191B (which deal with FWC amendment of enterprise agreements).

(3) The following provisions:

(a) section 180 (which deals with pre-approval steps);

(b) subsection 186(2) (which deals with the FWC's approval of enterprise agreements);

(c) section 188 (which deals with genuine agreement);

have effect as if:

(d) references in sections 180 and 188 (other than paragraph 188(2)(b)) to the proposed enterprise agreement, or the enterprise agreement, were references to the proposed variation, or the variation, of the enterprise agreement (as the case may be); and

(e) references in ~~those provisions~~ section 180, subsection 186(2) and section 188 to the employees employed at the time who will be covered by the proposed enterprise agreement, or the employees covered by the enterprise agreement, were references to the affected employees for the variation; and

(f) references in section 180 to subsection 181(1) were references to subsection 208(1); and

(fa) subsections 180(4A) to (4C) were omitted; and

(fb) the word "bargaining" in paragraph 180(6)(c) were omitted; and

(g) the words "if the agreement is not a greenfields agreement—" in paragraph 186(2)(a) were omitted; and

(ga) references in paragraph 186(2)(a) to the agreement were references to the variation of the agreement; and

(h) paragraph 186(2)(b) were omitted; and

(ha) references in paragraphs 186(2)(c) and (d) and 188(2)(b) to the agreement were references to the enterprise agreement as proposed to be varied; and

~~(hb) subparagraph 188(a)(ii) were omitted; and~~(hb) references in section 188 to section 180A were references to section 207A; and

(j) the words "182(1) or (2)" in ~~paragraph 188(b)~~ paragraph 188(5)(c) were omitted and the words "209(1) or (2)" were substituted.

(3A) Subsection 186(2B) has effect as if the requirement in that subsection that the agreement must not cover employees in relation to general building and construction work were a requirement that the agreement as proposed to be varied must not cover employees in relation to such work.

(4) Section 193 (which deals with passing the better off overall test) has effect as if:

(a) the words "that is not a greenfields agreement" in subsection (1) were omitted; and

(b) subsection (3) were omitted; and

(c) the words "the agreement" in subsection (6) were omitted and the words "the variation of the enterprise agreement" were substituted; and

(d) the reference in subsection (6) to subsection 182(4) or section 185 were a reference to section 210.

(4A) Section 193A (which also deals with passing the better off overall test) has effect as if:

(a) the words "if the agreement is not a greenfields agreement—" in paragraph (3)(b) were omitted; and

(aa) the words "in any case—a bargaining representative for the agreement" in paragraph (3)(c) were omitted and the words "the employee organisation or employee organisations that are covered by the agreement" were substituted; and

(ab) the words "the bargaining representative or bargaining representatives of" in paragraph (4)(a) were omitted; and

(ac) the words "the bargaining representative or bargaining representatives of award covered employees for the agreement (other than a bargaining representative that is not an employee organisation)" in paragraph (4)(b)

were omitted and the words "the employee organisation or employee organisations that are covered by the agreement" were substituted; and

(b) subsection (5) were omitted; and

(c) the words "if the agreement is not a greenfields agreement—" in paragraph (6A)(b) were omitted; and

(d) the words "in any case—a bargaining representative for the agreement" in paragraph (6A)(c) were omitted and the words "the employee organisation or employee organisations that are covered by the agreement" were substituted.

(5) For the purposes of determining whether an enterprise agreement as proposed to be varied passes the better off overall test, the FWC must disregard any individual flexibility arrangement that has been agreed to by an award covered employee and his or her employer under the flexibility term in the agreement.

Regulations may prescribe additional modifications

(6) The regulations may provide that, for the purposes of the FWC deciding whether it is satisfied of the matter referred to in paragraph (1)(a), specified provisions of this Part, or regulations made for the purposes of this Part have effect with such modifications as are prescribed by the regulations.

