

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

### REPLACEMENT EXPLANATORY STATEMENT

(issued by the authority of the Fair Work Commission as constituted by the Full Bench comprising Justice Hatcher, President, Vice President Asbury and Deputy President Masson)

#### **Authority**

Parts 14, 16 and 18–23A of Schedule 1 to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Amending Act) amend provisions of the *Fair Work Act 2009* (Cth) (Fair Work Act) dealing with the making of enterprise agreements and the approval of enterprise agreements by the Fair Work Commission (FWC). The amendments commence on 6 June 2023 (unless proclaimed earlier).

Section 188B of the Fair Work Act as amended by the Amending Act (amended Fair Work Act) 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.

Section 188B(1) of the amended Fair Work Act requires the FWC, by legislative instrument, to make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement.

Section 615(1) of the Fair Work Act provides that a function or power of the FWC may be performed or exercised by a Full Bench if the President of the FWC (President) so directs.

Section 4(1) of the *Acts Interpretation Act 1901* (Cth) as in force on 25 June 2009, provides that where an Act that does not come into operation immediately is expressed to confer a power to make an instrument, unless the contrary intention appears, the power may be exercised, and anything may be done for the purpose of enabling exercise of the power, before the Act comes into operation as if it had come into operation.

### **Purpose of the Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023**

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

Section 188 of the amended Fair Work Act sets out requirements that must be met for the FWC to be satisfied an enterprise agreement has been genuinely agreed to by employees. Under section 188(1), one of these requirements is that the FWC must take into account the statement of principles made by the FWC under section 188B(1) (Statement of Principles on Genuine Agreement).

Under the amended Fair Work Act, when considering whether variations to enterprise agreements have been genuinely agreed to by employees the FWC must take into account the Statement of Principles on Genuine Agreement in the manner and to the extent provided for in the Fair Work Act and the *Fair Work Regulations 2009*.

The *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* (Instrument) makes the Statement of Principles on Genuine Agreement, which is at Schedule 1 to the Instrument.

### **Details**

Details of the Instrument are set out in **Attachment A**.

### **Consultation on the Instrument**

Pursuant to section 17 of the *Legislation Act 2003* (Cth), the FWC has consulted with persons with expertise in fields that are relevant to the Statement of Principles on Genuine Agreement and has given persons likely to be affected by the Statement of Principles on Genuine Agreement an adequate opportunity to comment on its proposed content.

Before consultations commenced, interested parties were consulted on the proposed process and timetable for making the Statement of Principles on Genuine Agreement, through a series of Statements of the President published on the FWC’s website. The consultation process has included:

- on 6 February 2023, the FWC published a ‘Discussion paper: Statement of principles on genuine agreement’ prepared by FWC staff to promote discussion and facilitate consultations
- on 6 and 13 February 2023, the FWC held consultations with stakeholder peak councils—the Australian Council of Trade Unions (ACTU), Australian Industry Group, Australian Chamber of Commerce and Industry, and Council of Small Business Organisations Australia
- on 14 and 15 February 2023, the FWC held in-person conferences in Melbourne and Sydney and an online conference, with interested parties. In February, the FWC also received a submission from the Australian Small Business and Family Enterprise Ombudsman and some draft principles from the ACTU
- following these consultations and taking into account the views of the peak councils and other interested parties received during this process, the FWC developed a draft of the Instrument and published this for comment on 3 March 2023
- submissions on the draft Instrument closed on 30 March 2023 and 15 submissions were received, and
- interested parties were invited to lodge any submissions in reply by 13 April 2023 and 4 submissions in reply were received.

Throughout the consultation process updates have been published on the FWC’s website on a dedicated webpage and via the FWC’s general announcements subscription service.

Some amendments were made to the draft Instrument in response to comments received through the consultation process. The FWC has taken into account all submissions in making the Statement of Principles on Genuine Agreement.

The FWC is satisfied that the appropriate and reasonably practicable consultation has been undertaken.

