Meerkin & Apel

Our Ref: GK:SH:230013

30 March 2023

Justice Hatcher, President
Fair Work Commission
PO Box 1994
MELBOURNE VIC 3001

By Email:
consultation@fwc.gov.au

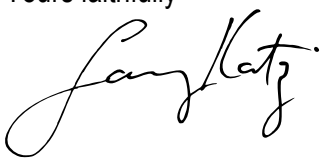
Dear Justice Hatcher

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

Meerkin & Apel Lawyers makes the attached Submissions in respect of the draft *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023*.

We acknowledge that the Submissions should have been filed by 4:00 p.m. today and therefore respectfully seek your indulgence in relation to this marginally late filing.

Yours faithfully



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SUBMISSIONS OF MEERKIN & APEL

Introduction

(1) The Employment Law and Workplace Relations Department of Meerkin & Apel provides Workplace/Industrial Relations and Human Resources Services to 76 of the 79 Victorian Local Government Councils, a large majority of Victorian Library Corporations, Water Corporations and Catchment Management Authorities, and a significant number of private sector employers across a broad range of industries.

(2) Specific services in regard to enterprise bargaining that are regularly provided by Meerkin & Apel include:

- comprehensive training courses;
- management briefings and presentations;
- email and telephone 'helpdesk' support;
- facilitation of a monthly Enterprise Bargaining Discussion Group;
- assistance with reviews of agreements to identify potential issues;
- advocacy and representation in negotiations;
- attendance at enterprise bargaining meetings as technical advisors or lead negotiators or Chairperson;
- assistance with bargaining disputes;
- advice and assistance with the lodgement of agreements; and
- assistance with agreement approval by the Fair Work Commission, including drafting of undertakings.

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

(3) Paragraph 6 of the draft Statement of Principles provides that "*An employee may be given the material specified in paragraph 5:*

(a) in hard copy, or

(b) by electronic means, provided the employee has a reasonable opportunity to read the material both during and outside working hours."

(4) Paragraph 6 appears to have the effect of limiting the existing provisions of s180 of the Fair Work Act 2009 ["the Act"] by requiring copies of the agreement, without the option of providing only access to the agreement. Section180(2)(b) of the Act provides that, as an alternative to providing a copy of the materials, "*the relevant employees have access, throughout the access period for the agreement, to a copy of those materials*."

(5) We submit that it would be preferable to include the existing option under s180(2)(b) of the Act in the Statement of Principles.

(6) Paragraph 7 of the draft Statement of Principles provides that "*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) Paragraph 7 introduces an uncertainty as to what is considered to be a "significant" proportion of employees. In the sectors we represent, employee organisations would generally represent a large group of employees, but it is estimated to be usually below 50% of the total number, and sometimes well below 50%. It is questionable as to whether this would be considered a "significant" proportion. In addition, the employer may be unaware of how many employees are represented by employee organisations, given that no employer would ask their employees whether they are union members. If an employer asked, at the bargaining table, how many employees were represented by a union, there would be immediate accusations of capricious conduct that undermines freedom of association.

(8) We submit that it would be preferable to have a clearly specified time period, before voting starts, in the Statement of Principles, and one that cannot be misinterpreted in a way that previously occurred when the 'goal posts were shifted' by the Fair Work Commission.

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

(9) Paragraph 8 of the draft Statement of Principles provides that "*Employees should be given a reasonable opportunity to vote on a proposed enterprise agreement in a free and informed manner. This should include:*

(a) a voting process that ensures the vote of each employee is not disclosed to or ascertainable by the employer, and

(b) a method and period of voting that provides all employees eligible to vote with a fair and reasonable opportunity to cast a vote."

(10) Paragraph 8 appears to limit the application of the Act in ruling out a show of hands, an accepted feature of our industrial relations system for decades. Whilst most employers prefer paper or electronic ballots, there are still some employers who regard a traditional 'show of hands' as a convenient and cost effective means of voting.

(11) There is nothing in the Act that requires a secret ballot, other than Division 8 which establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement.

(12) Section 181(3) of the Act provides that "Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method".

(13) We submit that it would be preferable to confine the Statement of Principles to ensuring a reasonable opportunity to vote on a proposed enterprise agreement in a free and informed manner, including a method and period of voting that provides all employees eligible to vote with a fair and reasonable opportunity to cast a vote, consistent with S181(3) of the Act – without introducing additional requirements.

(14) Paragraph 9 of the draft Statement of Principles provides that "*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 of [sic] more employee organisation(s) acting as bargaining representative(s) for a significant proportion of the employees to be covered by the agreement."

(15) Paragraph 9 (like paragraph 7) introduces another uncertainty as to what is considered to be a "significant" proportion of employees. In the sectors we represent, employee organisations would generally represent a large group of employees, but it is estimated to be usually below 50% of the total number, and often well below 50%. It is questionable as to whether or not this would be considered a "significant" proportion. In addition, the employer may be unaware of how many employees are represented by employee organisations, given that no employer would ever ask their employees whether they are union members.

(16) We submit that it would be preferable to have a clearly specified period, before voting starts, in the Statement of Principles, and one that cannot be misinterpreted by employers.

