

Form F18—Statutory declaration of employee organisation in relation to an application for approval of an enterprise agreement (other than a greenfields agreement)

Fair Work Act 2009, s.185; Fair Work Commission Rules 2013, rule 24 and Schedule 1

This is a statutory declaration in support of an application to the Fair Work Commission for approval of an enterprise agreement in accordance with Part 2-4 of the Fair Work Act 2009.

I,

Name	Jorge Navas		
Postal address	170 Greenhill Road		
Suburb	Parkside		
State or territory	SA	Postcode	5063
Occupation	Secretary		

make the following declaration under the *Statutory Declarations Act 1959*

1. I am an officer of the [name of union]

Health Services Union SA/NT

2. This declaration relates to an application for approval of an enterprise agreement (the Agreement) as follows

Name of agreement	The Clinpath Laboratories Enterprise Agreement 2017
Name of employer(s) to be covered by the agreement	Clinpath Laboratories Pty Ltd

3. The union was a bargaining representative for the Agreement because one or more members of the Union are employees who are covered by the Agreement and the Union is entitled to represent the industrial interests of those employees in accordance with s.176(1)(b) of the Fair Work Act 2009.

Yes

4. Does the Union support the approval of the Agreement by the Fair Work Commission?

No

If you have answered no to question 4—specify the grounds of objection of the Union using numbered paragraphs

1. Notice of employee representational rights

- 1.1 The notice of employee representational rights (NERR) was not correctly completed. The NERR the employer provided states:

Clinpath Laboratories Pty. Ltd. gives notice that it is bargaining in relation to an enterprise agreement (Clinpath Laboratories Enterprise Agreement 2017) which is proposed to cover employees that are currently covered by the Clinpath Laboratories Enterprise Agreement 2015 and the Clinpath Laboratories Nursing Employees Enterprise Agreement 2013.

- 1.2 However, this coverage is different to the coverage indicated in the proposed Enterprise Agreement that Clinpath indicates in its Form F17. In paragraph 2.2 of the Form F17, Clinpath states that:

The groups covered were the groups covered by the previous Clinpath Laboratories Enterprise Agreement and warehouse staff previously covered by the HPSS Award.

The groups not covered were nurses, who are covered by the Nurses Award and senior management.

- 1.3 It seems clear that the NERR is deficient, as warehouse staff are to be covered by the proposed agreement, but were not identified in the notice, and were not provided with the notice. Additionally, the proposed agreement does not cover those employees covered by the Clinpath Laboratories Nursing Employees Enterprise Agreement 2013, as indicated in the notice.
- 1.4 In addition, the employer did not attach to the NERR copies of the Enterprise Agreements referred to, or their coverage clauses. This meant that employees would not easily be able to ascertain whether or not they were covered by the proposed agreement.
- 1.5 We note that in *AMOU v Harbour City Ferries Pty Ltd* (2015) 250 IR 1, [29], the Full Bench held that:

The terms of the prescribed form necessitate the provision of information so that an employee is able to assess whether he or she is an employee who would be covered by the proposed agreement. The employee reading the notice must be able to understand who it is "who would be covered" by the proposed agreement. That is the purpose of the words in the first paragraph of the prescribed form "... which is proposed to cover employees that [proposed coverage]".

- 1.6 We submit that these defects to the NERR render it invalid. If no valid notice of employee representational rights was given to employees, it follows that the Agreement making process was not in accordance with s 188 of the *FW Act* and cannot be approved.

2. Ballot Process

- 2.1 We understand that employees were sent their ballot papers by mail on the 11 December 2017, together with instructions on how to vote, but did not receive access to the proposed agreement until 14 December 2017. This is detailed in paragraph 2.4 of the Employer's Form F17.
- 2.2 We submit this is in breach of s 180(1) of the *FW Act 2009*, which provides:

Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

2.3 It seems clear that the voting process began when employees were provided with ballot papers and were able to cast a vote. (See, for example, *Australian Char Pty Ltd* [2011] FWA 1627). This means the process began on 11 December 2017, and not 21 December 2017, as indicated in the Form F17 completed by the employer.

