MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE FAIR WORK COMMISSION ON THE DRAFT STATEMENT OF PRINCIPLES ON GENUINE AGREEMENT

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30 MARCH 2023

TABLE OF CONTENTS

OVERVIEW

This is the submission of the Minerals Council of Australia (MCA) in response to the Fair Work Commission's 'Draft Statement of Principles on Genuine Agreement' (the Draft Statement).

Australian mining is the largest contributor to the national economy accounting for almost 10 per cent of GDP, and the largest source of export income. Mining directly and indirectly supports over 1.1 million jobs at over 200 operating mine sites and in supply chains across the country, and directly employs more than 286,000 workers.[1]

Mining is Australia's highest paying industry with average full-time adult total earnings of $148,000, compared to $96,800 across all industries. Ninety-nine per cent of mining workers earn above-award wages and conditions.[2]

The Statement of Principles on Genuine Agreement (the Statement) should play a significant part in achieving Parliament's purpose of simplifying the currently complex and legalistic enterprise agreement approval process, by providing clear and authoritative guidance to employers, employees, and their representatives on how to satisfy the Commission that an agreement has been genuinely agreed.

To that end, we make the following recommendations:

1. Insert a preamble at the beginning of the Statement to clarify its purpose as follows:

   The *Fair Work Act* provides that enterprise agreements (other than greenfields agreements) are made when a majority of employees of each employer to be covered by the agreement who cast a valid vote approve the agreement. In order to approve an agreement the FWC must be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement. This Statement of Principles provides guidance on how the FWC will apply this legislative test.

2. Clearly distinguish between the Statement's 'explanatory' parts, which seek to summarise or explain existing legislation, and the 'operative' parts, which give guidance on how the Commission will apply the law.

3. Provide clear, plain English, guidance on concrete steps an employer can take in order to be taken to comply with each requirement in section 188B(3) of the *Fair Work Act* (see *recommended approach* under each section below) – and allow for the Commission to be satisfied of compliance by other reasonable processes.

4. Remove the requirement that an agreement be 'the product of an authentic exercise in enterprise bargaining'

5. Clarify that the requirement to advise employees of award variations that have not come into effect is limited to variations which form part of the award at the time the explanation is given.

6. Clarify the circumstances where the Commission will use its discretion to disregard minor or technical errors.

[1] Australian Bureau of Statistics, *Labour Force, Australia, Detailed*, released 23 March 2023 (2022 average); Deloitte Access Economics, report prepared for the MCA, 'Mining and METS: engines of economic growth and prosperity for Australians', 2017, p 13.

[2] Australian Bureau of Statistics, *Average Weekly Earnings, Australia,* May 2022, released 23 February 2023, table 10H.

KEY ISSUES

Making the purpose and legal status of the statement explicit

Although the Statement is a legislative instrument, the Revised Explanatory Memorandum to the Secure Jobs Better Pay Bill states:

> The statement would not create new rights or obligations for employers and employees but would be taken into account by the FWC when determining whether an enterprise agreement has been genuinely agreed.[3]

This makes it clear that the Statement is akin to guidance material which, we submit, should aim to serve two functions:

1. Promote enterprise bargaining and expeditious approval of agreements through clear explanation – assisting those engaging in enterprise bargaining to understand their rights and obligations easily and accurately, and
2. Set out how the Commission will apply the legislative approval requirements in certain situations.

To ensure there is no question about its function, the MCA recommends that the Statement explicitly set out in plain English how it should be used, and that it does not impose legal obligations beyond those contained in the legislation. A preamble should be inserted at the start of the Statement as follows:

> The Fair Work Act provides that enterprise agreements (other than greenfields agreements) are made when a majority of employees of each employer to be covered by the agreement who cast a valid vote approve the agreement. In order to approve an agreement the FWC must be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement. This Statement of Principles provides guidance on how the FWC will apply this legislative test.

We also note that some parts of the Draft Statement are devoted to referencing and explaining sections of the *Fair Work Act* (for example ss 10 and 11). In other sections, the Draft Statement appears to promulgate future Commission practice (for example section 18). It would be helpful to users of the Statement if it clearly distinguished between its 'explanatory' parts, which provide summary information on existing legislation, and the 'operative' parts which give guidance on how the Commission will apply the law.

Structure and design of the statement

The Statement is currently structured by sequentially addressing each of the matters required to be addressed in accordance with s188B(3). After including an appropriate preamble, this is a good approach.

In relation to each separate item, the Statement should provide clear guidance on concrete steps an employer can take in order to be taken to comply with each requirement. The steps should be described concisely and in plain English.

The drafting approach in relation to the first three matters follows the pattern of identifying the relevant requirement and specifying when an employer will be taken to comply with that requirement. This will serve to provide real guidance on the steps an employer should follow in order to comply with these requirements.

However, this commendable approach is not followed in relation to the remaining three requirements. Each of these parts of the principles needs to be rewritten to follow the structure of the first three requirements and contain the essential element of identifying what will be taken to comply with each requirement.

[3] Australian Senate, *Revised Explanatory Memorandum* to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, para 716-717.

Providing employees with a reasonable opportunity to vote

This principle does not identify the measures an employer can take in order to be taken to comply with this requirement. The principle needs to be rewritten to incorporate this essential element of the principles.

