

## IN THE FAIR WORK COMMISSION

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

#### REPLY SUBMISSION OF THE MINING AND ENERGY UNION (MEU)

##### Introduction

1. This submission is made in reply to submissions filed by other parties as part of the Commission's consultation on a Statement of Principles concerning genuine agreement in the approval of enterprise agreements (**Consultation**). It refers to matters raised in our submission of 31 March 2023 (**MEU Submission**) and adopts the same terms defined in that submission.
2. As in the MEU Submission, this submission is filed as a supplement to the reply submission of the Australian Council of Trade Unions filed on 13 April 2023,
3. This reply submission responds, as relevant, to the following submissions:
  - a. Submission of the Law Council of Australia, dated 30 March 2023 (**LCA Submission**);
  - b. Submission of the Minerals Council of Australia, dated 30 March 2023; (**MCA Submission**);
  - c. Submission of the Australian Chamber of Commerce and Industry, dated 30 March 2023 (**ACCI Submission**);
  - d. Submission of the Australian Industry Group, dated 30 March 2023 (**AIG Submission**); and
  - e. Submission of Meerkin & Apel, dated 30 March 2023 (**M&A Submission**).

##### Statement of Purpose

4. The AIG Submission and the MCA Submission both suggest that the Draft be amended to include a preamble or explanation of the purpose of the Statement of Principles. The MEU supports this suggestion.
5. In respect of the MCA's proposed preamble, the MEU does not object to the proposal.
6. In respect of the AI Group's proposal, it is submitted the proposed wording goes beyond an explanation of the purpose of the Statement of Principles and may undermine that purpose by misleading employers as to what is required to satisfy the Commission that an agreement has been genuinely agreed to by the employees covered by it.
7. While not objecting to the MCA's proposal, the MEU suggests the following alternative wording in relation to a proposed statement of purpose, derived from

the Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Bill 2022 (Cth) (Revised EM)*:

*This Statement of Principles is made in accordance with s 188B of the Fair Work Act 2009 (Cth). Its purpose is to guide parties as to how the Fair Work Commission will consider particular issues when determining whether a proposed enterprise agreement has been genuinely agreed. Its purpose is explanatory and facilitative, and it is directed at assisting employers to comply with the requirements of the Fair Work Act 2009 (Cth) in relation to genuine agreement.*

## **A general note**

8. Many of the submissions opposing aspects of the Draft raise a concern that the Draft creates requirements for certain steps that do not currently exist in the FW Act. In our submission, this opposition is unhelpful and, on occasion, disingenuous.
9. The purpose of the Statement of Principles is, as set out in the Revised EM, to “provide guidance for employers about ways to ensure an enterprise agreement is genuinely agreed to by employees. The statement would not create new rights or obligations... but would be taken into account by the FWC when determining whether an enterprise agreement has been genuinely agreed.”<sup>1</sup> For the Statement of Principles to meet this purpose, it needs to contemplate scenarios that might call into question the genuineness of an employee cohort’s agreement, and present employers with guidance as to how they may avoid that outcome. Its purpose necessitates an expansion of the requirements explicitly set out in the FW Act in order to provide adequate guidance on the particular issues to be considered when assessing whether an agreement has been genuinely agreed to.
10. The Draft achieves its purpose by taking a proactive approach to identify matters that may impact the genuineness of an employee cohorts’ agreement. It does this to assist the parties, predominantly employers, to ensure that they can take steps to ensure the genuineness of that agreement. These criticisms should be considered in that context, where the absence of prescription would do very little to assist the parties in ensuring the genuineness of agreement.

### ***Principle 1: Informing employees of bargaining for a proposed enterprise agreement***

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

11. The AIG Submission states that paragraphs 1 – 3 are not necessary, and further implies that these paragraphs create an obligation to inform employees of the matters set out in paragraph 1 where this is not mandated by the statute.

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<sup>1</sup> Revised EM, [742].

12. This submission misunderstands the purpose and role of the Statement of Principles, and the statutory requirements of the Statement of Principles, as set out at s 188B(3). The Draft *must* deal with these matters.
13. The MEU further submits that, even if that were not so, these matters are relevant to determining the genuineness of any agreement for the purposes of s 188B(3)(g). For many employees, the actions contemplated by these principles will be among the first interactions that employees have with bargaining, and they function as an important introduction to that process. Without this introduction, employees may lack the awareness that would enable their full and informed participation in bargaining which may, in turn, call into question their capacity to give their informed consent to any resulting agreement. Alerting employees that these matters will be considered by the Commission in assessing genuine agreement is both explanatory and facilitative, and their inclusion in the Draft is warranted.

***Principle 2: Providing employees with a reasonable opportunity to consider a proposed enterprise agreement***

14. In relation to paragraph 6(b) the AIG Submission takes issue with the Draft suggesting that employees have a reasonable opportunity to read the relevant material outside working hours, describing it as a “new limitation”.
15. The requirement mandated by the statute is that employees are given something more than an opportunity to consider the material – the opportunity must be a *reasonable* one. The MEU submits that providing employees with a reasonable opportunity to read the relevant material necessarily includes a reasonable opportunity to read the material during working hours.
16. The structure of employees’ lives is often such that when not at work they are juggling significant responsibilities at home. To assume that employees have devices readily available to them to consider detailed and complex documents over a period is a misstep. Guiding employers to provide employees with a reasonable opportunity to review electronic material during working hours avoids the risk of objections based on limited access or opportunity to review electronic material outside of working hours, and is consistent with the purpose of the Statement of Principles.

