

IN THE FAIR WORK COMMISSION

SUBMISSION BY THE MINING AND ENERGY UNION (MEU) IN RELATION TO THE DRAFT STATEMENT OF PRINCIPLES

Introduction

1. On 18 January 2023 the Fair Work **Commission** commenced a consultation process in relation to the Commission's obligation under what will become s 188B of the *Fair Work Act 2009* (Cth) (**FW Act**) to "make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement" (**Statement of Principles**).
2. On 3 March 2023 the Commission issued the draft Statement of Principles (**Draft**), and invited submissions in relation to that draft from any interested party.
3. These submissions are filed in response to that invitation. In addition to the matters set out in these submissions, the MEU generally supports the submissions of the Australian Council of Trade Unions (**ACTU Submissions**).

Overview

4. The Statement of Principles has been developed as a safeguard to the legislature's intended simplification of the enterprise agreement approval process. As set out in the Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth), at [702], the Statement of Principles "*contain[s] guidance for employers about how they can ensure employees have genuinely agreed. The statement of principles would be taken into account by the FWC when determining whether to approve an enterprise agreement.*"
5. It is the MEU's view that, for the Statement of Principles to be effective as a safeguard for employees, while contributing to a simplification of the pre-approval process, it needs to capture the existing case law and present it in an authoritative statement which can be used by employers, employees and employee organisations to better understand their rights and obligations in the enterprise agreement process.
6. The MEU is of the view that the Draft is effective in achieving this. We support the ACTU's view that the Draft provides an appropriate level of prescription and flexibility, and provide the below feedback in order to ensure that the guidance provided through the Statement of Principles provides as much guidance as possible to all stakeholders.

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

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

7. The MEU believes the Draft finds a good balance between the need to ensure that employees are informed that bargaining has commenced and of their right to representation during bargaining, and the desire of employers to have greater flexibility in the form that this notice takes.
8. The MEU additionally submits that the Draft presents an opportunity to provide further assistance to the parties to ensure that any agreement is genuine. This may be achieved at the preliminary stage by advising that employers should:
 - a. inform employees of these same rights when they commence employment after the notification time of the agreement, but before the agreement is made, to ensure that new employees are not disadvantaged in the bargaining process;
 - b. include information in any notification to employees which advises employees of what enterprise bargaining is and why it is significant, to ensure that employees understand the importance of and opportunity in the process that is being commenced;
 - c. provide employees with details of the current industrial instrument, to ensure that employees' participation in bargaining is informed; and
 - d. advise any employee organisation bargaining representative who could reasonably be known by the employer that the employer intends to bargain prior to providing the relevant notice to employees, to ensure that default bargaining representatives are able to fully participate in bargaining.

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

9. The MEU supports the Draft as it relates to guidance concerning providing employees with a reasonable opportunity to consider a proposed enterprise agreement.
10. In particular, the MEU notes the introduction of flexibility to the status quo, to apply in appropriate circumstances. The MEU suggests that the circumstances in which this flexibility might apply would be more appropriately confined to a situation where all employee organisation(s) acting as a bargaining representative have agreed to an alternative to the 7 full calendar day requirement.
11. The purpose of this suggested amendment is to ensure that an employee organisation's agreement to varying the reasonable time period did not have the unintended consequence of restricting a separate cohort of employees' ability to consider a proposed enterprise agreement, where that separate employee

cohort may have a series of other circumstances that mean the varied time period would not be appropriate.

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

12. The MEU supports the clarification in the Draft that votes should be cast in a free and informed manner. Given that other ballots contemplated by the FW Act and the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FW(RO) Act**) require a much more stringent process¹, the MEU takes the view that this is a measured but necessary inclusion that should not be controversial. It provides guidance to the parties that, if followed, will avoid some iterations of perceived (or actual) pressure on employees to vote in a certain way.
13. In relation to informing employees of the time, place and method of vote, the MEU supports the drafting, with the exception of paragraph 8(b). As set out at paragraphs 10 – 11, above, in relation to paragraph 6(b) of the Draft, the MEU suggests that the circumstances in which this flexibility might apply would be more appropriately confined to a situation where all employee organisation(s) acting as a bargaining representative have agreed to an alternative to the 7 full calendar day requirement.

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

14. **At paragraph 11** of the Draft the chapeau provides:

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.

