



## President's statement

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### *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 – Facilitating enterprise bargaining and the agreement approval process*

Justice Hatcher, President

Sydney, 4 April 2023

[1] On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Secure Jobs Better Pay Act) received Royal Assent. Relevantly, the Secure Jobs Better Pay Act amends the *Fair Work Act 2009* (the FW Act).

[2] On 8 December 2022, I issued a [Statement](#) setting out the Commission's approach to the implementation of the Secure Jobs Better Pay Act changes. That Statement noted that there are a number of significant changes to the enterprise bargaining and enterprise agreement approval processes that will commence on 6 June 2023, or an earlier date to be fixed by proclamation. An overview of these amendments is set out in **Attachment A** and a tabular summary of the various bargaining streams established by the amendments is set out in **Attachment B**. Both of these documents have been prepared by staff of the Commission and are provided for information purposes only.

### Implementation of the amendments

[3] This Statement sets out how the Commission proposes to implement the amendments relating to enterprise bargaining and agreement approvals, including by establishing a bargaining practice group which will run separately to the enterprise agreements approval process. Further information and education materials will be available in the coming months. The [Commission's website](#) currently provides extensive information about bargaining for, making, approving and terminating enterprise agreements, which will be updated to reflect the amendments.

[4] Due to the increased focus in the Secure Jobs Better Pay Act on the Commission's role in facilitating bargaining, I have appointed Deputy President Hampton as the National Practice Leader for Bargaining. In this role, Deputy President Hampton will lead the Commission's practice in connection with all bargaining and industrial action-related matter types. Coordination of the renamed Collaborative Approaches Program will also form part of Deputy President Hampton's role.

[5] In the 8 December 2022 Statement, I said that the Commission anticipated allocating additional Member resources to support the enterprise bargaining reforms. I confirm this approach, which has been supported by additional Member appointments to the Commission. Two important aspects of this approach are emphasised:

- (1) Any bargaining representative (including an employer) that encounters difficulty in reaching an enterprise agreement may apply to the Commission to deal with the bargaining dispute under s 240 of the FW Act. If such an application is made, the Commission will make available the appropriate level of Member resources in order to facilitate the reaching of an agreement.

- (2) Where the Commission has made a protected action ballot order in relation to a proposed agreement, new s 448A of the FW Act will require the Commission to make an order directing the bargaining representatives for the agreement to attend a conference for the purposes of mediation or conciliation in relation to the agreement. This conference must occur on or before the date of the close of voting in the protected action ballot, and thus represents an opportunity for the Commission to facilitate the making of an enterprise agreement before any protected industrial action occurs. The Commission will ensure that the appropriate level of Member resources is provided for the conduct of such conferences in order to maximise the prospects of success in facilitating an agreement. There will be a corresponding expectation that bargaining representatives will likewise apply the appropriate level of resources to the required conference process.

[6] Deputy President Masson will continue as the National Practice Leader for Enterprise Agreement Approvals and oversee the implementation of the changes to the agreement approval process effected by the Secure Jobs Better Pay Act. The emphasis will be on maintaining the efficiency and timeliness of approvals for agreements which meet the statutory criteria.

[7] There will be a functional separation between the bargaining support and the enterprise agreement approval practice areas. This will ensure that no conflict of interest arises from the Commission proactively assisting in bargaining matters and subsequently dealing with agreement approval applications arising from the same matters.

[8] The Commission will publish further information about implementation of the bargaining and agreements amendments over the coming months to 6 June 2023. An initial audit of Commission forms that will be updated or made prior to 6 June is at **Attachment C**. I note that the Commission's online forms F16 and F17 will require significant amendment and an assessment will be made about how and when to make those amendments in due course. Any comments on this audit can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au).

[9] The Commission is in the process of establishing an Enterprise Agreements and Bargaining Advisory Group. The EAB Advisory Group will be comprised of representatives from the peak organisations and other groups that represent users impacted by these amendments, and will provide ongoing feedback to the Commission about the practical operation of the amendments.

[10] Interested parties are encouraged to subscribe to receive notifications on the [subscription services page](#) of the Commission's website. Any questions about the contents of this Statement or the Commission's implementation of the Secure Jobs Better Pay Act can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au).

## **PRESIDENT**

## Attachment A - Overview of the amendments

*This overview has been prepared by staff of the Fair Work Commission for information purposes. It does not represent the views of the Commission on any issue.*

### ***Bargaining***

[1] The Secure Jobs Better Pay Act includes a number of changes to the bargaining framework in the FW Act. Amendments relating to initiating bargaining for a single-enterprise agreement commenced on 7 December 2022. Further information about this change is available on the [request to bargain for a replacement agreement](#) page of the Commission's website.

### ***Bargaining disputes***

[2] Part 18 of the Secure Jobs Better Pay Act repeals the provision in the FW Act for 'serious breach declarations' and 'bargaining related workplace determinations' (which the Commission can make in some circumstances following a serious breach of a bargaining order by a bargaining representative).

[3] From 6 June 2023, the Commission will be able to make an 'intractable bargaining declaration' (IB declaration) under new s 235 of the FW Act if an application for a declaration has been made by a bargaining representative for the proposed agreement, the Commission has dealt with the dispute about the agreement under s 240 ('Application for the FWC to deal with a bargaining dispute'), the 'minimum bargaining period' has ended and the Commission is satisfied, amongst other things, that there is no reasonable prospect of the bargaining parties reaching agreement.

[4] If an IB declaration is made, the Commission may specify a 'post-declaration negotiating period' during which the Commission can continue to assist the parties (such as by conciliation) but cannot make an 'intractable bargaining workplace determination' (IB workplace determination). The Commission must make an IB workplace determination as quickly as possible after making the IB declaration or the end of the post-declaration negotiating period (if there was one).

[5] The Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [826]–[827] states:

The amendments would repeal the existing provisions for serious breach declarations and bargaining-related workplace determinations as these provisions have not been effective in assisting parties to resolve bargaining disputes and would no longer be required following the commencement of the new intractable bargaining provisions.

These amendments support the Jobs and Skills Summit outcome of giving the FWC the capacity to proactively help workers and businesses reach agreements that benefit them.

### *Industrial action*

[6] The Commission's Industrial Action Benchbook sets out the current steps that must be completed before protected industrial action can be taken.

[7] The Secure Jobs Better Pay Act will make a number of changes to industrial action provisions including:

- removing the Australian Electoral Commission as the default agent to conduct protected action (PA) ballots
- giving the Commission the function of approving 'eligible protected action ballot agents', and requiring the Commission to review that approval at least every 3 years
- providing for an application for a protected action ballot order (PABO) in relation to a multi-enterprise agreement, to be treated as if it were a separate application for each employer
- providing that 120 hours' notice must be given before industrial action may commence in relation to a multi-enterprise agreement, and
- requiring bargaining representatives to participate in a Commission conciliation conference during the PA ballot period.

### *Multi-enterprise agreements – Supported bargaining arrangements*

[8] The new supported bargaining arrangements replace the present low-paid bargaining arrangements. For a supported bargaining agreement to be made, the Commission must first make a 'supported bargaining authorisation'. A supported bargaining authorisation must generally be made where the employees specified in the application for the authorisation are employed in an industry, occupation or sector declared by the Minister, or having regard to:

- matters including prevailing pay and conditions in the relevant industry or sector, and
- whether the employers have clearly identifiable common interests.

[9] Once the authorisation is made, the Commission has powers to facilitate bargaining.

### *Multi-enterprise agreements – Single interest employer arrangements*

The new single interest employer arrangements widen access to 'single interest employer authorisations'. For a single interest employer agreement to be made with 2 or more employers, the Commission must first make a single interest employer authorisation. A single interest employer authorisation can be made in certain circumstances including where the Commission is satisfied the employers have clearly identifiable common interests and it is not contrary to the public interest to make the authorisation.

