Australian Chamber of Commerce and Industry

Draft Statement of Principles

Fair Work Commission

ACCI Submission

30 March 2023

Australian Chamber of Commerce and Industry

Working for business.
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Telephone 02 6270 8000 | Email info@acci.com.au | Website www.acci.com.au

Media Enquiries
Telephone 02 6270 8020 | Email media@acci.com.au

Canberra Office
Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600
PO BOX 6005
Kingston ACT 2604

Melbourne Office
Level 2, 150 Collins Street
Melbourne VIC 3000

Sydney Office
Level 15, 140 Arthur Street
North Sydney NSW 2060
Locked Bag 938
North Sydney NSW 2059

Perth Office
Bishops See
Level 5, 235 St Georges Terrace
Perth WA 6000

ABN 85 008 391 795

Introduction

1. The Australian Chamber of Commerce and Industry (**ACCI**) welcomes the opportunity to provide feedback to the Fair Work Commission (**Commission**) on the *[DRAFT] Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* (**Statement of Principles**).

2. In its consultation with the Commission on 13 February 2023, ACCI submitted that the Statement of Principles should be drafted with sufficient detail to practically assist parties in understanding their existing statutory obligations, but not so much detail that the Commission inadvertently imposes new requirements on employers that go further than their obligations under the *Fair Work Act 2009*.

3. Additionally, ACCI expressed support for a document that is written in plain English with minimal legalistic expressions.

4. Overall, the draft Statement of Principles largely satisfies both tests. It is generally well-phrased and effective at achieving the purpose of explaining to employers the relevant requirements and considerations the Commission must consider when determining whether employees have genuinely agreed to a proposed enterprise agreement.

5. That said, ACCI has identified issues with certain aspects of six of the principles, including where certain requirements set out arguably impose obligations on employers that go further than the *Fair Work Act 2009* and where drafting is ambiguous and/or could mislead parties about their existing obligations.

6. This submission will set out each issue and will propose amendments to the draft principles for the Commission's consideration.

Principle 1

7. The effect of paragraph (b) in principle 1 is that employers are instructed to inform employees of their rights to be represented in bargaining for the agreement, "including by an employee organisation or by another bargaining representative of their choice". The principle should also note that employees have a right to appoint themselves as their own bargaining representative.

8. Alternatively, the reference to "including by an employee organisation" could be deleted. This would ensure that the information provided by employers to employees with respect to their representational rights does not mislead them into believing that they must appoint another person or specifically, an employee organisation, as their bargaining representative.

Principle 8

9. Paragraph (a) of principle 8 suggests that the opportunity to vote on a proposed agreement that is provided to employees should be through "a voting process that ensures the vote of each employee is not disclosed to or ascertainable by the employer". This paragraph should be amended to include after "by the employer" the phrase "or employee organisations".

10. Although in most cases a voting process that ensures that the vote of each employee is not ascertainable by the employer will also naturally be unascertainable by other parties, it is worth clarifying that the voting process should be an entirely secret ballot. Without this clarification, an employer could interpret paragraph (a) to mean that the vote could be conducted as an open ballot—such as through a show of hands—simply without the employer being able to observe the outcome.

11. Alternatively, the principle should be removed. This would reflect the fact that there is no requirement under the *Fair Work Act 2009* for a secret ballot when a vote on a proposed enterprise agreement is conducted.

Principle 12

12. Paragraph (a)(ii) of principle 12 suggests that an explanation of a proposed enterprise agreement will generally be sufficient where "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)" are explained (emphasis added).

13. In *The Australian Workers' Union v Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm & Kenrose Co Pty Ltd and Others* [2019] FWCFB 4253 (***Gray***), the Full Bench held at [89] that "forthcoming changes to the [Horticulture Award 2010] known in precise detail" should have been part of the employers' explanation of the terms and effect of the proposed agreement.

14. The forthcoming changes to the Horticulture Award 2010 that were considered in *Gray* were significant. The variations to the award affected the maximum ordinary hours of casual employees, averaging periods, and consequently, overtime rates: *Gray* at [65]. These were all matters which could be argued are relevant to the effect of a proposed enterprise agreement and the decision of employees as to whether to support it.

15. By contrast, modern awards are frequently subject to slight variations that remove ambiguities, update language, and correspond to legislative changes. Notwithstanding the decision in *Gray*, it is not clear on the terms of s 180(5) of the *Fair Work Act 2009* that *every* award variation that has not yet come into effect must be explained to employees. This would impose a significant burden on employers, particularly those in smaller entities.

