Australian Industry Group

Statement of Principles on Genuine Agreement

Reply Submission

17 April 2023

STATEMENT OF PRINCIPLES ON GENUINE AGREEMENT

1. This submission is filed by the Australian Industry Group (**Ai Group**) regarding the Fair Work Commission's (**Commission**) development of the Statement of Principles on Genuine Agreement (**Principles**). Specifically, the submission responds to some of those filed by other interested parties regarding a draft of the Principles published by the Commission (**Draft Principles**).

General Observations

2. Many of the submissions filed call for the Draft Principles to more prescriptively describe the steps that should be taken, in order to demonstrate that an enterprise agreement has been genuinely agreed. In some cases, the proposed amendments to the Draft Principles go so far as to create requirements or obligations, as to what must be done in order to establish genuine agreement.

3. It remains Ai Group's position that the Principles should not be overly prescriptive and they should not create obligations. To do so would be to undermine the purpose of the Principles.

4. As explained in the Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022,* the purpose of removing certain pre-approval requirements from the *Fair Work Act 2009* (**Act**) and requiring the development of the Principles was to *'simplify the pre-approval requirements, while retaining sufficient safeguards for employees'*. [1] The Explanatory Memorandum describes the Principles as providing *'guidance for employers about how they can ensure employees have genuinely agreed'*.[2]

5. It is critical that the purpose of the Principles is borne in mind when considering what they should include. The Principles are intended to <u>simplify</u> the pre-approval requirements. They should be prepared in a way that facilitates this. Complex, prescriptive guidelines will not result in the existing statutory scheme being replaced by a simpler one. Rather, they may give rise to a new set of obligations

[1] Paragraph 682 of the Explanatory Memorandum.

[2] Paragraph 683 of the Explanatory Memorandum.

(or perceived obligations) that are difficult to interpret and apply. They may also be the source of renewed disputation and litigation as to their interpretation and proper application.

6. The Principles are intended to offer no more than guidance to employers and members of the Commission. They should be simple and succinct. They should briefly outline the steps that an employer may take in order to ensure that their employees have genuinely agreed to an enterprise agreement. It should be clear from the Principles that they do not mandate requirements that must be observed in order to satisfy the Commission that an agreement has been genuinely agreed. It should be apparent from the terms of the Principles that the Commission may be satisfied that an agreement has been genuinely agreed where the employer takes different pre-approval steps. Put another way, the Principles should not purport to articulate conditions precedent that must be satisfied in order to establish that an agreement was genuinely agreed; nor should the Principles be so prescriptive that they give that impression.

7. The Commission should adopt a balanced approach to the development of the Principles. Whilst we acknowledge that the Principles are intended to serve as a safeguard in lieu of some previously applicable legislative provisions requiring an employer to take specific steps before asking employees to cast a vote in relation to a proposed agreement, the Principles should do so in a way that is brief and unambiguous. The Commission should not adopt the approach urged by the unions, which would result in the development of a purported rule book that would require employers to take steps that were not required by the very prescriptive legislative scheme that the amendments to the Act are intended to address, mor are they required by any other provision of the Act.

8. Some of the submissions filed by other employer representatives urge the Commission to take a less prescriptive approach than that which is found in the Draft Principles. In broad terms, we would support a simplification of the Draft Principles in a way that makes them less prescriptive, whilst still providing appropriate guidance to employers.

The Submissions of the Australian Council of Trade Unions

9. Our response to the Australian Council of Trade Union's (**ACTU**) submission can be found at **Attachment A** to this submission. It has been prepared by reference to the amendments proposed by the ACTU to the Draft Principles, in the document appended to its submissions.

The Unions

10. To a large extent, the submissions made by various unions overlap with those of the ACTU. To that extent, we rely on our submissions in reply to the ACTU.

11. Our submissions in response to other aspects of the unions' are set out below.

The Mining and Energy Union

12. The Mining and Energy Union (**MEU**) opposes the inclusion of **paragraph 14** of the Draft Principles.[3] In our submission, it should be retained.

13. It is not uncommon for unions to play a significant role in informing employees of the terms of a proposed agreement. It is appropriate that the Commission may take the dissemination of such information into account. Naturally, the nature of the explanation provided, the content covered and the number of employees to whom it was provided would be relevant to the Commission's assessment of whether s.180(5) has been satisfied. The Draft Principles do not suggest that an explanation provided by a union necessarily relieves an employer of taking any steps to ensure that the terms of a proposed agreement and the effect of those terms are explained to employees.