### *Multi-enterprise agreements – Cooperative workplaces*

[10] A cooperative workplace agreement is a multi-enterprise agreement made where there is no supported bargaining authorisation or single interest employer authorisation in operation. Protected industrial action cannot be taken in pursuance of a cooperative workplace agreement and the Commission cannot make bargaining orders or workplace determinations.

### *Existing Cooperative Workplaces Program*

[11] The Commission currently offers a free program that helps parties build cooperative working relationships using interest-based approaches. The program focuses on areas where interest-based approaches can be most helpful including bargaining, consultation and problem-solving.

[12] The Commission offers:

- Training in interest-based approaches, in person and through our [Online Learning Portal](#)
- Workshops in collaborative workplace change
- Facilitation of interest-based bargaining and dispute resolution.

[13] Further information about the program is available on [our website](#). The Commission anticipates that the program will continue to provide assistance to bargaining parties under the new framework.

[14] Following the Secure Jobs Better Pay Act amendments that will create a 'cooperative workplaces' bargaining stream, the Commission has decided to rename the existing cooperative workplaces program as the Collaborative Approaches Program. The Commission's website and associated materials will be updated to reflect the change in name.

### *Enterprise agreements*

[15] The provisions relating to enterprise agreements are in Part 2-4—Enterprise Agreements of the FW Act. The objects of this Part are set out at s 171 (which is not amended by the Secure Jobs Better Pay Act):

#### **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.

[16] The FW Act currently provides for single-enterprise agreements, multi-enterprise agreements and greenfields agreements as follows:

- *Single-enterprise agreements* – made between an employer and its employees or 2 or more employers that are ‘single interest employers’ and their employees. To be ‘single interest employers’, the employers must be engaged in a joint venture or common enterprise, related bodies corporate or named in a relevant ‘single interest employer authorisation’ that is in operation.
- *Multi-enterprise agreements* – made between 2 or more employers that are not single interest employers, and their employees.
- *Greenfields agreements* – greenfields agreements, in relation to genuine new enterprises, can be single-enterprise or multi-enterprise agreements and are made between an employer (or employers) and one or more employee organisations.

[17] When the Secure Jobs Better Pay Act amendments commence on 6 June 2023 (or as earlier proclaimed), the FW Act will include the following types of agreements:

- *Single-enterprise agreements* – an enterprise agreement covering a single employer, or 2 or more ‘related employers’ ie employers that are engaged in a joint venture or common enterprise or are related bodies corporate. Single-enterprise agreements will no longer cover 2 or more employers subject to a single interest employer authorisation.
- *Multi-enterprise agreements* – 3 types of multi-enterprise agreements will be available when the amendments commence. These are:
  - supported bargaining agreements (which replace the provisions to make agreements under the current ‘low paid bargaining’ stream)
  - single interest employer agreements, which can be made if the Commission makes a single interest employer authorisation, and
  - cooperative workplace agreements, which can be made if 2 or more employers agree to bargain together.
- *Greenfields agreements* – the provisions relating to the parties to a greenfields agreement will not change as a result of the Secure Jobs Better Pay Act amendments.

[18] Further information about each of the new agreement types and the related bargaining streams is at **Attachment B**.

### *Enterprise agreement approvals*

[19] The Commission has already commenced the consultation process to 'make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement' (statement of principles), as required by new s 188B.

[20] The draft *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* was published on 3 March 2023. Submissions in relation to the draft statement of principles were due by 30 March 2023, and any submissions in reply must be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by 13 April 2023. The final statement of principles will be published in the week commencing 8 May 2023 and will then be lodged with the Office of Parliamentary Counsel for registration.

[21] A [separate webpage](#) has been established for the statement of principles consultation process and submissions are being published on this webpage.

[22] The Secure Jobs Better Pay Act amendments also introduce 2 new requirements for genuine agreement:

- that employees requested to vote on a proposed agreement have a 'sufficient interest' in its terms and are 'sufficiently representative' of the employees the agreement will cover, and
- in the case of a proposed multi-enterprise agreement, before requesting that employees vote on the agreement an employer must obtain the written agreement of the employee organisations that are bargaining representatives for the agreement, or obtain a 'voting request order' from the Commission.

[23] The new provisions relating to genuine agreement will not apply to a proposed agreement for which the notification time occurs before commencement of the amendments.

[24] A number of changes are made to the pre-approval requirements in s 180. Section 173 ('Notice of employee representative rights' (NERR)) is also amended to confine the requirement that the employer give a NERR to employees at the prescribed time, to employees that will be covered by a 'proposed single-enterprise agreement (other than a greenfields agreement)'. The requirement will no longer apply in relation to a proposed multi-enterprise agreement.

### *Better Off Overall Test*

[25] Part 16 of the Secure Jobs Better Pay Act amends the Better Off Overall Test (BOOT). The Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [764]–[765] states:

These measures address concerns about the workability of the current framework, and include appropriate safeguards to protect employees. They implement a primary outcome of the Jobs and Skill Summit in removing unnecessary complexity in the agreement-making process for workers and employers.

The principal safeguard is the 'reconsideration process', which would allow employers, employees or their representatives to seek a reassessment of the BOOT where there has been a material change in working arrangements, or where the relevant circumstances were not properly considered during the approval process. The intention of the reconsideration process is to permit adjustments to the bargained outcome to the extent necessary to address the FWC's concerns, not to reduce the entitlements or interfere with the working arrangements for employees who are not affected by the concerns, or unnecessarily disrupt the operations of the enterprise.

[26] The amendments include:

- replacing references to 'prospective award covered employees' with 'reasonably foreseeable employees'
- inserting a new s 193A prescribing the manner in which the Commission is to apply the BOOT, including by specifying that the BOOT is a 'global assessment'
- requiring the Commission to only consider patterns or kinds of work, or types of employment, that are reasonably foreseeable at the test time, having regard to the nature of the enterprise(s) to which the agreement relates
- requiring the Commission to consider the views of the parties relating to whether the agreement passes the BOOT and to give primary consideration to any common view shared by employee organisations and employers about whether the agreement passes the BOOT. However, the Commission must still undertake its own independent assessment in applying the BOOT (see Supplementary Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [30])
- enabling the Commission, in approving an enterprise agreement, to amend the agreement where this is necessary to address a concern that it does not otherwise meet the BOOT, and
- inserting a new Division 7A of Part 2-4 that introduces a BOOT 'reconsideration' process.

[27] The amendments to the BOOT will only apply to agreements made on or after commencement of the amendments.

[28] The Commission will provide further guidance about the enterprise agreement approval process including the new BOOT provisions in the coming months. It is important to note that the guidance will develop over time as the Commission commences dealing with applications for approval of enterprise agreements and decisions are published.