216AB When the FWC must approve a variation of a supported bargaining agreement to add employer and employees

(1) If an application for the approval of a variation of a supported bargaining agreement is made under section 216AA, the FWC must approve the variation if the FWC is satisfied that:

(a) if the application that was made under section 242 for the supported bargaining authorisation in relation to the agreement had specified the affected employees and their employer, the FWC would have been required to make the authorisation in accordance with section 216AC; and

(b) the affected employees have voted on whether to approve the variation and, of those who cast a valid vote, a majority approved the variation; and

(c) the variation has been genuinely agreed to by the affected employees in accordance with section 216AD;

unless the FWC is satisfied that there are serious public interest grounds for not approving the variation.

(2) Despite subsection (1), the FWC must not approve the variation if, as a result of the variation, the agreement would cover employees in relation to general building and construction work.

(3) Despite subsection (1), the FWC must not approve the variation if the employer that will be covered by the agreement is specified in a single interest employer authorisation in relation to any of the affected employees.

216AD Determining whether a variation of a supported bargaining agreement to add employer and employees has been genuinely agreed to by affected employees

(1) For the purposes of paragraph 216AB(1)(c), the FWC is to determine whether it is satisfied that the variation has been genuinely agreed to by the affected employees in accordance with section 188, modified as follows:

(a) as if references (other than in a note) to an enterprise agreement being genuinely agreed to were references to the variation being genuinely agreed to;

(b) as if references to employees covered by or expressed to be covered by the agreement, employees requested to approve the agreement by voting for it, or employees, were references to the affected employees;

(c) as if, in paragraph 188(2)(a), the reference to the agreement were a reference to the agreement as proposed to be varied;

(d) as if subsections 188(2A), (3) and (4) were omitted;

(e) as if, in subsections 188(4A) and (5), references to subsection 180(5) were references to section 216AAA;

(f) as if, in paragraph 188(5)(c), the reference to subsection 182(1) or (2) were a reference to subsection 216A(4).

(2) In taking into account the statement of principles made under section 188B:

(a) the FWC may disregard the matters mentioned in paragraphs 188B(3)(a) and (b); and

(b) the matters mentioned in paragraphs 188B(3)(c) and (d) are taken to be matters relating to the agreement as proposed to be varied; and

(c) the matters mentioned in paragraphs 188B(3)(e) are taken to be matters relating to the variation.

(3) The regulations may provide that, for the purposes of the FWC deciding whether it is satisfied that the variation has been genuinely agreed to, specified provisions of this Part, or regulations made for the purposes of this Part, have effect with such modifications as are prescribed by the regulations.

216CB When the FWC must approve a variation of a cooperative workplace agreement to add employer and employees

(1) If an application for the approval of a variation of a cooperative workplace agreement is made under section 216CA, the FWC must approve the variation if the FWC is satisfied that:

(a) the employers, and any employee organisations, covered by the agreement before the variation was made have had an opportunity to express to the FWC their views (if any) on the variation; and

(b) the affected employees have voted on whether to approve the variation and, of those who cast a valid vote, a majority approved the variation; and

(c) the variation has been genuinely agreed to by the affected employees in accordance with section 216CC; and

(d) it is not contrary to the public interest for the employer and the affected employees to be covered by the agreement.

(2) Despite subsection (1), the FWC must not approve the variation if:

(a) the agreement is a greenfields agreement that covers employees in relation to general building and construction work; or

(b) as a result of the variation, the agreement would cover employees in relation to general building and construction work.

(3) Despite subsection (1), the FWC must not approve the variation if the employer that will be covered by the agreement is specified in a supported bargaining authorisation, or a single interest employer authorisation, in relation to any of the affected employees.

216CC Determining whether a variation of a cooperative workplace agreement to add employer and employees has been genuinely agreed to by affected employees

(1) For the purposes of paragraph 216CB(1)(c), the FWC is to determine whether it is satisfied that the variation has been genuinely agreed to by the affected employees in accordance with section 188, modified as follows:

(a) as if references (other than in a note) to an enterprise agreement being genuinely agreed to were references to the variation being genuinely agreed to;

(b) as if references to employees covered by or expressed to be covered by the agreement, employees requested to approve the agreement by voting for it, or employees, were references to the affected employees;

(c) as if, in paragraph 188(2)(a), the reference to the agreement were a reference to the agreement as proposed to be varied;

(d) as if subsections 188(2A), (3) and (4) were omitted;

(e) as if, in subsections 188(4A) and (5), references to subsection 180(5) were references to section 216CAA;

(f) as if, in paragraph 188(5)(c), the reference to subsection 182(1) or (2) were a reference to subsection 216C(4).