[3] MEU submission at [17] – [19]. The submission incorrectly refers to paragraph 13 of the Draft Principles.

14. The union proposes that **paragraph 16** of the Draft Principles be amended such that they provide that the Commission may also take into account *'any time provided to employees by the employer to receive any oral explanation and/ or to consider the relevant material that has been distributed'*.[4] We strongly oppose this proposal.

15. The Act does not require that employers provide employees with an opportunity during paid working time to receive or consider an explanation provided about a proposed agreement. The Principles should not suggest or require that this is necessary in order to satisfy the Commission that the explanation was given in an appropriate manner. As we have repeatedly submitted, the Principles should not introduce, or have the effect of introducing, additional obligations on employers.

16. In relation to the MEU's submissions about **paragraph 19** of the Draft Principles;[5] the precise amendment proposed and its effect are unclear. They should not be adopted.

17. In any event, the Principles will concern whether an agreement was genuinely agreed. The issue raised by the union relates to the *process* of bargaining, whilst the requirement that employees genuinely agreed concerns the *outcome* of the bargaining process. The principles should not purport to govern the process through which bargaining should occur.

The Construction, Forestry, Maritime, Mining and Energy Union, Construction & General Division

18. In response to paragraph 36(a) of the union's submission; the Principles do not relate to good faith bargaining. The submission is misplaced.

[4] MEU submission at [20]. The union submission mistakenly refers to paragraph 15 of the Draft Principles.

[5] MEU submission at [27]. The union submission mistakenly refers to paragraph 18 of the Draft Principles.

19. In relation to paragraph 36(b) of the union's submission; we refer to paragraphs 17 – 20 of our submission dated 30 March 2023. We oppose the proposed paragraph 8(a) of the Draft Principles and, by extension, the submissions of the union.

20. In relation to paragraph 36(c) of the union's submission; this is expressly provided at paragraph 5(b) of the Draft Principles.

21. In relation to paragraph 36(d) of the union's submission; this is adequately provided for at paragraph 12 of the Draft Principles.

The Australian Manufacturing Workers' Union

22. The Commission should not adopt the amendment proposed by the union in relation to **paragraph 13** of the Draft Principles.[6]

23. If an employer misstates the effect of a particular provision of an enterprise agreement, this may not have any bearing on whether there was genuine agreement because, for instance, the relevant term is a machinery provision that does not provide any right or entitlement. Paragraph 13 should not apply to *all* misstatements.

24. The union's submissions about **paragraph 14** of the Draft Principles should not be accepted.[7] It appears to misunderstand the effect of the Draft Principles. We refer to our response above to the MEU's submissions about paragraph 14.

25. Similarly, the union's submissions about **paragraph 15(c)** of the Draft Principles should also be rejected.[8] The Commission may take into account any evidence about whether an explanation provided for the purposes of s.180(5) was adequate. This could include a written record; however, it may also include witness evidence from persons involved in the provision of the explanation. The

[6] AMWU's submission at [11].

[7] AMWU's submission at [12]. The union's submission mistakenly refers to paragraph 13 of the Draft Principles.

[8] AMWU's submission at [13].

absence of a written record should not of itself affect the Commission's assessment of whether s.180(5) of the Act is satisfied.

The Australian Chamber of Commerce and Industry

26. In relation to the submissions made by the Australian Chamber and Commerce and Industry (**ACCI**) about **paragraph 14** of the Draft Principles; ACCI appears to misunderstand s.180(5) of the Act. It requires an employer to take *'all reasonable steps to ensure that'* the terms of a proposed agreement and the effect of those terms are explained to the relevant employees. It does not require that the employer must provide the explanation. The obligation at s.180(5) may be discharged by, for example, taking steps to ensure that the proposed agreement is explained by a third party (such as a union).

27. The Principles should not demur from the proposition that an explanation provided by one or more union bargaining representatives is relevant to the Commission's assessment of whether s.180(5) of the Act has been satisfied.