# Bargaining Streams

From 6 June 2023 or an earlier date to be fixed by proclamation



	Single-enterprise agreement	Single-enterprise agreement (greenfields)	Supported bargaining agreement	Single interest employer agreement	Cooperative workplaces agreement
<b>Overview</b>	Made by one employer or 2 or more related employers and such employees who are employed at the time and who will be covered by the agreement. Employees are not required to be employed by the employer at the time the agreement is made.	Made by one employer or 2 or more related employers and such employees who are employed at the time and who will be covered by the agreement. Employees are not required to be employed by the employer at the time the agreement is made.	A type of multi-employer agreement where a bargaining representative is elected by employees and the agreement is made by the bargaining representative on behalf of the employees and the employer.	A type of multi-employer agreement where a bargaining representative is elected by employees and the agreement is made by the bargaining representative on behalf of the employees and the employer.	A type of multi-employer agreement where a bargaining representative is elected by employees and the agreement is made by the bargaining representative on behalf of the employees and the employer.
<b>When does bargaining commence?</b>	When one of the following occurs: • the employer agrees to bargain; • a majority support determination occurs; the employer agrees to bargain; • a bargaining representative is elected to bargain to the agreement; or • the employer agrees to bargain to the agreement.	When the employer starts a bargaining representative bargaining process for the agreement. Employees are not required to be employed by the employer at the time the agreement is made.	When the employer starts a bargaining representative bargaining process for the agreement. Employees are not required to be employed by the employer at the time the agreement is made.	When a group of employees decide to bargain together.	When a group of employees decide to bargain together.
<b>Small businesses included?</b>	Yes.	Yes.	Yes.	Small businesses (less than 20 employees) only included by consent.	Yes. Included (less than 20 employees) only included by consent.
<b>Must an employee organisation be involved?</b>	No.	Yes.	Yes. To make a supported bargaining application, the FWC must be satisfied that at least some employees who will be covered are represented by an employee organisation.	Yes. To make a single interest employer application, the FWC must be satisfied that at least some employees who will be covered are represented by an employee organisation.	Yes.
<b>Protected industrial action</b>	Available. If a PABO is made, conditions by the FWC is mandatory.	Not available.	Available. If a PABO is made, conditions by the FWC is mandatory.	Available. If a PABO is made, conditions by the FWC is mandatory.	Not available.
<b>Bargaining orders</b>	Available.	Available, but only if the 6-month notified negotiation period has not ended.	Available.	Available.	Not available.
<b>Bargaining disputes</b>	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may apply for the FWC to deal with a bargaining dispute.
<b>Intractable bargaining declarations</b>	Available. The FWC may be satisfied that the bargaining representative is unable to do so with the employer, there is no reasonable prospect of agreement, or that the bargaining representative is unable to do so with the employer, there is no reasonable prospect of agreement, or that the bargaining representative is unable to do so with the employer, there is no reasonable prospect of agreement.	Not available.	Available. The FWC may be satisfied that the bargaining representative is unable to do so with the employer, there is no reasonable prospect of agreement, or that the bargaining representative is unable to do so with the employer, there is no reasonable prospect of agreement.	Available. The FWC may be satisfied that the bargaining representative is unable to do so with the employer, there is no reasonable prospect of agreement, or that the bargaining representative is unable to do so with the employer, there is no reasonable prospect of agreement.	Not available.
<b>Variations to add employers/employees</b>	Not available.	Not available.	A supported bargaining agreement may be varied to cover additional employees and employers upon joint application by the bargaining representative and the employer.	A supported bargaining agreement may be varied to cover additional employees and employers upon joint application by the bargaining representative and the employer.	A supported bargaining agreement may be varied to cover additional employees and employers upon joint application by the bargaining representative and the employer.
<b>Applies to general building and construction industry?</b>	Yes.	Yes.	The FWC cannot make a supported bargaining application if the agreement would cover employees in relation to general building and construction work.	The FWC cannot make a single interest employer application if the agreement would cover employees in relation to general building and construction work.	The FWC can only approve a cooperative workplaces agreement if the agreement is a general building and construction industry agreement.

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## Attachment C – Forms to be amended or created

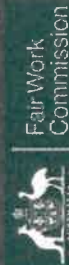
<b>Form name</b>	<b>Form number</b>
Application for the Commission to deal with a bargaining dispute	Form F11
Application for an order to stop etc (unprotected) industrial action	Form F14
Application for approval of an enterprise agreement (other than a greenfields agreement)	Form F16
Employer's declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement)	Form F17
Declaration of employee organisation in relation to an application for approval of an enterprise agreement (other than a greenfields agreement)	Form F18
Declaration of employee representative in relation to application for approval of an enterprise agreement (other than a greenfields agreement)	Form F18A
Application for approval of a greenfields agreement made under subsection 182(3) of the Act	Form F19
Employer's declaration in support of application for approval of a greenfields agreement made under subsection 182(3) of the Act	Form F20
Declaration of an employee organisation in relation to an application for approval of a greenfields agreement made under subsection 182(3) of the Act	Form F21
Application for approval of variation of an enterprise agreement	Form F23
Employer's declaration in support of variation of an enterprise agreement	Form F23A
Declaration of employee organisation in relation to variation of an enterprise agreement	Form F23B

<b>Form name</b>	<b>Form number</b>
Application for a serious breach declaration	Form F33
Application for a protected action ballot order	Form F34
Application for the Commission's assistance to promote cooperative & productive workplaces & prevent disputes	Form F79
New forms for variations to add or remove employers from the coverage of an agreement.	
New forms for applications to reconsider the BOOT under section 227A.	
New forms for single interest employer authorisations and supported bargaining authorisations	



# Bargaining Streams

From 6 June 2023 or an earlier date to be fixed by proclamation



	Single-enterprise agreement	Single-enterprise agreement (greenfields)	Supported bargaining agreement	Single interest employer agreement	Cooperative workplaces agreement
<b>Overview</b>	Made by one enterprise or 2 or more related enterprises with the employees who are employed at the time and who will be covered by the agreement. Employers are 'related enterprises' if engaged in a joint venture or common enterprise or related bodies corporate.	Made by one enterprise or 2 or more related enterprises and each related enterprise or person that the agreement is entered into to cover, in relation to a genuine new enterprise. Employers are 'related enterprises' if engaged in a joint venture or common enterprise or related bodies corporate.	A type of multi-enterprise agreement where a supported bargaining authorisation was in operation. The type of multi-enterprise agreement is supported bargaining if the FWC or an assistant FWC or an employee who has had difficulty face barriers to bargaining.	A type of multi-enterprise agreement where a single interest authorisation was in operation. A single interest agreement covers multiple employees that have agreed to bargain together.	A type of multi-enterprise agreement where there was no supported bargaining authorisation or single interest employee authorisation in operation in relation to the agreement. Immediately after the agreement is made, the FWC or an assistant FWC or an employee who has had difficulty face barriers to bargaining.
<b>When does bargaining commence?</b>	When one of the following occurs: • a majority support determination comes into operation • a scope order comes into operation • an employer or employee requests to bargain to the employer, and the bargaining is for a single-enterprise agreement to replace one that has passed its nominal expiry date within the past 3 years.	When the employer who is a bargaining representative gives written notice to each employee organisation that is a bargaining representative, and the bargaining is for a single-enterprise agreement to replace one that has passed its nominal expiry date within the past 3 years.	When the supported bargaining authorisation comes into operation. When the FWC or an assistant FWC or an employee who has had difficulty face barriers to bargaining. When the FWC must be satisfied that it is appropriate for the employees and employees to bargain together, having regard to certain matters including that the employees are certain franchisees or have clearly identifiable common interests, and that making the authorisation is not contrary to the public interest.	When the single interest employer authorisation comes into operation. When the FWC or an assistant FWC or an employee who has had difficulty face barriers to bargaining. When the FWC must be satisfied that it is appropriate for the employees and employees to bargain together, having regard to certain matters including that the employees are certain franchisees or have clearly identifiable common interests, and that making the authorisation is not contrary to the public interest.	When a group of employers decide to bargain together.
<b>Small businesses included?</b>	Yes.	Yes.	Yes.	Small businesses (less than 20 employees) only included by consent.	Yes, provided they consent, as all employees must agree to participate in the cooperative workplaces stream.
<b>Must an employee organisation be involved?</b>	No.	Yes.	Yes. To make a supported bargaining authorisation, the FWC must be satisfied that at least some employees who will be covered are represented by an employee organisation.	Yes. To make a single interest employer authorisation, the FWC must be satisfied that at least some employees who will be covered are represented by an employee organisation.	Yes.
<b>Protected industrial action</b>	Available. If a Protected Action Ballot Order (PABO) is made, conciliation by the FWC is mandatory.	Not available.	Available. If a PABO is made, conciliation by the FWC is mandatory. 120 hour notice must be given before taking protected industrial action.	Available. If a PABO is made, conciliation by the FWC is mandatory. 120 hour notice must be given before taking protected industrial action.	Not available.
<b>Bargaining orders</b>	Available.	Available, but only if the 6-month notified negotiation period has not ended.	Available.	Available.	Not available.
<b>Bargaining disputes</b>	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may only apply for the FWC to deal with a proposed cooperative workplaces agreement have agreed to the making of the application.
<b>Intractable bargaining declarations</b>	Available. The FWC must be satisfied that it has dealt with the dispute under s240 and the applicant participated in the FWC's processes to resolve the dispute, and that the applicant has taken all reasonable steps to resolve the dispute, and it is reasonable in all circumstances to make the declaration, taking into account the views of the bargaining representatives.	Not available.	Available. The FWC must be satisfied that it has dealt with the dispute under s240 and the applicant participated in the FWC's processes to resolve the dispute, and that the applicant has taken all reasonable steps to resolve the dispute, and it is reasonable in all circumstances to make the declaration, taking into account the views of the bargaining representatives.	Available. The FWC must be satisfied that it has dealt with the dispute under s240 and the applicant participated in the FWC's processes to resolve the dispute, and that the applicant has taken all reasonable steps to resolve the dispute, and it is reasonable in all circumstances to make the declaration, taking into account the views of the bargaining representatives.	Not available.
<b>Variations to add employers/employees</b>	Not applicable.	Not applicable.	A supported bargaining agreement may be varied to cover additional employers and employees upon joint application by the employer and employees to be added, or an agreement being reached without the declaration, and it is reasonable in all circumstances to support the interests of the employees to be covered. The FWC must be satisfied that a majority of the employees support the variation.	A single interest employer agreement may be varied to cover additional employers and employees upon joint application by the employer and employees to be added, or an agreement being reached without the declaration, and it is reasonable in all circumstances to support the interests of the employees to be covered. The FWC must be satisfied that a majority of employees support the variation.	An agreement can be varied to add an employer and employees by the FWC or an assistant FWC or an employee who has had difficulty face barriers to bargaining. Before making the variation, the FWC or an assistant FWC or an employee who has had difficulty face barriers to bargaining must be satisfied that it is not contrary to the public interest (and see below for limitations on variations in relation to the general building and construction industry).
<b>Applies to general building and construction industry?</b>	Yes.	Yes.	The FWC cannot make a supported bargaining authorisation if the agreement would cover employees in relation to general building and construction work.	The FWC cannot make a single interest employer authorisation if the agreement would cover employees in relation to general building and construction work.	The FWC can only approve a cooperative workplaces agreement if the agreement is greenfields. Such a greenfields agreement cannot be varied to add employers and employees. A cooperative workplaces agreement cannot be varied to add employees performing general building and construction work.