### **Impact Analysis**

As required by the Australian Government’s best practice regulation requirements, the Office of Impact Assessment was consulted on 3 April 2023 as to whether an Impact Analysis in respect of the Instrument was required.

The Office of Impact Assessment advised that an Impact Analysis was not required because the Statement of Principles on Genuine Agreement does not have more than a minor regulatory impact, as it will have no impact on the employment rights and obligations that might be established or regulated by an enterprise agreement (reference number OIA23-04840).

### **Statement of compatibility with human rights**

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003* applies to cause a statement of compatibility to be prepared in respect of that legislative instrument.

The Instrument will not be subject to disallowance once section 188B(4) of the amended Fair Work Act comes into operation.

A statement of compatibility with human rights has been prepared and is at **Attachment B**.

## **ATTACHMENT A**

### **Details of the *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023***

#### **Clause 1 Name**

This clause provides that the name of the Instrument is the *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023*.

#### **Clause 2 Commencement**

This clause provides that the Instrument commences at the same time as Part 14 of Schedule 1 to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* commences. Part 14 commences on 6 June 2023 (unless proclaimed earlier).

#### **Clause 3 Authority**

This clause notes that the Instrument is made under section 188B of the Fair Work Act.

#### **Clause 4 Statement of Principles on Genuine Agreement**

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

### **Schedule 1 – Statement of Principles on Genuine Agreement**

#### Preamble

The preamble outlines the purpose of the Statement of Principles on Genuine Agreement in relation to the FWC's functions of approving, and approving the variation of, enterprise agreements made under the Fair Work Act.

#### Paragraphs 1 to 3

Paragraphs 1 to 3 relate to the prescribed matters of:

- informing employees of bargaining for a proposed enterprise agreement, and
- informing employees of their right to be represented by a bargaining representative (see sections 188B(3)(a) and (b) of the amended Fair Work Act).

Paragraph 1 provides that an employer should ensure employees are informed in a timely and appropriate manner about bargaining for an enterprise agreement, and of their rights to be represented in bargaining and how to exercise those rights.

Paragraph 2 provides for the interaction between paragraph 1 and section 173(1) of the Fair Work Act.

Paragraph 3 provides that an employer should not mislead employees as to their rights to be represented in bargaining.

Notes to these paragraphs provide information about sections 173 ('Notice of employee representational rights'), 174 ('Content and form of notice of employee representational rights') and 188(5) ('Minor errors may be disregarded') of the amended Fair Work Act, and regulation 2.04 ('Notice of employee representational rights—how notice is given') and Schedule 2.1 ('Notice of employee representational rights') of the *Fair Work Regulations 2009*.

#### Paragraphs 4 to 7

Paragraphs 4 to 7 relate to the prescribed matter of providing employees with a reasonable opportunity to consider a proposed enterprise agreement (see section 188B(3)(c) of the amended Fair Work Act).

Paragraph 4 provides that an employer should provide employees with a reasonable opportunity to consider a proposed enterprise agreement before voting on it, so that the employees can vote in an informed manner.

Paragraphs 5 to 7 provide that an employer may satisfy paragraph 4 by providing to employees a copy of the agreement and any incorporated material in a timely and appropriate manner.

#### Paragraphs 8 to 14

Paragraphs 8 to 14 relate to the prescribed matter of explaining to employees the terms of a proposed enterprise agreement and their effect (see section 188B(3)(d) of the amended Fair Work Act).

The Fair Work Act provides that before an employer requests that employees vote on a proposed agreement, the employer must take all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, are explained to the employees (section 180(5)(a)), and the explanation is provided in an appropriate manner taking into account the employees' particular circumstances and needs (section 180(5)(b)).

Section 180(6) of the Fair Work Act provides examples of the kinds of employees whose circumstances and needs are to be taken into account when explaining the terms of the agreement and the effect of those terms.