28. We support ACCI's submissions about **paragraph 19** of the Draft Principles.

29. We oppose ACCI's proposal that the word *'significant'* before *'weight'* be removed from **paragraph 20** of the Draft Principles. It is in our submission appropriate that significant weight be afforded to union support for the approval of an agreement. This is particularly so where the union represents a significant proportion of the relevant workforce.

Attachment A

Response to the ACTU's Submissions

Paragraph of the Draft Principles (as renumbered)	Response
1(c)	We oppose the proposed new paragraph 1(c). It should not be adopted by the Commission. Proposed paragraph 1(c) contemplates the provision of information that is not presently required by the Act. It would add unjustifiable prescription to the Principles. The Principles would thereafter state that employers *should* provide that information in order to ensure that employees have genuinely agreed. We note that the Commission currently has a broad discretion to determine that an enterprise agreement has not been genuinely agreed (s.188(1)(c) of the Act). Despite this, the authorities do not suggest that this step is generally required in order to satisfy the Commission that there was genuine agreement. Providing the information contemplated by the proposed principle would materially increase an employer's regulatory burden. In order to ensure compliance with s.174(1A) of the Act, which requires that the Notice of Representational Rights should only contain the content prescribed by the *Fair Work Regulations 2009*, the information described at paragraph 1(c) would need to be provided separately. Put bluntly, the proposal would be better described as a measure that would enhance union engagement in the enterprise bargaining process and create business development opportunities for unions to recruit new members. It is inappropriate that employers be tasked with this.
1(d)	We oppose the proposed new paragraph 1(d). It should not be adopted by the Commission. Proposed paragraph 1(d) contemplates the provision of information that is not presently required by the Act. It would add unjustifiable prescription to the Principles. The Principles would thereafter state that employers *should* provide that information in order to ensure that employees have genuinely agreed. We note that the Commission currently has a broad discretion to determine that an enterprise agreement has not been genuinely agreed (s.188(1)(c) of the Act). Despite this, the authorities do not suggest that this step is generally required in order to satisfy the Commission that there was genuine agreement. Providing the information contemplated by the proposed principle would materially increase an employer's regulatory burden. In order to ensure compliance with s.174(1A) of the Act, which requires that the Notice of Representational Rights should only contain the content prescribed by the *Fair Work Regulations 2009*, the information described at paragraph 1(d) would need to be provided separately.
1(e)	We oppose the proposed new paragraph 1(e), for the reasons articulated above in relation to paragraph 1(d). It should not be adopted by the Commission.

3	We strongly oppose the proposed paragraph 3. It should not be adopted by the Commission. The proposed paragraph is plainly directed towards increasing the extent to which unions are involved in enterprise bargaining. It is not appropriate that the Principles are used as a vehicle to attain that objective. The Principles are intended to guide employers as to how they can ensure that employees have genuinely agreed. Clearly, the proposal contemplates the provision of information that is not presently required by the Act. It would add unjustifiable prescription to the Principles. Moreover, it is expressed as a *requirement*; that is, a step that employers *'must'* take. This is wholly inappropriate for inclusion in the Principles. Naturally, the requirement would also increase employers' regulatory burden. Notably, it would require an employer to not only notify unions that it knows are entitled to represent employees who would be covered by a proposed agreement; it would also require employers to contact unions who could *'reasonably have been known'* to the employer as being entitled to represent the interests of the relevant cohort of employees. Further, the precise scope of the latter requirement is ambiguous. In what circumstances would the Commission consider that an employer could *'reasonably have known'* that a particular union is entitled to represent some of their employees' interests? What steps would an employer be expected to take? Would they be required to seek legal advice to ascertain which unions are entitled to represent their employees' interests? This imprecision of itself tells against the adoption of this proposal.
4	The proposed paragraphs 1(c) – 1(e) should not be introduced and, by extension, the proposed paragraph 4 should also be excluded.
7(c)	We oppose the proposed paragraph 7(c). It should not be adopted by the Commission. Proposed paragraph 7(c) contemplates the provision of material that is not presently required by the Act. It would add unjustifiable prescription to the Principles. The Principles would state that employers *should* provide the additional documentary material in order to ensure that employees have genuinely agreed. We note that the Commission currently has a broad discretion to determine that an enterprise agreement has not been genuinely agreed (s.188(1)(c) of the Act). Despite this, the authorities do not suggest that this step is generally required in order to satisfy the Commission that there was genuine agreement. Further, enterprise agreements and awards are publicly available documents, including via the Commission's website. A copy of an applicable instrument could also be sought from an employer or union participating as an employee bargaining representative upon request. In any event, the key terms of the instrument applying to employees at the time of bargaining is typically explained by employers prior to the conduct of the vote in relation to the agreement.