(2) In taking into account the statement of principles made under section 188B:

(a) the FWC may disregard the matters mentioned in paragraphs 188B(3)(a) and (b); and

(b) the matters mentioned in paragraphs 188B(3)(c) and (d) are taken to be matters relating to the agreement as proposed to be varied; and

(c) the matters mentioned in paragraph 188B(3)(e) are taken to be matters relating to the variation.

(3) The regulations may provide that, for the purposes of the FWC determining whether it is satisfied that the variation has been genuinely agreed to by the affected employees, specified provisions of this Part, or regulations made for the purposes of this Part, have effect with such modifications as are prescribed by the regulations.

216DC When the FWC must approve a variation of a single interest employer agreement to add employer and employees

Approval of variation by the FWC

(1) The FWC must approve a variation of a single interest employer agreement if:

(a) an application for approval of the variation has been made under section 216DA or 216DB; and

(b) the FWC is satisfied that:

(i) the employers and any employee organisations covered by the agreement have had an opportunity to express to the FWC their views (if any) on the application; and

(ii) if the application was made by an employer under section 216DA—the variation has been genuinely agreed to by the affected employees in accordance with section 216DD; and

(iii) if the application was made by an employee organisation under section 216DB—the requirements of subsection (1A) are met; and

(iv) the requirements of either subsection (2) or (3) (which deal with franchisees and common interest employers) are met; and

(v) if the requirements of subsection (3) are met—the operations and business activities of the employer are reasonably comparable with those of the other employers who are covered by the agreement.

(1AA) If:

(a) the application for approval of the variation was made by an employee organisation under section 216DB; and

(b) the employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed for the purposes of subparagraph (1)(b)(v) that the operations and business activities of the employer are reasonably comparable with those of the other employers that are covered by the agreement, unless the contrary is proved.

Additional requirements for application by employee organisation

(1A) The requirements of this subsection are met if:

(a) the employer that will be covered by the agreement employed at least 20 employees at the time that the application for approval of the variation was made; and

(b) a majority of the affected employees want to be covered by the agreement; and

(c) subsection (1C) does not apply to the employer.

(1B) For the purposes of paragraph (1A)(b), the FWC may work out whether a majority of the affected employees want to be covered by the agreement using any method the FWC considers appropriate.

(1C) This subsection applies to an employer if:

(a) the employer and the affected employees are covered by another enterprise agreement that has not passed its nominal expiry date at the time that the FWC will approve the variation; or

(b) the employer and an employee organisation that is entitled to represent the industrial interests of one or more of the affected employees have agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and the affected employees or substantially the same group of the affected employees.

Franchisees

(2) The requirements of this subsection are met if the employers covered by the agreement and the employer that will be covered by the agreement carry on similar business activities under the same franchise and are:

(a) franchisees of the same franchisor; or

(b) related bodies corporate of the same franchisor; or

(c) any combination of the above.

Common interest employers

(3) The requirements of this subsection are met if it is appropriate to approve the variation, having regard to:

(a) whether the employers covered by the agreement and the employer that will be covered by the agreement have clearly identifiable common interests; and

(b) whether it would be contrary to the public interest to approve the variation.

(3A) For the purposes of paragraph (3)(a), matters that may be relevant to determining whether the employers have a common interest include the following:

(a) geographical location;

(b) regulatory regime;

(c) the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.

(3AB) If:

(a) the application for approval of the variation was made by an employee organisation under section 216DB; and

(b) the employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the requirements of subsection (3) are met, unless the contrary is proved.

Calculating number of employees

(3AC) For the purposes of calculating the number of employees referred to in paragraph (1AA)(b), (1A)(a) or (3AB)(b):

(a) ***employee*** has its ordinary meaning; and

(b) subject to paragraph (c), all employees employed by the employer at the time that the application was made are to be counted; and

(c) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer; and

(d) associated entities of the employer are taken to be one entity.