A voting process without undue influence by any other person is an important element of a free vote. If the employer conducts a secret ballot whereby the vote of each employee is not ascertainable by any other person (not only the employer) this should be taken to satisfy the requirement.

To ensure that employees have a reasonable opportunity to vote the method and period of voting should enable all employees a fair and reasonable opportunity to cast a vote.

An assessment of one or more employee representatives or other bargaining representatives and the size of the cohort they represent is unnecessary and introduces added complexity.

Recommended approach:

- An employer who provides at least 7 days' notice of the time, place and method of voting (or an alternative reasonable time period) should be taken to satisfy this requirement.
- It should remain open to the Commission to be satisfied that the requirement has been complied with by other reasonably processes.

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

This principle does not identify the measures an employer can take to be taken to comply with this requirement and needs to be rewritten to incorporate this essential element.

Couching the principle with reservations by use of words such as "generally be sufficient" does not provide substantive guidance or provide for a consistent approach.

The requirement to advise employees of award variations that have not come into effect must be limited to variations which form part of the award at the time the explanation is given. The requirement to compare the modern award and proposed enterprise agreement should be a point-in-time comparison. An ongoing requirement to explain every difference (however immaterial) between a modern award including future variations would complicate the information available to employees, be confusing and would be counterproductive.

Recommended approach:

When replacing an existing enterprise agreement, an employer who:

- Identifies the differences between the proposed agreement and the existing agreement,
- Identifies all changes to the award since the last agreement was made,
- Provides factual explanatory material in an appropriate manner in hard copy, electronic means or orally on the content of the agreement, and
- Does not make an incorrect representation or mislead employees in a material way
- Or the Commission is satisfied that the requirement has been complied with by other reasonable processes

should be taken to satisfy this requirement.

Where a proposed agreement does not replace an existing agreement, an employer who:

- Identifies the differences in entitlements and other terms and conditions between the proposed agreement and the applicable modern award
- Provides factual explanatory material in an appropriate manner in hard copy, electronic means or orally on the content of the agreement, and

- Does not make an incorrect representation or mislead employees in a material way,
- Or the Commission is satisfied that the requirement has been complied with by other reasonable processes

should be taken to comply with the requirement.

Other matters considered relevant

This draft principle does not identify the concrete measures an employer can take to be taken to comply with section 188(2). The draft is deficient to this extent and should be redrafted to include this essential element. The means that the Draft Statement provides no clear pathway to employers to satisfy the Commission that the statutory requirements have been met.

Indeed the draft principle seeks to impose additional requirements beyond section 188(2). Under this draft principle certain factors are said to be possibly taken into account without indicating the precise meaning or the significance of the additional considerations. The considerations are highly contestable and will only serve to confuse and complicate approval processes – the very approach that should be avoided at all cost in drafting the principles (see **Box 1**). Section 188(2) is sufficiently clear and requires only a simple statement of the requirement for compliance.

Section 19 of the Draft Statement, which states the genuine agreement requirement will not generally be satisfied unless the enterprise agreement 'was the product of an authentic exercise in enterprise bargaining' should be removed as it opens the whole bargaining process to a genuine agreement assessment. This paragraph establishes a requirement beyond those adopted by the legislature. Rather than establish how the legislative requirement can be satisfied, it establishes a new open-ended barrier to approval which the legislature has chosen not to impose. It should play no part in the Commission's principles.

Recommended approach:

If the voting cohort is:

- Comprised only of employees whose employment will be covered by the agreement, and
- Sufficiently representative of employees the agreement is expressed to cover
- Or the Commission is satisfied that section 188(2) has been complied with by other reasonable processes

the requirement in s188(2) should be taken to be satisfied.

Box 1: Examples of how the Statement of Principles may complicate agreement-making

Section 18 of the Draft Statement list four factors the Commission may consider in deciding whether the employees who were able to vote for an agreement were 'sufficiently representative' and had a 'sufficient interest': classifications; type of employment; geographic location; and industries and occupations covered by the agreement.

Depending on how strictly the four factors are applied, they could slow and frustrate agreement-making by:

- Imposing unreasonable information requirements on employers, for example requiring data on how many employees in each classification, form of employment, location and occupation – and combination thereof, had an opportunity to vote for an agreement
- Encouraging voting for agreements to be 'split' between classifications, and the proliferation of single classification agreements that are smaller in scope, increasing the Commission's workload and administrative burden on employers
- Allowing multi-union agreements to be rejected based on an argument that the members of one union did not by majority genuinely agree, even though an overall majority voted for the agreement
- Agreements being voided after their approval on the grounds that the employer accessed casual, part-time, or labour, when this 'cohort' was not represented at the time of voting

Clarifying how the Commission will use its discretion to disregard minor or technical errors

A key shortcoming of the legislation has been the scope it has provided for the Commission to overturn bargained outcomes that had been agreed by employers and employees on minor technical grounds. This practice has been particularly harmful in cases where there was no evidence that employees suffered any detriment, nor any evidence that the employee vote was affected.

The MCA notes the Draft Statement contains no guidance on the circumstances in which the Commission will exercise its discretion to disregard minor procedural or technical errors with respect to notices of employee representational rights – for example, the relevance of evidence of genuine efforts to meet notice requirements, what other considerations the Commission might consider, and how these would be weighed up. This is an example where the statement could work to assist parties by clarifying how a Commission discretion will be applied.