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

(17) Paragraph 12 of the draft Statement of Principles provides that "*In section 180(5)(a), taking all reasonable steps to explain the terms of the agreement, and the effect of those terms, should include at a minimum explaining to employees how the proposed enterprise agreement will alter their existing minimum entitlements and other terms and conditions of employment. In explaining this:*
(a) where a proposed enterprise agreement will replace an existing enterprise agreement—it will generally be sufficient to explain:

(i) the differences in entitlements and other terms and conditions between the proposed agreement and the existing agreement, and

(ii) the differences in entitlements and other terms and conditions between the proposed agreement and any applicable modern award provisions that have been varied since the existing agreement was made (including award variations that have not yet come into effect);"

(18) In relation to 185(a)(ii) of paragraph 12, many employers and professional human resources staff are likely to have taken no interest in the modern award provisions, given that these have no application to any employees under the enterprise agreement, with the sole exception of the modern award being the reference instrument for the Better Off Overall Test (BOOT). The only requirements under the Act are to ensure that the proposed agreement meets the BOOT (as part of the approval process). In addition, when an employer is paying, say, 40% above the award pay rates, an award variation may be inconsequential, whether it has come into effect or not. This would place another administrative burden on employers for no apparent reason.

(19) We submit that it would be preferable to confine the explanation in paragraph 12 of the Statement of Principles to explaining the differences in entitlements and other terms and conditions between the proposed agreement and the existing agreement – and not introducing irrelevant and potentially confusing comparisons with a modern award, in instances where there is an existing agreement.

(20) Paragraph 14 of the draft Statement of Principles provides that "*In determining whether section 180(5) has been complied with, the Fair Work Commission (the FWC) may have regard to any explanation of the proposed agreement given to employees by one or more employee organisation(s)*

acting as bargaining representative(s) for a significant proportion of the employees to be covered by the agreement."

(21) Paragraph 14 of the draft Statement of Principles introduces yet another uncertainty and potential ambiguity as to what is considered to be a "significant" proportion of employees.

(22) We submit that it would be preferable that, in determining whether section 180(5) has been complied with, the Fair Work Commission should 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 any employees to be covered by the agreement, without qualifying the proportion of employees.

Other matters considered relevant

(23) Paragraph 18 of the draft Statement of Principles provides that "*In considering the criteria in sections 188(2)(a) and 188(2)(b), the FWC may take into account:*

(a) whether the employees who voted on the agreement are to be paid the rates of pay provided for in the agreement, and

(b) the extent to which the employees who voted on the agreement are employed across the full range of:

(i) classifications in the agreement
(ii) types of employment in the agreement (for example, full-time, part-time and casual)
(iii) geographic locations the agreement covers, and
(iv) industries and occupations the agreement covers."

(24) It is impossible for any employer to know which employees voted on an agreement, and whether they are employed across "the full range classifications" or their type of employment, as set out in paragraph 18 of the draft Statement of Principles, given that voting is secret.

(25) We submit that it would be preferable to confine the principle under paragraph 18 of the draft Statement of Principles, to matters contained in sections 188(2)(a) and 188(2)(b) of the Act i.e. that the Fair Work Commission is satisfied that the agreement would have been genuinely agreed to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.

(26) Paragraph 19 of the draft Statement of Principles provides that "*An enterprise agreement will generally not have been genuinely agreed to by the employees covered by the agreement unless the agreement was the product of an authentic exercise in enterprise bargaining.*"

(27) Paragraph 19 of the draft Statement of Principles introduces another subjective and undefined term being "authentic exercise."

(28) We submit that it would be preferable to delete the principle under paragraph 19 of the draft Statement of Principles.

(29) Paragraph 20 of the draft Statement of Principles provides that "*In considering whether an enterprise agreement has been genuinely agreed to by the employees covered by the agreement, significant*

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

(a) supports the approval of the agreement, and

(b) does not have concerns that the agreement was not genuinely agreed.

(30) This is very subjective in terms of "significant weight" and a "significant proportion of the employees". It is also concerning that it also requires union support of the agreement, rather than the employee organisation having no concerns that the agreement was genuinely agreed. Whether a union supports the agreement or not has nothing to do with whether it was genuinely agreed to by the employees covered by the agreement.

(31) We submit that it would be preferable to delete part (a) of the principle under paragraph 20 of the draft Statement of Principles.

Other relevant matters

The application of the Better Off Overall Test (BOOT)

(32) In the President's Statement of 8 December 2022 there are three references linking enterprise agreement approval to the Better Off Overall Test – paragraphs 14, 18 and 23. However, there is nothing of any substance in the draft Statement of Principles, other than an obscure reference to modern award variations in paragraph 12.

(33) BOOT issues often result in delays to approval of enterprise agreements and are a source of frustration for employers, particularly in regard to:

(a) unrealistic and hypothetical scenarios, in regard to hours of work and penalty rates for example, that have no relationship to the workplace and have never existed in practice;

(b) a 'line by line' comparison of the proposed agreement compared with the modern award, with associated questionable advice from the Fair Work Commission that these individual items do not meet the BOOT; and

(c) frequent refusal by the Fair Work Commission to consider any arguments from employers unless they choose to appear before the Commission, and consequently 'forcing' changes to the agreement to avoid further delays and inconvenience.

(34) We submit that the principle under paragraph 12 of the draft Statement of Principles should include:

(a) consideration of hypothetical scenarios for the BOOT, only if they are relevant to the particular workplace; and

(b) that the Fair Work Commission must apply the BOOT as it is intended under the Fair Work Act – better off overall and not a line by line comparison.

Date: 30 March 2023

Meerkin & Apel

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MEERKIN & APEL
Solicitors for the Respondent