This document has been prepared by staff of the Fair Work Commission only as an overview for information purposes. It does not represent the views of the Commission on any issue.



# What's changing

## Single interest employer agreements

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### Secure Jobs Better Pay information pack

From 6 June 2023, employers and employees will be able to make a single interest employer agreement.

A single interest employer agreement is a type of multi-enterprise agreement. It allows two or more employers (that are franchisees or with common interests) to be covered by the same enterprise agreement.

It is one of three new multi-agreement types arising from changes to the Fair Work legislation made by the Secure Jobs Better Pay Act 2022.

### New single interest employer agreements

Find out about the single interest employer authorisations that are required before a single interest employer agreement can be made, including information about varying authorisations to add and remove employers:

- Go to: [New single interest employer agreements](#)

### Assistance to make a multi-enterprise agreement

Find out how the Commission can help parties make a single interest employer agreement once a single interest employer authorisation is in place.

- Go to: [Assistance to make a multi-enterprise agreement](#)

### Adding employers and their employees to a single interest employer agreement

Find out how to vary a single interest employer agreement to add employers and their employees to the agreement's coverage.

- Go to: [Adding employers and their employees to a single interest employer agreement](#)

## Removing an employer and employees from multi-enterprise agreements

Find out about how multi-enterprise agreements can be varied to remove employers and their employees.

- **Go to:** [Removing an employer and employees from multi-enterprise agreements](#)

## Changes to making agreements

Find out about changes to agreement making including changes to genuine agreement, the better off over all test (the BOOT) and multi-enterprise agreements.

- **Go to:** [Changes to making agreements](#)

## Other Secure Jobs Better Pay changes

Find out about how the Secure Jobs Better Pay Act is changing laws relevant to our work, including changes to bargaining and agreement making, as well as to sexual harassment cases, flexible work disputes, and the regulation of registered organisations.

- **Go to:** [Secure Jobs Better Pay Act – what's changing](#)

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# What's changing

## Cooperative workplace agreements

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### Secure Jobs Better Pay information pack

**From 6 June 2023, parties will be able to make a cooperative workplace agreement.**

A cooperative workplace agreement is a type of multi-enterprise agreement. It can be made by employers who have agreed to bargain together where they are not included in a supported bargaining authorisation or single interest authorisation.

It is one of three new multi-enterprise agreement types arising from changes to the Fair Work legislation made by the Secure Jobs Better Pay Act 2022.

### **New cooperative workplace agreements**

Find out about who can make a cooperative workplace agreements, and how they can be varied to add employers and employees.

- **Go to:** [New cooperative workplace agreements](#)

### **Assistance to make a multi-enterprise agreement**

Find out how the Commission can assist parties make a cooperative workplace agreement.

- **Go to:** [Assistance to make a multi-enterprise agreement](#)

### **Removing an employer and employees from multi-enterprise agreements**

Find out about how multi-enterprise agreements can be varied to remove employers and their employees.

- **Go to:** [Removing an employer and employees from multi-enterprise agreements](#)

## Changes to making agreements

Find out about changes to agreement making including changes to genuine agreement, the better off over all test (the BOOT) and multi-enterprise agreements.

- **Go to:** [Changes to making agreements](#)

## Other Secure Jobs Better Pay changes

Find out about how the Secure Jobs Better Pay Act is changing laws relevant to our work, including changes to bargaining and agreement making, as well as to sexual harassment cases, flexible work disputes, and the regulation of registered organisations.

- **Go to:** [Secure Jobs Better Pay Act – what's changing](#)

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[Information about the Secure Jobs Better Pay changes](#)



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## Changes made to agreement related forms

09 Jan 2023

**We have made some changes to our enterprise agreement and bargaining related forms.**

The changes follow the commencement of the [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Act 2022](#) [↗](https://www.legislation.gov.au/Details/C2022A00079) (<https://www.legislation.gov.au/Details/C2022A00079>), which amended the *Fair Work Act 2009*.

The changes include:

- **Form F17** – Employer's declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement): Question 17, regarding notification time, now includes requests to bargain under section 173(2A) of the Fair Work Act.
- **Form F24C** – Declaration in relation to termination of an enterprise agreement after the nominal expiry date: New questions have been added for the new test set out in section 226 of the Fair Work Act
- **Form F28** – Application for termination of collective agreement-based transitional instrument: New questions have been added for the new test set out in section 226 of the Fair Work Act
- **Form F32** – Application for a bargaining order: Now includes requests to bargain under section 173(2A) of the Fair Work Act as one of the grounds to seek a bargaining order
- **New Form F24D** – Declaration in response to application to terminate an agreement after the expiry date: This new form allows an employer, employee or union to tell us whether they support or oppose an application to terminate an enterprise agreement after the nominal expiry date.

All our forms are available on the [Forms \(/apply-or-lodge/forms\)](#) page of our website.

You can also read more [Information about the Secure Jobs Better Pay Act 2022 changes \(/about-us/secure-jobs-better-pay-act-whats-changing\)](#).