16. The words "including award variations that have not yet come into effect" should be deleted. Alternatively, the word "significant" should be inserted as follows: "including significant award variations that have not yet come into effect".

17. For these reasons, ACCI submits that a failure to make this change will see the Statement of Principles impose a greater burden on employers than their obligations under the *Fair Work Act 2009*.

Principle 14

18. Principle 14 suggests that the Commission "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" when considering whether the terms and effect of a proposed enterprise agreement have been explained to the employees it intends to cover.

19. The requirement to explain the terms and effect of a proposed enterprise agreement in s 180(5) is imposed on employers. It is not a general requirement that can be satisfied by other parties. It is the employer who must take "reasonable steps" to ensure the explanation has been adequately.

20. There is a concern that principle 14 could mislead employers about this aspect of the requirements for obtaining genuine agreement. It should be amended to clarify that explanations provided by other parties must be *in addition to* and not *a substitute for* the employer's explanation of the agreement.

Principle 16

21. Employers are required under s 180(5)(b) to explain the terms and effect of a proposed enterprise agreement "in an appropriate manner taking into account the particular circumstances and needs of the relevant employees". Principle 16 provides a list of factors which "the FWC may take into account" when deciding whether an employer has met this requirement.

22. While the factors listed *could* be relevant to employers' obligation under s 180(5)(b), the wording of the principle does not make this connection clear. A person reading principle 16 is required to consider the relevance of "the location(s) where employees are working", "the environment(s) in which work is performed", and the "facilities available", to the employer's obligation to explain the agreement "in an appropriate manner" taking into account "the particular circumstances and needs of the relevant employees".

23. It is accepted that these factors could limit the opportunities that employees have to consider the information provided about the proposed agreement or require the information to be provided in a certain way; however, this is not obvious when reading the principle.

24. To assist employers' understanding of their obligations under s 180(5)(b), principle 16 could be reworded in a manner that clarifies the relevance of factor that is listed. This is already achieved to some degree in paragraph (d) which notes that certain hours of work or rosters could impact the appropriateness of an explanation because they could "limit access to relevant facilities or limit the time employees have to consider materials or information". Similar brief elaborations could be included in the principle.

Principle 19

25. Principle 19 suggests that there is unlikely to have been genuine agreement to an enterprise agreement "unless the agreement was the product of an authentic exercise in enterprise bargaining".

26. Two issues with this principle can be identified.

27. First, the phrase "authentic exercise in enterprise bargaining" is ambiguous. It is unlikely to be easily understood by an individual who lacks experience in industrial relations.

28. Second, the principle could be construed to mean that genuine agreement will only exist where an agreement is the product of adversarial, back-and-forth negotiations. This is not a requirement that exists under the *Fair Work Act 2009*. Employers should be able to freely offer a fair and reasonable agreement, and employees should be free to accept the proposed agreement at first instance, without any further changes made. Simply because employees are satisfied with the first version of an agreement proposed by an employer does not mean that they cannot genuinely agree to its terms.

Principle 20

29. In determining whether employees have genuinely agreed to a proposed enterprise agreement principle 20 provides that "significant weight" will be given to the views of employee organisations which support its approval.

30. While it is acknowledged that the Commission will generally place significant weight on the views of employee organisations involved, irrespective of whether this principle is included in the Statement of Principles, principle 20 could be misconstrued in a way that misleads employers into believing that they must obtain the support of an employee organisation acting as bargaining representative in the process.

31. It should be clarified that the support of one or more employee organisation(s) acting as bargaining representative(s) for a significant proportion of the employees covered by the agreement is not an approval requirement. This could be largely achieved by simply deleting the word "significant" before "weight" in principle 20, or by clarifying that an employee organisation does not need to give its consent.

32. Additionally, principle 20 suggests that "significant weight will be given to the views of one or more employee organisation(s) acting as bargaining representative(s)", to the exclusion of bargaining representatives who are not employee organisations. This should be rectified by making the following amendments:

> 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)~~ bargaining representative(s): …

33. There is no objection to expediting the approval process for proposed enterprise agreements that are supported by employee organisations which represent a significant proportion of the relevant employees; however, this is justified on the basis of their representation of the employees. It should not be allowed on the mere basis that they are employee organisations.

About ACCI

The Australian Chamber of Commerce and Industry represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

ACCI strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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