Paragraphs 8 and 9 provide for what taking all reasonable steps to explain the effect of a proposed enterprise agreement, and the effect of those terms, should include.

Paragraph 10 provides that section 180(5) will not generally be satisfied if the employer makes an incorrect representation or misleads employees about a significant term of the proposed enterprise agreement or its effect.

Paragraph 11 provides that in determining whether section 180(5) has been complied with, the FWC may have regard to any explanation of the proposed enterprise agreement given to employees by one or more employee organisation(s) acting as bargaining representative(s) in certain circumstances.

Paragraphs 12 and 13 provide for the manner in which the explanation required by section 180(5) may be provided to an employee.

Paragraph 14 provides that in determining whether the explanation of the agreement was given in an appropriate manner as required by section 180(5)(b), in addition to taking into account the circumstances and needs of the kinds of employees in section 180(6), the FWC may take into account certain additional matters.

Notes to these paragraphs provide information about sections 180(5) and (6) ('Terms of the agreement must be explained to employees etc.') and section 188(5) ('Minor errors may be disregarded') of the amended Fair Work Act.

#### Paragraphs 15 and 16

Paragraphs 15 and 16 relate to the prescribed matter of providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing the employees of the time, place and method for the vote (see section 188B(3)(e) of the amended Fair Work Act).

Paragraph 15 provides that employees should be given a reasonable opportunity to vote on a proposed enterprise agreement in a free and informed manner and addresses the voting process and method and period of voting.

Paragraphs 16 provides for employees to be informed of the time, place and method for the vote in a timely manner.

Notes to these paragraphs provide information about sections 180A ('Agreement of bargaining representatives that are employee organisations'), 181 ('Employers may request employees to approve a proposed enterprise agreement'), 182 ('When an enterprise agreement is made') and 188(5) ('Minor errors may be disregarded') of the amended Fair Work Act.

#### Paragraphs 17 to 19

Paragraphs 17 to 19 relate to other matters that the FWC considers relevant (see section 188B(3)(g) of the amended Fair Work Act).

Section 188(2) of the amended Fair Work Act provides that the FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employees requested to approve the agreement by voting for it have a sufficient interest in the terms of the agreement (section 188(2)(a)) and are sufficiently representative, having regard to the employees the agreement is expressed to cover (section 188(2)(b)).

Paragraph 17 provides that in considering sections 188(2)(a) and 188(2)(b)), the FWC may take into account certain specified matters.

Paragraph 18 provides that an enterprise agreement will generally not have been genuinely agreed to by the employees covered by the agreement unless the agreement was the product of an authentic exercise in agreement-making between the employer(s) and employees in one or more enterprises, and the employees who voted for the agreement had an informed and genuine understanding of what was being approved.

Paragraph 19 provides that if one or more employee organisation(s) acting as bargaining representative(s) in certain circumstances supports approval of the agreement and does not

have concerns that the agreement was not genuinely agreed to by the employees, then this should be given significant weight by the FWC.

A note to these paragraphs provides information about section 188(2) ('Sufficient interest and sufficiently representative') of the amended Fair Work Act.

#### Paragraph 20

Paragraph 20 provides for definitions of terms used in the Statement of Principles on Genuine Agreement.

## ATTACHMENT B

### Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the  
*Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)

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

The *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* (Instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the Instrument

Before the Fair Work Commission (FWC) can approve an enterprise agreement, the *Fair Work Act 2009* (Cth) (Fair Work Act) requires it to be satisfied that the agreement has been genuinely agreed to by the employees whom it is expressed to cover.

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) amends the Fair Work Act (amended Fair Work Act), including by inserting new section 188B. Section 188B(1) requires the FWC to 'make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement'. This amendment commences on 6 June 2023 (unless proclaimed earlier).

Schedule 1 to the Instrument contains the Statement of Principles on Genuine Agreement made by the FWC pursuant to section 188B(1) of the amended Fair Work Act.