## Related news

### **New multi-enterprise bargaining information packs** →

19 May 2023

Single interest employer agreements and cooperative workplaces agreements

---

### **New agreement tool released – check which tests apply** →

16 May 2023

Check which tests apply to your agreement

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### **Final statement of principles on genuine agreement** →

12 May 2023

The statement of principles will commence 6 June 2023.

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**Published by the Fair Work Commission ([www.fwc.gov.au](http://www.fwc.gov.au))**

**Last updated:** 09 Jan 2023

**Location on last update:** <https://www.fwc.gov.au/about-us/news-and-media/news/changes-made-agreement-related-forms>



Information about the Secure Jobs Better Pay changes




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## Implementing the new bargaining provisions

28 Apr 2023

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Secure Jobs Better Pay Act) amends the enterprise bargaining provisions in the Fair Work Act 2009 (the FW Act). Some of these amendments [commenced on 7 December 2022 \(/agreements-awards/enterprise-agreements/make-enterprise-agreement/you-start-bargaining/request/\)](/agreements-awards/enterprise-agreements/make-enterprise-agreement/you-start-bargaining/request/) and further changes are due to come into effect on 6 June 2023. These amendments will have a significant impact on our work and those who use our services. We are proposing to implement a number of initiatives to assist users to understand and navigate the amendments.

As outlined in a  [statement by President Justice Hatcher on 8 December 2022 \(/documents/consultation/presidents-statement-more-jobs-better-pay-2022-12-08.pdf\)](/documents/consultation/presidents-statement-more-jobs-better-pay-2022-12-08.pdf), we are committed to implementing these amendments in an open and transparent way and have been listening closely to our users and other experts.

We have established the Enterprise Agreement and Bargaining Advisory Group (EAB Advisory Group) which will meet from early May 2023. This group consists of employer and employee organisations who represent their members interests. They will contribute feedback and advice as we work to design services that meet user needs.

The new provisions place more focus on our role in facilitating bargaining. The President has provided a commitment that we will ensure appropriate support is provided to parties during bargaining. In recognition of the need for increased support, Justice Hatcher recently appointed Deputy President Hampton as the National Practice Leader for Bargaining. See the  [President's Statement from 4 April 2023 \(/documents/consultation/presidents-statement-agreements-and-bargaining-2023-04-04.pdf\)](/documents/consultation/presidents-statement-agreements-and-bargaining-2023-04-04.pdf) for more information.

The new practice area will ensure functional separation between bargaining matters and applications for approval of enterprise agreements within the Commission. However, we recognise that for our users bargaining and agreement making are part of the same process. Accordingly, our proposed resources will support users across the whole process.

## **Bargaining initiatives to support you**

We are proposing a series of bargaining initiatives to assist users understand and navigate the changes to bargaining. We are currently consulting with the EAB Advisory Group on a range of proposed initiatives to ensure we are meeting the needs of our users. Some of the proposed initiatives include:

1. A Member led information video series
2. A Masterclass series
3. Information packs about the amendments and the Commission's processes
4. Promotion of the [Cooperative Workplaces Program \(/issues-we-help/collaborative-approaches-program\)](#), which has been renamed as the Collaborative Approaches Program

Over the coming weeks, we will be publishing further information about different aspects of the bargaining amendments, starting with an information pack about the new processes for protected action ballot order applications. All information and resources will be published on our website.

We encourage you to [subscribe to our announcements \(/subscriptions\)](#) and [follow us on LinkedIn](#)  (<https://www.linkedin.com/company/fair-work-commission-au>) to stay up to date.


We will also be distributing information through employer and employer organisations. If you have any feedback, please email us at [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) (<mailto:consultation@fwc.gov.au>).

## **Overview of the new bargaining provisions**

The Secure Jobs Better Pay Act amends the bargaining provisions of the *Fair Work Act 2009*. Key amendments include:

- removing the Australian Electoral Commission as the default agent to conduct protected action ballots
- giving the Commission the function of approving 'eligible protected action ballot agents', and requiring the Commission to review that approval at least every 3 years
- a requirement for all bargaining representatives involved in a proposed enterprise agreement to participate in a Commission conciliation conference during the protected action ballot period
- new 'intractable bargaining declaration' provisions
- new multi-enterprise bargaining streams.

See [Secure jobs better pay – what’s changing \(/about-us/secure-jobs-better-pay-act-whats-changing\)](/about-us/secure-jobs-better-pay-act-whats-changing) for more information.

Attachment A to the  [President’s Statement from 4 April 2023 \(/documents/consultation/presidents-statement-agreements-and-bargaining-2023-04-04.pdf\)](/documents/consultation/presidents-statement-agreements-and-bargaining-2023-04-04.pdf) also provides an overview of the changes.

## Related news

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19 May 2023

Single interest employer agreements and cooperative workplaces agreements

### **New agreement tool released – check which tests apply** →

16 May 2023

Check which tests apply to your agreement

### **Final statement of principles on genuine agreement** →

12 May 2023

The statement of principles will commence 6 June 2023.

**Location on last update:** <https://www.twc.gov.au/about-us/news-and-media/news/implementing-new-bargaining-provisions>







Information about the [Secure Jobs Better Pay changes](#)




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[← Back to Media releases \(/about-us/news-and-media/media-releases\)](#)

## Changes to the Fair Work Commission's functions

05 Mar 2023

From today, a number of changes to the functions of the Fair Work Commission come into operation. These changes are a result of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*.

As set out in the  [President's Statement of 8 December 2022 \(/documents/consultation/presidents-statement-more-jobs-better-pay-2022-12-08.pdf\)](#), the Commission is committed to implementing these legislative amendments in an open and transparent way and with the needs of our users in mind.

### Prohibiting sexual harassment in connection with work

The *Fair Work Act 2009* now includes a prohibition against sexual harassment in connection with work. The Commission can deal with sexual harassment disputes by:

- making a stop sexual harassment order
- otherwise dealing with the dispute, or
- both making a stop sexual harassment order and by otherwise dealing with the dispute.

We have published application forms for the new sexual harassment jurisdiction. These are available on the [Forms \(/apply-or-lodge/forms\)](#) page of our website. A new email address: [ABSH@fwc.gov.au](mailto:ABSH@fwc.gov.au) (<mailto:ABSH@fwc.gov.au>) has also been created for parties to file documents with the Commission and contact case managers.

Detailed information on our role in dealing with sexual harassment in connection with work is now available on our website. A number of changes have been made to materials following the consultations, and we will continue to review the feedback that has been provided and update material as the jurisdiction develops.

We welcome ongoing feedback in relation to materials and processes. Feedback can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) (<mailto:consultation@fwc.gov.au>).

Updated case law benchbooks will be published shortly.

We thank the members of our Sexual Harassment Working group for their input during this process. We also thank the organisations that responded in writing and those that gave their time to meet with us to provide feedback. All organisations will receive a direct response to their feedback.

## **Expert Panels for Pay Equity and the Care and Community Sector**

An Expert Panel will be required when the Commission is considering changes to modern awards which relate to gender pay equity or the Care and Community Sector and when deciding whether to make an equal remuneration order.

A newly created Pay Equity and Awards Team within the Commission will support the work of the Expert Panels. The team can be contacted at [awards@fwc.gov.au](mailto:awards@fwc.gov.au) (<mailto:awards@fwc.gov.au>).

New application forms to vary a modern award and apply for an equal remuneration order are available on the [Forms \(/apply-or-lodge/forms\)](#) page of our website.

Information about [gender pay equity \(/agreements-awards/gender-pay-equity\)](#), the work of the [expert panels \(/agreements-awards/gender-pay-equity/gender-pay-equity-fair-work-act\)](#) and [equal remuneration orders \(/agreements-awards/gender-pay-equity/equal-remuneration-orders\)](#) have also been added to our website.

We intend to engage in a research project on occupational segregation and gender undervaluation. Further details concerning the research program will be announced in due course.

