

Australian Industry Group

Statement of Principles on Genuine Agreement

Submission

30 March 2023



STATEMENT OF PRINCIPLES ON GENUINE AGREEMENT

1. This submission is filed by the Australian Industry Group (**Ai Group**) in accordance with the directions issued by the Fair Work Commission (**Commission**) on 3 March 2023, regarding the draft '*Statement of Principles on Genuine Agreement*' (**Draft Principles**).
2. The submission deals with specific concerns arising from the Draft Principles.

Statement of Purpose

3. The Draft Principles should be amended to include an explanation of their purpose. This would assist readers with understanding their role. It would also make this clear for members of the Commission who are required to take them into account when determining whether to approve an application for the approval of an enterprise agreement.
4. We suggest the following would be appropriate:

This statement of principles is made for the purposes of s.188B(1) of the Fair Work Act. It provides guidance as to how employers can ensure that employees have genuinely agreed to an enterprise agreement. It does not create or impose any rights or obligations. Compliance with all elements of these principles may not be necessary to satisfy the Commission that an enterprise agreement has been genuinely agreed to by the employees covered by it.

Paragraphs 1 – 3

5. In our submission, paragraphs 1 – 3 of the Draft Principles are not necessary and should be removed. The Principles should not have the effect, or appear to have the effect, of creating an obligation to inform employers of the matters described in paragraph 1 where this is not mandated by the statute. There is no apparent basis for creating such a requirement.

Paragraph 5 – Providing access to the relevant materials

6. Paragraph 5 of the Draft Principles is in the following terms: (emphasis added)

The employer will be taken to satisfy paragraph 4 if, a reasonable time period before the start of the voting on the proposed agreement, the employer gives employees who are eligible to vote on the agreement:

- (a) a full copy of the agreement, and
- (b) a full copy of any other material incorporated by reference in the agreement.

7. The proposed principle states that an employer will be taken to have provided employees with a reasonable opportunity to consider a proposed enterprise agreement before voting on it if the employer ‘gives’ eligible employees a full copy of the agreement and any material incorporated in it by reference.

8. Presently, s.180(2) of the Act requires as follows: (emphasis added)

(2) The employer must take all reasonable steps to ensure that:

- (a) during the access period for the agreement, the employees (the **relevant employees**) employed at the time who will be covered by the agreement are given a copy of the following materials:

- (i) the written text of the agreement;
- (ii) any other material incorporated by reference in the agreement; or

- (b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.

9. The Act requires an employer to ‘give’ or ensure that employees have ‘access to’ the relevant materials. This, on its face, creates a lower threshold than the steps contemplated by paragraph 5 of the Draft Principles.

10. In practice, rather than *giving* employees the required documents, many employers commonly ensure that employees *have access* to them by, for example, leaving hard copies in a common area (such as a lunch room) for employees to collect and / or making the documents available on an internal webpage (such as an intranet site). This is generally accompanied by some form of notification to employees that the documents are available at the relevant locations.

11. These are effective and efficient ways of ensuring that employees are able to review the relevant documents prior to casting a vote in relation to a proposed agreement. In our experience, the Commission has typically accepted that such arrangements satisfy the extant legislative requirements.
12. Ai Group appreciates that paragraph 5 provides one way in which paragraph 4 could be satisfied. We nonetheless propose that the Principles should not imply that paragraph 4 can be satisfied only if employees are *given* the requisite materials. Rather, they should expressly recognise that *providing access* to the documents will also satisfy paragraph 4.

Paragraph 5 – Employees otherwise having access to the relevant material

13. Further to the above, paragraph 5 should recognise that where employees are given, or provided access to, a copy of a proposed enterprise agreement and any incorporated material by some means other than by it being given to them by their employer, the requirements of paragraph 4 would be satisfied. For example, if an employee organisation that is a bargaining representative or indeed a representative of the employer, gives or provides access to the relevant documents, this should be taken into account when determining whether employees have had a reasonable opportunity to consider the proposed agreement before voting on it. The Principles should reflect the proposition that it is access to the material that is important. They should not suggest, or appear to prescribe, that it is necessary that the material be provided by the employer.

Paragraph 6(b)

14. Paragraph 6(b) provides that an employee can be given the material in paragraph 5 *‘by electronic means, provided the employee has a reasonable opportunity to read the material both during and outside working hours’* (emphasis added).
15. The Act does not require that employees must have an opportunity to read material provided to them during working hours. In our submission, there is no justification for this new limitation.

16. To the extent that the Commission is concerned with circumstances in which employees are provided the relevant materials electronically, without a reasonable opportunity to access and read them, paragraph 6(b) could instead read as follows:

- (b) by electronic means, provided the employee has a reasonable opportunity to access and read the material ~~both during and outside working hours~~.

Paragraph 8(a)

17. The proposed paragraph 8(a) states that employees *'should be given a reasonable opportunity to vote on a proposed enterprise agreement in a free and informed manner. This should include ... a voting process that ensures the vote of each employee is not disclosed to or ascertainable by the employer'*.

18. The guidance provided by paragraph 8(a) suggests that employers should no longer conduct votes in relation to proposed enterprise agreements using many of the ways currently very widely utilised. For instance, it suggests that the vote should not be conducted by show of hands or through a form of electronic voting that identifies the employee. The latter may arise where employees cast a vote by email or text message. These methods of voting are particularly common in relation to employees who are absent from work at the time of the vote, where the ballot is being conducted in person (either via show of hands or through a secret ballot).

19. It would appear that in order to conform with the proposed principle, employers would need to conduct a secret ballot, utilise an online platform that allows employees to vote anonymously without gathering any identifying information about them, or engage a third party to collect and count the votes without releasing identifying information to the employer. This would impose a considerably greater regulatory burden on employers than is currently required by the Act. This aspect of the Draft Principles should not be adopted or, alternatively, the chapeau in paragraph 8 should be amended such that the second *'should'* is replaced with *'could'*.

20. We acknowledge that, in principle, employees should be able to cast their vote without fear of reprisal. Employers are, however, prohibited from taking adverse action against an employee where they exercise a workplace right, including casting a vote in relation to an enterprise agreement.¹ To that extent, employees are relevantly protected. We would not oppose the inclusion of a note or reference to this aspect of the legislative scheme in the Draft Principles, in lieu of paragraph 8(a).

Paragraph 15(b)

21. The submissions made above about paragraph 6(b) of the Draft Principles are also relevant to paragraph 15(b). We press the arguments articulated there in relation to this aspect of the Draft Principles too.

¹ Sections 340(1) and 341(1)(b) of the Act. See also s.341(2)(e) of the Act.