The Statement of Principles on Genuine Agreement does not address the content of an enterprise agreement, but deals with the following matters prescribed by section 188B(3) of the amended Fair Work Act:

- 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, and
- other relevant matters.

Once the Instrument commences, the Statement of Principles on Genuine Agreement will inform employers, employees and their representatives of certain matters the FWC must take into account in determining whether an enterprise agreement has been genuinely agreed to by employees, for the purpose of the FWC deciding whether to approve the agreement (section 188(1) of the amended Fair Work Act).

## Human rights implications

The definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the core 7 United Nations human rights treaties. The FWC has assessed the Instrument, and considers that the Instrument promotes the following rights:

- the right to the enjoyment of just and favourable conditions of work under Article 7 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR), and
- the right to freedom of association, including the right to form and join trade unions under Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 8(1)(a) of the ICESCR.

The content of the right to just and favourable conditions of work and the right to freedom of association in the ICESCR and ICCPR can be informed by specific obligations in International Labour Organisation (ILO) treaties such as the *Right to Organise and Collective Bargaining Convention 1949 (No. 98)*, which protects the right of employees to collectively bargain for terms and conditions of employment, and the *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)*, which provides employer and employee organisations with protection for their organisational autonomy.

The Instrument promotes the rights to just and favourable conditions of work and collective bargaining, by facilitating good faith bargaining and the making of enterprise agreements. This includes that in determining whether an enterprise agreement has been genuinely agreed to by employees, the FWC must take into account provision in the Statement of Principles on Genuine Agreement:

- as to matters the FWC may take into account in satisfying itself that the employees requested to approve an agreement by voting for it have a sufficient interest in the terms of the agreement and are sufficiently representative having regard to the employees that the agreement is expressed to cover (paragraph 17), and
- that an agreement will generally not have been genuinely agreed to by employees unless the agreement was the product of an authentic exercise in agreement-making between the employer(s) and employees, and the employees who voted for the agreement had an informed and genuine understanding of what was being approved (paragraph 18).

The Instrument is therefore compatible with and will promote the right to just and favourable conditions of work and collective bargaining.

The Instrument also promotes the right to freedom of association in Article 22 of the ICCPR, Article 8 of the ICESCR, and ILO Conventions No. 87 and No. 98, by facilitating good faith bargaining and the making of enterprise agreements. This includes that in determining whether an enterprise agreement has been genuinely agreed to by employees, the FWC must take into account provision in the Statement of Principles on Genuine Agreement that:

- employers should ensure employees are informed that bargaining has commenced and of their right to be represented in bargaining by an employee organisation (union) or another person of their choice (paragraph 1)
- in determining whether section 180(5) of the amended Fair Work Act has been complied with, the FWC may have regard to any explanation of the proposed enterprise

agreement given to employees by one or more unions acting as bargaining representatives in certain circumstances (paragraph 11), and

- if one or more unions acting as bargaining representatives in certain circumstances supports approval of an enterprise agreement and does not have concerns that the agreement was not genuinely agreed to by employees, then this should be given significant weight by the FWC (paragraph 19).

The Instrument is therefore compatible with and will promote the right to freedom of association.

Further, the Instrument promotes the right to collective bargaining in ILO Convention No. 98, by facilitating good faith bargaining and the making of enterprise agreements. This includes that in determining whether an enterprise agreement has been genuinely agreed to by employees, the FWC must take into account provision in the Statement of Principles on Genuine Agreement that:

- employers should provide employees with a reasonable opportunity to consider a proposed enterprise agreement before voting on it, so that the employees can vote in an informed manner (paragraphs 4 to 7), and
- employees should be given a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including being informed of the time, place and method for the vote in a timely manner (paragraphs 15 and 16).

The Instrument is therefore compatible with and will promote the right to collective bargaining.

## **Conclusion**

This Instrument is compatible with human rights because it promotes human rights, including the right to the enjoyment of just and favourable conditions of work, the right to freedom of association and the right to collective bargaining.