

IN THE FAIR WORK COMMISSION

Approval of enterprise agreements – genuine agreement - Statement of Principles

SUBMISSION OF THE AUSTRALIAN SERVICES UNION

1. These are the submissions of the Australian Services Union ('ASU') regarding the draft *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023 ('Draft Statement')* issued by the Fair Work Commission on 3 March 2023.
2. The ASU is one of Australia's largest unions, representing approximately 135,000 members. ASU members work in a wide variety of industries and occupations in both the public, private and community sectors. Our members are employed by the largest and smallest employers in Australia.
3. The ASU supports the making of a legislative instrument based on the Draft Statement with the minor amendments proposed by the Australian Council of Trade Union ('ACTU').

Employers collaborating with Employee Organisations

4. We support the mechanisms in the Draft Statement to permit employers the flexibility to tailor agreement-making processes by agreement with registered employee organisations. The Commission's proposal offers employers flexibility while maintaining protections for employees.
5. It is appropriate that employers may only make arrangements to fulfil their obligations under the Statement of Principles with employee organisations. Employee organisations are closely regulated, have specialist industrial expertise, and are responsible to their members under their rules. Other employee bargaining representatives are likely to have little or no experience or knowledge of bargaining. Further, individual bargaining representatives are almost completely unregulated and have no special obligations to the employees they represent.
6. However, we do not support the Commission's use of the formula 'one or more employee organisation(s) acting as bargaining representatives (s) for a significant proportion of employees' at Principle 6(b), Principle 13 and Principle 19. Where multiple employee organisations are involved in bargaining, they are likely to represent different sections of the workforce with different interests. The ACTU's proposal to require agreement with all registered organisations is preferable.

Informing employees of bargaining for a proposed enterprise agreement

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

7. Employees should be given all the information they need to engage in the bargaining process at the earliest opportunity.
8. Most employees have little knowledge of the law or the Australian industrial relations system. Without help, most employees will not have the time or the resources to acquire this knowledge or professional representation. Many employees will have no idea that they are covered by an enterprise agreement, let alone understand what enterprise bargaining means.
9. For most employees, that appropriate time to provide this information will be the notification time for the agreement. However, employees who start work after the notification time should

be informed of their rights in bargaining. New employees share the same need for information as employees who were engaged at the notification time. This proposal particularly important for high turnover industries and occupations such as disability services or call centres.

10. We strongly support the clear requirement that an employer should not mislead employees about their rights to be represented. In our experience, it is common for employers to tell employees that they have no union to represent them or to manipulate the appointment of individuals as bargaining representatives to create tame 'bargaining committees' to negotiate against. Employees should not be misled about their representational rights or the status of other bargaining representatives.

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

11. Employees should be given all the information that they need to make an informed decision about a proposed enterprise agreement before voting on that enterprise agreement by their employer.
12. We support the Commission's view that electronic documents should only be used where the employee has a reasonable opportunity to read the material both during and outside working hours. Many employees will not have access to their work emails or intranet unless they are using a company computer. Company policy is likely to restrict access personal emails accounts at work and prohibit the forwarding of company documents to personal devices. Consequently, it will be difficult (perhaps impossible) for many employees to access an electronic copy of the documents outside of working time and they may not have time during their working hours to read the documents.
13. It is also important that employees have access to their current terms and conditions of employment when considering a proposed enterprise agreement. This should be provided by the employer because it is difficult for lay people to find industrial instruments for themselves.
14. The ACTU proposal to require consideration of the circumstances of the business and needs of employees when determining the notice period for an agree should be adopted by the Commission. The ASU represents a diverse community of workers across many industries and occupations. Different groups of workers will vary in their characteristics and working arrangements. Some will be very comfortable with computers and digital technology; others may not work with computers at all. Some workers will work at a single location or return to a depot at every shift, but others will always be highly mobile. Additionally, workers with a first language that is not English may seek formal or informal support from their fellow language speakers to understand the proposed enterprise agreement and collateral documents. In our experience, accessing this support may take longer than 7 days to access. It is appropriate to require consideration of these factors when notifying a ballot.

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

15. The ACTU proposal to require consideration of the circumstances and needs of employees is reasonable. As noted above (at [14]), the appropriate voting method will differ significantly between different groups of employees and businesses.

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

16. Agreements are not made by industrial parties: they are made between employers and the employees who vote to make the agreement. It is essential that the employees who vote for the proposed enterprise agreement understand what it is that they are voting for. The employer must be subject to a strict obligation to explain the terms of the agreement and their effects truthfully and accurately to their employees.
17. This explanation cannot be limited to a bare explanation of what is in the proposed enterprise agreement. It must include an explanation of any less beneficial terms than those in the industrial instrument that applies to the employees and/or the applicable safety net instruments (like modern awards or equal remuneration orders). As noted above, this explanation should take into account the needs of employees.
18. Finally, employers should not be permitted to rely on the communications of an employee organisation unless the employer facilitated that communication. We can only imagine that an employer would rely on the explanation of an enterprise agreement by an employee organisation in the context of a contested enterprise agreement approval application. In that context, the employer is likely to have failed to meet their obligation to explain the terms of the enterprise agreement to their employees. It would be perverse to allow them to rely on the actions of a registered organisation that is opposing the approval of the enterprise agreement to make good their own failures.

Other matters considered relevant

19. The ACTU has proposed to strengthen Principle 21 by adding the words 'good faith' before enterprise bargaining. All participants in bargaining are required to comply with the good faith bargaining principles, it is reasonable to take compliance with these obligations into consideration when determining if the employees genuinely agreed to the enterprise agreement.

AUSTRALIAN SERVICES UNION

30 March 2022