***Principle 3: 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***

17. The MEU notes the objections to paragraph 8(a) of the Draft in the LCA Submissions, the M&A Submissions and the AIG Submissions.
18. The MEU accepts that the articulation of this principle as requiring a vote that is not disclosed or ascertainable by the employer is new, but the concepts underpinning it are not.
19. Agreement will never be genuine where it is subject to a undue influence, coercion or a fear of reprisal. These risks are alleviated by a secret ballot, with

the proposed drafting guiding employers down a path which effectively removes the possibility that employees may have voted in a certain way because their employer would know how they voted. It is a sensible inclusion which addresses the relevant concerns in relation to genuine agreement and, as set out in the MEU Submissions at [12], is much less stringent than other ballot processes contemplated by the FW Act and the FW(RO) Act.

***Principle 4: Explaining to employees the terms of a proposed enterprise agreement and their effect***

20. **In relation to paragraph 12** of the Draft, the M&A Submissions objects to the inclusion of a recommendation that the differences in terms and conditions between the proposed agreement and any modern award conditions that have been varied since the existing agreement was made be explained. This submission is made on the basis that the requirement would create an administrative burden on employers in circumstances where the award variation may be inconsequential.

21. The MEU submits that the clause as drafted provides helpful guidance to employers that will facilitate genuine agreement and does so in a way that is not prescriptive, but suggestive, allowing for exceptions to the guide where the circumstances warrant it. The provision will provide important guidance where an award has had major changes or clarifications across the duration of an agreement and those changes significantly alter terms and conditions that commonly apply across, or underpin enterprise agreements in, the industry. An explanation of changes of this kind would ensure that employees make informed choices both during bargaining and when casting their vote, and that employers don't unintentionally withhold relevant information from employees when explaining the terms and effect of a proposed agreement.

***Other matters considered relevant***

22. **In relation to paragraphs 17 and 18** the LCA Submissions suggest that employers would not be able to independently satisfy these points where a secret ballot is required under paragraph 8(a). The MEU understands this submission to be made on a misunderstanding of what paragraph 17 requires, which relates to the *employees requested to approve the agreement*, rather than requiring the capacity to identify which employees actually cast a vote in the ballot.

23. In relation to paragraph 18, the concern appears to arise from the use of the phrase "the employees who voted on the agreement". Should this phrase be a concern for the Commission, it is submitted that the concern would be resolved by adopting the phrasing of paragraph 17, which refers instead to the employees requested to approve the agreement.

24. **In relation to paragraph 19** of the Draft the MCA and ACCI Submissions seek the removal of the requirement that the agreement "*was the product of an authentic exercise in enterprise bargaining*", predominantly on the basis that it

establishes a barrier to approval which the legislature has not chosen to impose. The MEU disagrees with this characterisation.

25. Firstly, the legislature repeatedly expresses what has been described as a *strong preference* for collective bargaining<sup>2</sup>. The agreement making provisions of the FW Act are implicitly predicated on bargaining taking place.
26. Secondly, the paragraph is presented as a general requirement. In this articulation it leaves space for exceptions but provides helpful guidance to employers that reinforces the legislatures' preference (if not requirement) to have bargaining as a precursor to agreement making.
27. Thirdly, instances where an absence of genuine agreement (under the current provisions) resulted in an enterprise agreement being incapable of approval has commonly included circumstances where an authentic exercise in enterprise bargaining has not occurred.<sup>3</sup> The converse is also true: in the hundreds of enterprise agreements where genuine agreement is not questioned, bargaining of some kind has invariably taken place. As Deputy President Asbury observed in *The Go2 People Australia Pty Ltd* [2019] FWC 8505, at [39]:

*In cases where employees have been actively engaged in bargaining either directly or through bargaining representatives and numerous drafts of an agreement have been circulated, discussed and amended it may also be more readily established that the requirements in s. 180(5) have been met than where a process of an NERR and preliminary information and a proposed agreement is provided to employees as a fait accompli within the precise timing required by the Act with no discussion or negotiation of the agreement terms.<sup>4</sup>*

28. The MEU submits that the simplest way to reduce legitimate concerns about genuine agreement being raised is for employers to authentically bargain with their employees for an enterprise agreement. It is our view that the inclusion of this component in the Statement of Principles will alert employers of the need to bargain with their workforce in circumstances where the need to do this to make an agreement has seemingly not been apparent. Where this guidance is followed, we anticipate that the instances where genuine agreement is a concern for the Commission will be greatly reduced.

**Mining and Energy Union**  
**13 April 2023**

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<sup>2</sup> Sections 3(c) and (f), 171. See, also: *One Key*, [150].

<sup>3</sup> See, for example, *One Key; Construction, Forestry, Maritime, Mining and Energy Union v Ditchfield Mining Services Pty Limited* [2019] FWCFB 4022; *CFMMEU & ors v OS ACPM Pty Ltd & Anor* (2020) 296 IR 351, [2020] FWCFB 2434.

<sup>4</sup> See, also, *Application by WorkPac Mining Pty Ltd* [2016] FWC 251, [105].