Employers and employees that are already bargaining

(3B) Despite subsection (1), the FWC may refuse to approve the variation if the FWC is satisfied that:

(a) the employer is bargaining in good faith for a proposed enterprise agreement that will cover the employer and the affected employees, or substantially the same group of the affected employees; and

(b) the employer and the affected employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employer and the affected employees, or substantially the same group of the affected employees; and

(c) on the day that the FWC will approve the variation, less than 9 months have passed since the most recent nominal expiry date of an agreement referred to in paragraph (b).

General building and construction work

(4) Despite subsection (1), the FWC must not approve the variation if:

(a) the agreement is a greenfields agreement that covers employees in relation to general building and construction work; or

(b) as a result of the variation, the agreement would cover employees in relation to general building and construction work.

Supported bargaining authorisation

(5) Despite subsection (1), the FWC must not approve the variation if the employer that will be covered by the agreement is specified in a supported bargaining authorisation in relation to any of the affected employees.

216DD Determining whether a variation of a single interest employer agreement to add employer and employees has been genuinely agreed to by affected employees

(1) For the purposes of subparagraph 216DC(1)(b)(ii), the FWC is to determine whether it is satisfied that the variation has been genuinely agreed to by the affected employees in accordance with section 188, modified as follows:

(a) as if references (other than in a note) to an enterprise agreement being genuinely agreed to were references to the variation being genuinely agreed to;

(b) as if references to employees covered by or expressed to be covered by the agreement, employees requested to approve the agreement by voting for it, or employees, were references to the affected employees;

(c) as if, in paragraph 188(2)(a), the reference to the agreement were a reference to the agreement as proposed to be varied;

(d) as if subsections 188(2A), (3) and (4) were omitted;

(e) as if, in subsections 188(4A) and (5), references to subsection 180(5) were references to section 216DAA;

(f) as if, in paragraph 188(5)(c), the reference to subsection 182(1) or (2) were a reference to subsection 216D(5).

(2) In taking into account the statement of principles made under section 188B:

(a) the FWC may disregard the matters mentioned in paragraphs 188B(3)(a) and (b); and

(b) the matters mentioned in paragraphs 188B(3)(c) and (d) are taken to be matters relating to the agreement as proposed to be varied; and

(c) the matters mentioned in paragraphs 188B(3)(e) are taken to be matters relating to the variation.

(3) The regulations may provide that, for the purposes of the FWC determining whether it is satisfied that the variation has been genuinely agreed to by the affected employees for the purposes of subparagraph 216DC(1)(b)(ii), specified provisions of this Part, or regulations made for the purposes of this Part, have effect with such modifications as are prescribed by the regulations.

240A Application to FWC for voting request order

Proposed multi-enterprise agreement

(1) After the notification time for a proposed multi-enterprise agreement, a bargaining representative for the enterprise agreement may apply to the FWC for an order (a ***voting request order***) permitting an employer to make a request under subsection 181(1) that employees approve the enterprise agreement by voting for it if:

(a) each bargaining representative for the enterprise agreement that is an employee organisation has been asked to provide the employer with written agreement to the making of the request; and

(b) one or more of the employee organisations has failed to provide the written agreement.

Variation of multi-enterprise agreement

(2) A person referred to in subsection (3) may apply to the FWC for an order (also a ***voting request order***) permitting an employer to make a request under subsection 208(1) that employees approve a variation of a multi-enterprise agreement by voting for it if:

(a) each employee organisation covered by the enterprise agreement has been asked to provide the employer with written agreement to the making of the request; and

(b) one or more of the employee organisations has failed to provide the written agreement.

(3) The persons are the following:

(a) an employer covered by the enterprise agreement;

(b) an employee organisation covered by the enterprise agreement;

(c) an affected employee for the variation.

240B FWC must make voting request order

The FWC must, on application under subsection 240A(1) or (2), make a voting request order permitting an employer to make a request if the FWC is satisfied that:

(a) for each employee organisation that has failed to provide written agreement to the making of the request, the failure was unreasonable in the circumstances; and

(b) if the request relates to approval of a proposed enterprise agreement—the making of the request by the employer would not be inconsistent with or undermine good faith bargaining for the enterprise agreement.