## **Absorbing the functions of the Registered Organisations Commission**

The functions of the Registered Organisations Commissioner have now transferred to the General Manager of the Commission.

The obligations of registered organisations do not change.

All ongoing investigations, inquiries and litigation will transfer to the General Manager who will be assisted by staff transferring from the Registered Organisations Commission into the newly formed Registered Organisations Governance and Advice Branch. Conduct that occurred prior to the transfer of these functions may be subject to a potential inquiry, investigation or proceeding by the General Manager.

A new email address has been established for all registered organisations matters:

[regorgs@fwc.gov.au](mailto:regorgs@fwc.gov.au) (<mailto:regorgs@fwc.gov.au>). Staff in the registered organisations teams at the Fair Work Commission can be contacted on 1300 341 665. Further information can be accessed at [regorgs.fwc.gov.au](https://regorgs.fwc.gov.au) [↗](https://regorgs.fwc.gov.au) (<https://regorgs.fwc.gov.au>).

We have also established a Registered Organisations Advisory Committee who will play an important advisory role over the coming months. We thank the members of the committee for their assistance.

## Contact for further information

Media & Communications team  
Communications

**Telephone**                      [0427 097 628 \(tel: 0427 097 628\)](tel:0427097628)

**Email**                              [communications@fwc.gov.au](mailto:communications@fwc.gov.au) (<mailto:communications@fwc.gov.au>)

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Published by the Fair Work Commission ([www.fwc.gov.au](http://www.fwc.gov.au))

Last updated: 06 Mar 2023

Location on last update: <https://www.fwc.gov.au/changes-fair-work-commissions-functions>





[Information about the Secure Jobs Better Pay changes](#)



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## Bargaining information pack series

04 May 2023

We have developed a new information pack on protected action ballot orders.

### Download:

 [Changes to protected action ballot orders information pack \(PDF\)](#) ([/sites/default/files/2023-05/PABO information pack SJBP.pdf](/sites/default/files/2023-05/PABO_information_pack_SJBP.pdf))

This is the first in a series of information packs about the changes to bargaining that will commence on 6 June 2023. Over the coming weeks we will continue to publish information packs on different topics.

These information packs will be part of an expanding suite of resources designed to help our users understand and prepare for changes to bargaining that are due to commence on 6 June 2023. All information and resources will be published on our website.

We encourage you to [subscribe to our announcements \(/subscriptions\)](#) and [follow us on LinkedIn](#)  (<https://www.linkedin.com/company/fair-work-commission-au>) to stay up to date.

## Related news

### New multi-enterprise bargaining information packs

19 May 2023

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12 May 2023

The statement of principles will commence 6 June 2023.

**Published by the Fair Work Commission ([www.fwc.gov.au](http://www.fwc.gov.au))**

**Last updated: 14 May 2023**

**Location on last update: <https://www.fwc.gov.au/about-us/news-and-media/news/bargaining-information-pack-series>**



Information about the Secure Jobs Better Pay changes



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## Pre-2010 agreement resources for employers

05 May 2023

We have developed resources to help employers meet their obligations to notify their employees about the sunsetting of their pre-2010 agreements.

If you are an employer with a have a pre-2010 agreement that covers one or more employees (also known a 'zombie agreement'), you are required to notify affected employees in writing about the sunsetting of the agreement. You must do this **before 7 June 2023**. Failing to give the required written notice to employees is a breach of a civil penalty provision

### Download:

-  [Guide for employers \(PDF\)](https://www.fwc.gov.au/documents/resources/pre-2010-agreements-written-notice-guide-employers.pdf)  (https://www.fwc.gov.au/documents/resources/pre-2010-agreements-written-notice-guide-employers.pdf) – information about pre-2010 agreements ('zombie agreements') and the written notice requirement
-  [Template written notice \(Word\)](https://www.fwc.gov.au/documents/resources/pre-2010-agreements-template-written-notice.docx)  (https://www.fwc.gov.au/documents/resources/pre-2010-agreements-template-written-notice.docx) – You can use our template written notice to meet your obligation.

Find out more about [sunsetting of pre-2010 agreements \('zombie agreements'\)](/agreements-awards/enterprise-agreements/sunsetting-pre-2010-agreements-zombie-agreements) (/agreements-awards/enterprise-agreements/sunsetting-pre-2010-agreements-zombie-agreements).

## Related news

New multi-enterprise bargaining information packs



19 May 2023

Single interest employer agreements and cooperative workplaces agreements

**New agreement tool released – check which tests apply**



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**Published by the Fair Work Commission ([www.fwc.gov.au](http://www.fwc.gov.au))**

**Last updated: 05 May 2023**

**Location on last update: <https://www.fwc.gov.au/about-us/news-and-media/news/pre-2010-agreement-resources-employers>**





[Information about the Secure Jobs Better Pay changes](#)




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[← Back to latest news \(/about-us/news-and-media/news\)](#)

## Supported bargaining agreements – new information pack

11 May 2023

We have developed a new information pack on supported bargaining agreements.

**Download:**  [New supported bargaining agreements \(PDF\) \(/documents/resources/supported-bargaining-information-pack-sjbp.pdf\)](/documents/resources/supported-bargaining-information-pack-sjbp.pdf)

This is the second in a series of information packs about the changes to bargaining that will commence on 6 June 2023. Over the coming weeks we will continue to publish information packs on different topics.

These information packs will be part of an expanding suite of resources designed to help our users understand and prepare for changes to bargaining that are due to commence on 6 June 2023. All information and resources will be published on our website.

We encourage you to [subscribe to our announcements \(/subscriptions\)](/subscriptions) and [follow us on LinkedIn](https://www.linkedin.com/company/fair-work-commission-au)  (<https://www.linkedin.com/company/fair-work-commission-au>) to stay up to date.

### Related news

**New multi-enterprise bargaining information packs**



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Check which tests apply to your agreement

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[Information about the Secure Jobs Better Pay changes](#)



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## New agreement tool released – check which tests apply

16 May 2023

The Secure Jobs Better Pay Act is changing how employers and employees bargain and make agreements. On 6 June 2023, new enterprise bargaining and agreement making provisions will commence. The amendments include:

- changes to the better off overall test (BOOT)
- a Statement of principles on genuine agreement
- changes to multi-enterprise agreements.

See [changes to making agreements \(/agreements-awards/enterprise-agreements/changes-making-agreements\)](#) for more information.

On commencement of the new provisions, we will apply different tests when approving your agreement. The tests that apply will depend on when you started bargaining and when the agreement was made.

To help you comply with the legislative tests that apply to your application we have developed the '[Understand the tests that apply to agreements \(/agreements-awards/enterprise-agreements/changes-making-agreements/understand-tests-apply-agreements\)](#)' tool. You can enter the relevant timeframes to determine which tests will apply to you.

### Access the new agreement tests tool

The new tool is a part of our work to assist you in navigating the new provisions. We will update the tool when the forms are finalised. This will provide you with links to the forms that apply in your


circumstances.