15. Given the purpose of the obligation imposed on employers by s 180(5) is not limited to an understanding of how an individual's existing entitlements will be altered, but instead to how wages and conditions of employment might be affected more generally², it is proposed that this paragraph would provide greater assistance to the parties if the above amendment, reflected in strikethrough, was made.
16. **In relation to paragraph 11(b)** of the Draft, the MEU supports the ACTU's proposal to clarify that the requisite explanation should generally include an explanation of the terms of the proposed agreement and their effect, along with the differences between the proposed agreement and any applicable modern award.

¹ See, for example, Division 8, Part 3-3 of the FW Act; Parts 2 and 3, Chapter 3 of the FW(RO) Act.

² See: **One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union** (2018) 262 FCR 527, [115].

17. **In relation to paragraph 13** of the Draft, the MEU does not support the inclusion of this clause, particularly given the possibility of conflicting explanations being provided from an employer and an employee organisation, and/ or between employee organisations, but also because an explanation of this kind will not necessarily reach every employee.
18. Notwithstanding this position, should the FWC prefer to include a provision of this kind, it would be of more assistance for this clause to clarify that regard should also be given as to whether the explanation(s) of the relevant employee organisation(s) were:
- a. facilitated by the employer; and
 - b. provided to all employees;
19. Should this be the preferred course, the MEU supports the drafting proposed in the ACTU Submissions in relation to this paragraph. This includes the express clarification in respect of an incorrect or misleading representation not being rectified by an explanation provided by an employee organisation.
20. **In relation to paragraph 15** of the Draft, the MEU submits that the provision would provide greater assistance to the parties if it stipulated that the Commission may also take into account:
- a. any time provided to employees by the employer to receive any oral explanation and/ or to consider the relevant material that has been distributed, particularly in circumstances where the length of that explanation and the quantum of that material may be quite voluminous and/ or complicated; and
 - b. whether employees were provided an opportunity to meet with any relevant employee organisation, and any role the employer has played in facilitating that meeting.
21. It is submitted that the addition of these components to the guidance provided by the Draft would ensure the Commission takes into account the degree to which the employer has facilitated obtaining their employees' genuine agreement. This is an important facet of making such an assessment.
22. An assessment of whether an employee's agreement is genuine will be more comprehensive where it considers whether employers have provided time to employees to receive and/ or consider an explanation. Such an approach ensures greater employee participation in this important step, and a greater level of understanding, both of which underpin an employee's capacity to give informed consent.
23. There is a current practice among some employers of providing any mix of:
- a. lengthy oral explanations;
 - b. lengthy video explanations; and

c. a large volume of explanatory materials.

24. It is submitted that in circumstances where there is an expectation that employees engage with this material, their agreement would more likely be genuine in circumstances where their employer has facilitated that engagement by providing them with time to attend meetings, view digital explanations or review materials.
25. In relation to the suggestion that the Commission take into account the level to which the employer has facilitated the employees with an opportunity to meet with any relevant employee organisation, it is submitted that where the Commission may take into account any explanation provided by an employee organisation, a consideration of the employer's role in facilitating the delivery of that information is relevant.

Other matters considered relevant: Sufficiently Representative

26. **In relation to paragraph 17** of the Draft, the MEU submits that, when considering whether an agreement is sufficiently representative, the parties would be assisted by the Commission also taking into account the number of employees requested to approve the agreement and the reasonably foreseeable number of employees the agreement will cover. This submission is to ensure the principles adequately reflect the Full Court's concerns expressed in *One Key*, at [151].
27. **In relation to paragraph 18** of the Draft, the MEU respectfully submits that the purpose of this provision would be better served if the notion of "an authentic exercise in enterprise bargaining" included some reference to bargaining as a collective. It is suggested that the amendment align itself to the legislative objective³, perhaps instead requiring "an authentic exercise in enterprise-level collective bargaining." This would also ensure that the Statement of Principles incorporates guidance to address the Full Court's concerns in *One Key*, at [149] – [156].
28. **In relation to paragraph 19** of the Draft, the MEU supports the ACTU Submission on this point, being that the views of all employee organisations acting as bargaining representatives should be given significant weight, rather than prioritising the views of one cohort above another.
29. The MEU submits that the views of one employee organisations acting as bargaining representatives should not downgrade the importance of legitimate concerns raised by another, and that the Commission should retain the capacity to determine what weight to give to each organisation's views in a manner which is responsive to the particular circumstances.

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³ See FW Act, ss 3, 171.