

IN THE FAIR WORK COMMISSION

Approval of enterprise agreements – genuine agreement – Statement of Principles

REPLY SUBMISSIONS OF THE ACTU

I. INTRODUCTION

1. We refer to our submission of Monday 3 April (ACTU Submission) in relation to the FWC's consultation on a Statement of Principles on Genuine Agreement. Where a term is defined in the ACTU Submission, we adopt that definition here.
2. These submissions are made in reply to submissions filed in this matter by other parties.

II. STATEMENT OF PURPOSE

3. The Ai Group's Submission (at [4]) proposes the addition of a statement of purpose at the beginning of the Statement of Principles.
4. ACTU does not oppose this course in general terms. However, we submit that only the first sentence of Ai Group's proposed text should be adopted. We are concerned that the balance of the paragraph could mislead employers as to the nature of what is required of them and encourage them to avoid steps set out in the Statement of Principles, with the ultimate effect of then failing to secure approval for their proposed enterprise agreement.

III. INFORMING EMPLOYEES OF BARGAINING FOR A PROPOSED ENTERPRISE AGREEMENT AND INFORMING EMPLOYEES OF THEIR RIGHT TO BE REPRESENTED BY A BARGAINING REPRESENTATIVE

5. The Ai Group's Submission (at [5]) contends that paragraphs 1-3 of the FWC Draft Statement should be removed. The ACTU opposes this.
6. Ai Group's Submission on this point fundamentally misapprehends, or overlooks, the statutory basis for the Statement of Principles and their purpose.

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7. Section 188(1) of the amended FW Act will require the FWC to take into account the final Statement of Principles. s 188B(3) regulates what must be included in the Statement of Principles (emphasis added):

(3) The statement must deal with the following matters:

(a) informing employees of bargaining for a proposed enterprise agreement;

(b) informing employees of their right to be represented by a bargaining representative;

(c) providing employees with a reasonable opportunity to consider a proposed enterprise agreement;

(d) explaining to employees the terms of a proposed enterprise agreement and their effect;

(e) providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote;

(f) any matter prescribed by the regulations for the purposes of this paragraph;

(g) any other matters the FWC considers relevant.

8. The Statement of Principles *must* deal with informing employees of bargaining and of their right to be represented. The wholesale removal of paragraphs 1-3 of the FWC Draft Statement would have the immediate consequence that the Statement of Principles does not meet its statutory objective.
9. It is submitted that the intention of the legislature, in including these matters as mandatory elements of the Statement of Principles, could not be clearer.
10. Moreover, a broad discretion to include matters additional to those mandatory matters specified in s 188B(3)(a)-(f) is brought about by paragraph (g) which allows the Statement of Principles to include “any other matters the FWC considers relevant”.
11. Even if it were not for the requirement to include the matters set out in paragraphs 1-3 of the FWC Draft Statement, it could hardly be denied that those matters (telling workers that bargaining is happening and telling them that they can participate through a representative, which may include an employee organisation) are highly relevant to bargaining and genuine agreement.

12. Further, it is submitted that the additional matters set out in the ACTU Draft Statement are equally supported by the above.
13. ACCI submit (at paragraph 7 of their Submission) that the Statement of Principles should advise that an employee may appoint themselves as a bargaining representative. ACTU does not oppose this and submits that the following wording could be adopted to achieve this at paragraph (1)(b):

of the employees' rights to be represented in bargaining for the agreement, including by an employee organisation or by another bargaining representative (which may be themselves), and how to exercise those rights
14. However, ACTU does oppose the removal of reference to employee organisations in the alternative. On this point, it is submitted that the FWC Draft Statement simply adds greater context to inform employees of their right to be represented, including by an employee organisation.

IV. PROVIDING EMPLOYEES WITH A REASONABLE OPPORTUNITY TO CONSIDER A PROPOSED ENTERPRISE AGREEMENT

15. The ACTU submits that the Ai Group's submission, from paragraph [6], is satisfactorily addressed by the ability to provide a full copy of materials by electronic means.
16. By providing materials through electronic means, employers will be able to meet the requirements of the Statement of Principles and provide employees with a reasonable opportunity to consider a proposed agreement without excessive administrative burden.
17. The physical circumstances described in paragraph [10] of the Ai Group's submission are precisely the occasions which warrant provision of an actual copy of materials rather than access. Each workplace is different, and rostering pattern and locations may mean that some employees don't in fact have access to a copy of an agreement located in a particular breakroom. By adopting a requirement to give each employee a copy of the proposed agreement, the FWC Draft Statement sets out a clear requirement for employers to follow and avoids disputation involving the FWC having to make detailed considerations as to whether access was actually provided, and to what extent.
18. We note that the Ai Group Submission (at [13]) speaks to the need to allow for materials to be provided other than by an employer, the example being given as by an employee organisation. It is submitted that the ACTU Draft Statement, at paragraph [23], provides for this, adding to the reasons for its inclusion.

19. In response to paragraphs [14] – [16] of the Ai Group’s Submission, the ACTU submits that there *is* justification for a requirement that would allow employees to read materials during and outside of working hours. Moreover, it is submitted that this is not a “limitation” (as put by the Ai Group) but rather a way of ensuring that employees are given *a reasonable opportunity* to consider a proposed enterprise agreement.
20. The ACTU does not oppose the submission made by the AHEIA (at p1) in relation to paragraph 7 of the FWC Draft statement.

V. 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

21. The primary submissions of ACCI (at [9] – [10]) and Ai Group (at [17] - [20]) are at odds as to the conduct of secret ballots, or shows of hands.
22. The ACTU submits that the provisions of the ACTU Draft Statement should be adopted, or that alternately, the FWC Draft Statement provisions should not be disturbed.
23. Either would allow for a ballot to be conducted by way of a show of hands (as is submitted for by Ai Group). The only caveat to this would be that the show of hands would have to be conducted by a party other than the employer (which would reduce the administrative burden on employers). It is submitted that the Statement of Principles provide that this be an employee organisation, on the basis that an employee organisation is a democratic institution accustomed to the conduct of ovting and feedback procedures.
24. Further, the ACTU Draft Statement (at [23]) would allow for agreement to be reached between employers and employee organisations who are bargaining representatives as to the precise manner in which voting should be conducted.

VI. EXPLAINING TO EMPLOYEES THE TERMS OF A PROPOSED ENTERPRISE AGREEMENT AND THEIR EFFECT

25. The ACTU opposes the submissions of ACCI at [12] – [16] on the basis that this will unnecessarily introduce complexity into the approval process. Instead of placing a clear and ascertainable requirement to explain pending modern award changes, adoption of the ACCI proposal would require the FWC to determine whether such changes were “significant” or not – which could be the subject of dispute.
26. ACTU opposes the submissions of Ai Group at [21], for the reasons set out above.

VII. OTHER MATTERS CONSIDERED RELEVANT

27. In response to the Law Council of Australia’s Submission (at p2), (and the similar submissions of ACCI at [25] –[28]) on paragraph 19 of the FWC Draft Statement, the ACTU submits that the ACTU Draft Statement – which inserts reference to good faith bargaining – addresses this concern by relying on a well established concept that is familiar to industrial participants.

VIII. CONCLUSION

28. For the reasons above and given in our earlier submission, it is submitted that the FWC should adopt, in its ultimate Statement of Principles on Genuine Agreement, the terms provided by the ACTU Draft Statement.

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