9(a)	We oppose the amendment proposed to paragraph 9(a). It should not be adopted by the Commission. The paragraph, as amended, would be unclear. The purpose of the purported requirement and its practical operation is ambiguous. Further, it contemplates an additional requirement, that is not presently imposed by the Act. It would add unjustifiable prescription to the Principles and increase employers' regulatory burden. We note that the Commission currently has a broad discretion to determine that an enterprise agreement has not been genuinely agreed (s.188(1)(c) of the Act). Despite this, the authorities do not suggest that this step is generally required in order to satisfy the Commission that there was genuine agreement.
10(b)	We oppose the amendment proposed to paragraph 10(b). It should not be adopted by the Commission. The proposed paragraph contemplates an additional requirement, that is not presently imposed by the Act. It would add unjustifiable prescription to the Principles and increase employers' regulatory burden. We note that the Commission currently has a broad discretion to determine that an enterprise agreement has not been genuinely agreed (s.188(1)(c) of the Act). Despite this, the authorities do not suggest that this step is generally required in order to satisfy the Commission that there was genuine agreement.
11(a)	We oppose the amendment proposed to paragraph 11(a), for the reasons articulated above in relation to paragraph 10(b). It should not be adopted by the Commission.
14(a)(ii)	We oppose the amendment proposed to paragraph 14(a)(ii). It should not be adopted by the Commission. Curiously, the proposal would narrow the scope of the Principles as drafted by the Commission. This is not desirable for various reasons. *First*, in some cases, it is not practicable to determine whether a term of a proposed agreement is more or less favourable than a term of the relevant award. This is because the agreement term deals with the relevant subject matter in a way that is inherently different. This is most relevant to hours of work provisions; an agreement may contain a scheme for regulating hours of work that is fundamentally different to the way in which the award does so. An assessment as to whether one is more or less beneficial may not be feasible in such cases. *Second,* in other instances, an assessment of whether a term of a proposed agreement is more or less beneficial than a comparable award term is entirely subjective. It will depend on the circumstances of an individual employee or indeed their own perspective on the matter.

	Finally, focusing on terms of a proposed agreement that are less beneficial than the relevant award would result in the relevant employees receiving an incomplete explanation of how they two instruments compare. The explanation would not provide a balanced comparison of the agreement and award. It is more appropriate that employers are provided with a wholistic understanding of the differences between the instruments, including the relative advantages and disadvantages (if any) of the proposed agreement.
14(b)(i)	This proposed paragraph merely replicates the requirement prescribed by the Act. It is not necessary and it is inconsistent with the approach generally adopted in the Draft Principles. It should not be adopted.
14(b)(ii)	We oppose the amendment proposed to paragraph 14(b)(ii). It should not be adopted by the Commission. In some cases, it is not practicable to determine whether a term of a proposed agreement is more or less favourable than a term of the relevant award. This is because the agreement term deals with the relevant subject matter in a way that is inherently different. This is most relevant to hours of work provisions; an agreement may contain a scheme for regulating hours of work that is fundamentally different to the way in which the award does so. An assessment as to whether one is more or less beneficial may not be feasible in such cases. Further, in other instances, an assessment of whether a term of a proposed agreement is more or less beneficial than a comparable award term is entirely subjective. It will depend on the circumstances of an individual employee or indeed their own perspective on the matter.
16	The Draft Principles, as proposed by the Commission, provide that it may have regard to *'any explanation of the proposed agreement given to employees by one or more employee organisation(s) acting as bargaining representative(s) for a significant proportion of the employees to be covered by the agreement'*. The ACTU proposes that this element of the Draft Principles be amended, such that it provides that the Commission may have regard to any explanation given by *all* employee organisations that are acting as bargaining representatives. Where there are multiple unions participating as bargaining representatives, it is not uncommon for the union with the largest number of constituents who would be covered by the agreement to play a leading role in engaging with the workforce. In some cases, the other unions do not play any role in engaging with the workforce; in other instances, they may have some limited involvement. For example, unions will often hold joint mass meetings with all members of all of those unions, however only one of the unions will address the employees and provide the relevant information, even if representatives of the other unions are present. The circumstances in which the Commission can take into account the explanation provided by a union should not be limited to cases in which *all* the unions do so. The Principles should simply provide that any explanation provided by any union may be taken into account by the Commission. Ultimately, the question of whether s.180(5) of the Act was satisfied will depend on the nature of the explanation provided and the number or proportion of employees to whom it was provided.