Understand the tests that apply tool

(/agreements-awards/enterprise-agreements/changes-making-agreements/understand-tests-apply-agreements)

## Support and tools

We will continue to provide you with new and updated resources in preparation of the new provisions commencing. In the coming weeks we will release updates to the:

- [Date calculator for single enterprise agreement \(/agreements-awards/enterprise-agreements/make-enterprise-agreement/you-start-bargaining/date\)](/agreements-awards/enterprise-agreements/make-enterprise-agreement/you-start-bargaining/date)
- [Create the NERR tool \(/agreements-awards/enterprise-agreements/make-enterprise-agreement/start-bargaining/nerr-notice-1\)](/agreements-awards/enterprise-agreements/make-enterprise-agreement/start-bargaining/nerr-notice-1) to align with the amended Fair Work Regulations commence
- pre-approval checklist to reflect the new legislative requirements. This checklist is completed by Commission staff then given to the Commission Member who reviews the application before deciding whether to approve the agreement [See  [pre-approval checklist \(docx\) \(/sites/default/files/2022-08/s185-EA-pre-approval-legislative-checklist.docx\)](/sites/default/files/2022-08/s185-EA-pre-approval-legislative-checklist.docx)]
- online agreement forms so parties can continue to lodge their applications online from 6 June using the online *Form F16 – Application for approval of an enterprise agreement (other than a greenfields agreement)* and attach the paper-based Form F17

We remain committed to improving service delivery through digital transformation. We will continue to notify you of the pending changes and as resources become available. We recommend you [subscribe to our announcements \(/subscriptions\)](/subscriptions) and [follow us on LinkedIn !\[\]\(c694a3ff3b077d76910920a6a1593ab4\_img.jpg\)](https://www.linkedin.com/company/488529) (<https://www.linkedin.com/company/488529>) to keep up to date.

Useful links:

- [Secure Jobs Better Pay Act - what's changing \(/about-us/secure-jobs-better-pay-act-whats-changing\)](/about-us/secure-jobs-better-pay-act-whats-changing)
- [Supporting you to bargain and make agreements from 6 June 2023 \(/secure-jobs-better-pay/bargaining-support-6-june-23\)](/secure-jobs-better-pay/bargaining-support-6-june-23)
- [Changes to making agreements \(/agreements-awards/enterprise-agreements/changes-making-agreements\)](/agreements-awards/enterprise-agreements/changes-making-agreements)

## Related news

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12 May 2023

The statement of principles will commence 6 June 2023.

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### **Supported bargaining agreements - new information pack** →

11 May 2023

New information pack - supported bargaining agreements

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**Last updated:** 16 May 2023

**Location on last update:** <https://www.fwc.gov.au/about-us/news-and-media/news/new-agreement-tool-released-check-which-tests-apply>





## Terms of Reference – Enterprise agreements and bargaining advisory group

### Background

On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Secure Jobs Better Pay Act) received Royal Assent. Relevantly, the Secure Jobs Better Pay Act amends the *Fair Work Act 2009* (the FW Act).

The Secure Jobs Better Pay Act includes a number of significant changes to the enterprise bargaining and enterprise agreement approval processes that will commence on 6 June 2023. The President's statement issued on 4 April 2023 sets out how the Commission proposes to implement the amendments. An overview of these amendments is set out in Attachment A of the statement.

Due to the increased focus in the Secure Jobs Better Pay Act on the Commission's role in facilitating bargaining, Deputy President Hampton has been appointed as the National Practice Leader for Bargaining. In this role, Deputy President Hampton will lead the Commission's practice in connection with all bargaining and industrial action-related matter types. Deputy President Hampton will also be responsible for the coordination of the renamed Collaborative Approaches Program.

Deputy President Masson will continue as the National Practice Leader for Enterprise Agreement Approvals and oversee the implementation of the changes to the agreement approval process effected by the Secure Jobs Better Pay Act. The emphasis will be on maintaining the efficiency and timeliness of approvals for agreements which meet the statutory criteria.

### Purpose of the advisory group

The Commission is establishing the advisory group to consult with those who represent users impacted by the changes to the enterprise bargaining and enterprise agreement approval processes as a result of the Secure Jobs Better Pay Act.

The advisory group will provide advice to support the implementation of the changes and will have an opportunity to provide ongoing feedback about the practical operation of the changes. The advisory group will be a forum for information exchange, improving the Commission's understanding of the challenges users may face, and ways the Commission can assist.

The Commission will also consult with the advisory group in relation to future initiatives aimed at providing proactive support for workers and businesses, in particular small business, to help reach agreements that benefit them.

The Commission must be in a position to implement the enterprise bargaining and enterprise agreement approval changes by 6 June 2023. However, the Commission is committed to continual improvement of its processes on an ongoing basis, including through this advisory group.

### Membership

- Ian MacDonald, National IR Manager, Australian Public Transport Industrial Association
- Cathy Lovell, Associate Chief Executive: School Operations and Governance, Association of Independent Schools NSW
- Stephen Ferguson, National CEO, Australian Hotels Association
- Dr Matthew Steen, Executive Director – Policy & Advocacy, Australian Small Business and Family Enterprise Ombudsman
- Brent Ferguson, Head of National Workplace Relations Policy, Ai Group
- Jessica Tinsley, Director Workplace Relations, Australian Chamber of Commerce and Industry

- David Wemyss, Senior Workplace Relations Consultant, Victorian Chamber of Commerce and Industry
- Jason Robertson, Director – Policy, Sustainability and Impact, Australian Retailers Association
- Liam O'Brien, Assistant Secretary, Australian Council of Trade Unions
- Rebecca Sostarko, Senior Adviser – Safety, Contracts & Workplace Relations, Master Builders Australia
- Scott Harris, Director – Workplace Relations and Business, Pharmacy Guild of Australia
- Robert Potter, National Secretary, Australian Services Union
- Cassandra Taylor, National Legal Counsel, Electrical Trades Union
- Sue-Anne Burnley, National Industrial Officer, Shop, Distributive and Allied Employees Association
- Larissa Harrison, Deputy Director, United Workers Union
- Luis Izzo, Managing Director – Sydney Workplace, Australian Business Lawyers & Advisor
- Ryan Martin, Director of Workplace Relations, Chamber of Commerce and Industry WA
- Lorraine Cassin, Federal Secretary Print Division, Australian Manufacturing Workers' Union
- Trevor Clarke, Director – Legal & Industrial, Australian Council of Trade Unions

### **Meeting protocols**

Meetings will be held by Microsoft Teams and will run for 1 hour. The advisory group will have an initial meeting on 4 May 2023. The group will also meet after the commencement date of the amendments to monitor processes post implementation with the view to making continued improvements.

We anticipate the advisory group will meet on 2 to 3 occasions in 2023.

The Commission will provide material in advance of meetings where possible and out of session feedback may also be sought.

The Commission will conduct the meetings in an open and transparent manner. However, in some limited circumstances, the Commission may ask advisory group members to treat some information as confidential (for example, in circumstances where the Commission anticipates making a public announcement but has not done so). The Commission will clearly identify any information that should remain confidential and will expect the members of the advisory group to comply with such a request.

### **Co-chairs**

Deputy President Masson is the National Practice Leader for Enterprise Agreements and Deputy President Hampton is the National Practice Leader for Bargaining. The advisory group will be co-chaired by both Deputy President Masson and Deputy President Hampton.

### **Secretariat**

- Mirella Franceschini – Associate to Justice Hatcher, President





## President's statement

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### Approval of enterprise agreements – genuine agreement – Statement of Principles

Justice Hatcher, President

Sydney, 3 March 2023

[1] On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (the Secure Jobs Better Pay Act) received Royal Assent. Relevantly, the Secure Jobs Better Pay Act amends the *Fair Work Act 2009* (Fair Work Act), the *Fair Work (Registered Organisations) Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

[2] On 8 December 2022, I issued a Statement setting out the Commission's approach to the implementation of the Secure Jobs Better Pay Act changes. That Statement noted that the Secure Jobs Better Pay Act makes a number of significant changes to the enterprise bargaining and enterprise agreement approval processes including inserting new section 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 to be fixed by proclamation.

[3] On 18 January 2023, I issued a further Statement setting out a draft timetable for the Commission to make the new Statement of Principles including the consultation process to be conducted by myself, Deputy President Asbury and Deputy President Masson. The statement invited parties to provide submissions and feedback regarding the proposed draft timetable by Wednesday, 25 January 2023.