	To give effect to our submission, paragraph 16 would need to be amended such that it reads as follows: In determining whether section 180(5) has been complied with, the Fair Work Commission (the FWC) may have regard to any explanation of the proposed agreement given to the employees by one or more employee organisation(s) acting as bargaining representative(s) for ~~a significant proportion of the~~ any employees to be covered by the agreement. The amendments proposed by the ACTU would also limit the circumstances in which the Commission can take into account explanations provided by unions to cases in which *'the provision of such explanation is facilitated by the employer'*. We oppose this proposed amendment. It should not be adopted. It is not clear why explanations provided by a union, that are not facilitated by the employer, cannot be taken into account by the Commission. Section 180(5) of the Act requires an employer to take all reasonable steps to ensure that the requisite explanation is provided; however, this does not equate to requiring that the employer *facilitated* the explanation. Put simply, the proposal appears to be designed to incentivise employers to facilitate paid meetings between the union and their members during working time. This is not appropriate. Any such arrangements should be determined at the enterprise level, through discussions between an employer and the relevant unions. The Principles should not be used as a vehicle for inducing employers to agree to them.
18(d)	This proposed paragraph broadly repeats the requirement prescribed by the Act. It is not necessary and it is inconsistent with the approach generally adopted in the Draft Principles. It should not be adopted.
18(h)	We oppose the proposed paragraph 18(h). It should not be adopted by the Commission. Paragraph 18 concerns the assessment of whether an explanation provided in relation to a proposed agreement was given in an appropriate manner, *'taking into account the particular circumstances and needs of the relevant employees'*. The proposed amendment requires a consideration of whether employees were provided an opportunity to meet with *any* employee organisation that is entitled to represent their industrial interests, irrespective of whether they have in fact been involved in the bargaining process. The proposed paragraph is also not clearly directed towards whether the employees were provided with an opportunity to meet with the relevant employee organisation(s) *in respect of the proposed enterprise agreement*. To that extent, the scope of the proposed requirement is plainly inappropriate. An opportunity to meet with any union about any issue cannot be considered relevant to the question of whether the explanation provided of a proposed agreement was adequate. Moreover, the proposed principle again appears to be designed to encourage employers to take steps to facilitate employee meetings with unions, thereby entrenching union presence and involvement in their workplace. This blatant attempt by the ACTU to achieve this aim should not be permitted.

20(b)	We oppose the amendments proposed to paragraph 20(b). They should not be adopted by the Commission. The soon-to-be-introduced ss.188(2)(a) and 188(2)(b) are yet to commence operation. The Commission should take a cautious approach to identifying factors that are to be taken into account when applying those provisions, ahead of the emergence of authorities that concern their proper interpretation. Therefore, the Commission should not specify any considerations in addition to those contained in the Draft Principles.
21	We oppose the proposed amendment to paragraph 21. It should not be adopted by the Commission. The Principles will concern whether an agreement was genuinely agreed. The question of whether the enterprise bargaining process was undertaken in *'good faith'* is not necessarily relevant to this. It relates to the process of bargaining, whilst the requirement that employees genuinely agreed concerns the outcome of the bargaining process. Further, the issue of *'good faith bargaining'* concerns the bargaining representatives, whilst the issue of genuine agreement concerns, above all else, the nature of the agreement ultimately reached between an employer and its employees.
22	We oppose the amendments proposed to paragraph 22. They should not be adopted by the Commission. If one or more unions, who are the bargaining representative(s) for a significant proportion of the employees covered by the agreement, support the approval of the agreement and do not have any concerns about the agreement being genuinely approved, this should be afforded significant weight. Such an approach would, of course, not be determinative of the matter. If another bargaining representative did not support the approval of the agreement and raised concerns about whether the agreement reached was genuine, the Commission would retain the discretion to take this into account.