[4] On 30 January I issued a further Statement varying the proposed timetable to provide parties with the opportunity to file reply submissions as requested by Australian Industry Group on 25 January 2023. In that Statement I noted that the actual filing dates for submissions and submissions in reply will be set out in the Statement to be issued in the week commencing 27 February 2023.

[5] On 6 February 2023 I published a staff discussion paper to assist with the conferences to be held with interested parties on 14 and 15 February 2023. The discussion paper set out the amendments to the Fair Work Act that require that the Commission to make the Statement of Principles. Conferences with interested parties, all of which were conducted by myself together with Deputy President Asbury and Deputy President Masson, were held as follows:

- Melbourne (10.00am Tuesday 14 February)
- Sydney (10.00am Wednesday 15 February), and
- Online via Microsoft Teams (2.00pm Wednesday 15 February)

[6] Separate consultation was undertaken with the peak councils, namely the Australian Industry Group, the Australian Council of Trade Unions, the Australian Chamber of Commerce and Industry and the Council of Small Business Organisations of Australian.

[7] Following the consultation process and taking into account the views of the peak councils and other interested parties received during that process, the Commission has developed a draft Statement of Principles. The draft Statement of Principles is published in conjunction with this statement.

[8] I confirm the dates (set out in the table below) for interested parties to make submissions in relation to the draft Statement of Principles. I invite parties to review the draft Statement of Principles and provide submissions in accordance with the following timetable:

<b>Date</b>	<b>Task or event</b>
3 March 2023	Statement with draft Statement of Principles published for comment
30 March 2023	Closing date for submissions in relation draft Statement of Principles
13 April 2023	Closing date for optional submissions in reply following initial submissions filed on 30 March 2023.
w/c 8 May 2023	Final Statement of Principles (as made) published on website and lodged with the Office of Parliamentary Counsel for registration
Late May 2023	Final Statement of Principles registered with the Federal Register of Legislation published on the Commission's website
6 June 2023	Statement of Principles will commence operation

[9] Submissions should be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au). The Commission will publish any submissions received in relation to the Statement of Principles, as it does for all matters of public interest and instruments of broad application. This ensures that all interested parties are kept informed of the progress of this matter. Parties filing submissions in this matter should take this into account when filing. A dedicated [statement of principles on genuine agreement in bargaining](#) webpage has been established.

[10] Interested parties are encouraged to subscribe to receive notifications on the [subscription services page](#) of the Commission's website. Any questions about the contents of this Statement or the Commission's implementation of the Secure Jobs Better Pay Act can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au).

**PRESIDENT**

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## Full Bench statement

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### Approval of enterprise agreements – genuine agreement – Statement of Principles on Genuine Agreement

Justice Hatcher, President  
Vice President Asbury  
Deputy President Masson

Sydney, 12 May 2023

#### Background

[1] 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 (Commission). The amendments commence on 6 June 2023 (unless proclaimed earlier).

[2] 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.

[3] Section 188B(1) of the amended Fair Work Act requires the Commission, by legislative instrument, to make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement (Statement of Principles on Genuine Agreement).

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

[5] Section 188 sets out requirements that must be met for the Commission to be satisfied an enterprise agreement has been genuinely agreed to by employees. One of these requirements (in s 188(1)) is that the Commission must take into account the Statement of Principles on Genuine Agreement.

[6] The Fair Work Act also generally requires the Commission to be satisfied that a variation of an enterprise agreement has been genuinely agreed to by employees, before it can approve the variation. In determining whether it is satisfied that a variation has been genuinely agreed to, the Commission 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*.

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

[7] Pursuant to s 188B(1), the Commission, constituted by this Full Bench, has made the *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* (Instrument). The Instrument is published with this statement. The Statement of Principles on Genuine Agreement is at Schedule 1 to the Instrument.

[8] As set out in the President's statement of 3 March 2023, the Instrument will now be lodged with the Office of Parliamentary Counsel for registration.

[9] Following registration, the Instrument will commence operation at the same time as the commencement of Part 14 of Schedule 1 to the Amending Act, on 6 June 2023 (unless that Part is proclaimed to commence earlier).

[10] We note that, pursuant to s 33(3) of the *Acts Interpretation Act 1901* (Cth) as in force on 25 June 2009, the Statement of Principles on Genuine Agreement may be varied by the Commission from time to time.

#### **Consultation**

[11] The Commission consulted broadly during the process to make the Instrument. The consultation commenced with a statement of the President on 18 January 2023 which set out a draft timetable for the Commission to make the Statement of Principles on Genuine Agreement, including the consultation process to be conducted by this Full Bench. The statement invited parties to provide submissions and feedback regarding the proposed draft timetable by Wednesday, 25 January 2023.

[12] The President issued a further statement on 30 January varying the proposed timetable to provide parties with the opportunity to file reply submissions as requested by Australian Industry Group (Ai Group) on 25 January 2023.

[13] On 6 February 2023, the Commission published a discussion paper prepared by Commission staff to promote discussion and facilitate consultations.

[14] Conferences with interested parties were held as follows:

- Melbourne (10.00am Tuesday 14 February)
- Sydney (10.00am Wednesday 15 February), and
- Online via Microsoft Teams (2.00pm Wednesday 15 February).

[15] Separate consultation was undertaken with the peak councils, namely the Ai Group, the Australian Council of Trade Unions (ACTU), the Australian Chamber of Commerce and Industry (ACCI) and the Council of Small Business Organisations of Australia.

[16] A draft Instrument was published on 3 March 2023. Interested parties were invited to make submissions in response to the draft by 30 March 2023. Submissions in reply were due by 13 April 2023.

[17] Submissions were made by:

- ACCI
- ACTU
- Australian Higher Education Industrial Association
- Ai Group
- Australian Manufacturing Workers' Union
- Australian Public Transport Industrial Association
- Australian Services Union
- Australian Small Business and Family Enterprise Ombudsman
- Construction Forestry Maritime Mining & Energy Union–Manufacturing Division
- Construction, Forestry, Maritime, Mining and Energy Union–Construction and General Division (CFMMEU–Construction and General Division)
- Housing Industry Association
- Law Council of Australia
- Meerkin & Apel
- Mineral Council of Australia
- Mining and Energy Union, and
- Ventia.

[18] Submissions in reply were made by:

- ACTU
- Ai Group
- CFMMEU–Construction and General Division, and

- Mining and Energy Union.

[19] Throughout the consultation process updates have been published on the Commission's website on a dedicated webpage and via the Commission's general announcements subscription service.

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

#### **Further information about bargaining and enterprise agreements**

[21] Now that the Statement of Principles on Genuine Agreement has been made, the Commission will be publishing a range of tools and resources to assist parties to comply with the relevant legislative tests over the coming weeks.

[22] Some information about changes to the Form F17 – Employer's declaration in support of an application for approval of an enterprise agreement and the Form F16 – Application for approval of an enterprise agreement (other than a greenfields agreement) was published on 8 May 2023.

[23] We understand that amendments to the *Fair Work Regulations 2009* (Cth) (Regulations) are being contemplated to further support the amendments made by the Amending Act. Further materials will be developed once any amendments to the Regulations are made. This will include further information about the notice of employee representational rights (NERR) which is set out in the Regulations.

[24] The Commission's subscription service will be used to notify subscribers as new information is published. Any feedback about the information we publish can be sent to consultation@fwc.gov.au.

**PRESIDENT**



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

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

Dated

PRESIDENT

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## 1 Name

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

## 2 Commencement

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

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

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

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

## 3 Authority

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

## 4 Statement of Principles on Genuine Agreement

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

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

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

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

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

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

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

#### **Informing employees of bargaining for a proposed enterprise agreement**

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

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

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

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

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

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

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

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

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

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

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

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to employees who are entitled to vote on the agreement:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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**Other matters considered relevant**

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

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

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

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

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## Definitions

20. In this Statement of Principles on Genuine Agreement:

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