2.4 As employees were not provided with copies of the agreement until 14 December 2017, four days after the voting process had begun, we submit that the pre-approval requirements in s 180 of the *FW Act* were not met, and the vote is therefore invalid.

2.5 We also note that the information provided to employees about the voting process was deficient and confusing. It did not state when the ballot was to open, only that it closed at 4pm on the 28th December 2017. Furthermore, the ballot return box was not always accessible. This, coupled with the timing of the ballot over the Christmas period caused major confusion and frustration by employees wanting to cast a ballot.

3. Misleading information provided to employees

3.1 The HSU SA/NT maintains that Clinpath misled employees in its communication on 1 December 2017, as indicated in our letter dated 13 December 2017, to which Clinpath responded on 13 December 2017. Further, the letter Clinpath provided to employees dated 11 December 2017 contained contradictory information about what was and was not changing in the proposed agreement.

3.2 For example, Clinpath stated in their agreement summary titled '*Changes to the agreement are*,' that the '*increment increases occur at 1950 hours for all staff*', but also said in the '*Many clauses remain unchanged in the agreement*' summary that there will be '*no change to increment increases*'. The increment increases were a major point of difference in negotiations and a point the parties did not reach an in principle agreement on.

4. Agreement does not meet BOOT

4.1 We have concerns that the Agreement does not meet the Better Off Overall Test (BOOT) per s 193, and therefore should not be approved per s 186(d).

4.2 For example, we are concerned that provisions in relation to part-time employees do not meet the BOOT.

4.3 The *Health Professional and Support Services Award* ('HPSS Award') provides restrictions around part-time employment. Clause 10.3 provides, relevantly, that:

(b) Before commencing employment, the employer and employee will agree in writing on a regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day.

(c) The terms of the agreement may be varied by agreement and recorded in writing.

4.4 However, unlike the HPSS Award, under clause 19 of the Agreement, there is no requirement for a part-time employee to agree with their employer in writing on a regular pattern of work before employment commences or, for any variation to the terms of the agreement to be made in writing.

4.5 Moreover, clause 23.3 of the Agreement provides part time employees with overtime payments only where working in excess of full time hours, being 38 hours per week

or if they are required to work an extended shift beyond the time they had been rostered at the beginning of the shift. By contrast, under clause 28.1(d) of the HPSS Award, part-time employees are entitled to overtime for all work in excess of their agreed hours.

4.6 We also have concerns that a number of Agreement provisions are inferior to the HPSS Award, leading to the Agreement failing to meet the BOOT. These include:

- (a) Clause 23.2 – Overtime rates are paid at time and a half for the first *three* hours, and double time thereafter. Under the Award, employees are paid at time and a half for the first *two* hours and double time thereafter.
- (b) Clause 25 Shift Penalties – Shift penalties are payable under the HPSS Award where employees finish between 6:00pm and 8:00am, or commence work between 6:00pm and 6:00am. Under the Agreement, shift penalties apply where work finishes between 8:00pm and 7:00am, or commence between 8:00pm and 7:00am.
- (c) Clause 30.1 Higher Duties – Under clause 16.1 of the Agreement, higher duties are only payable after an employee acts for more than three full shifts on consecutive working days in a more senior role. Support Services employees are worse off under this clause, as per clause 30.1 of the HPSS Award, they are entitled to payment for higher duties for work performed in a more senior role for all or part of a shift.
- (d) The Agreement contains no provision for a rest period after overtime, which is provided for in clause 28.2 of the HPSS Award.

4.7 We will be able to provide further and better particulars of how the Agreement fails to meet the BOOT at a Hearing or in further submissions.

5. With respect to the matters contained in the employer's Form F17 statutory declaration that are within my knowledge:

I disagree with one or more of the answers given to questions in the statutory declaration, or with matters specified in the statutory declaration, as follows:

If you disagree with the employer's statutory declaration—set out the matters of disagreement in numbered paragraphs. Attach additional pages if necessary

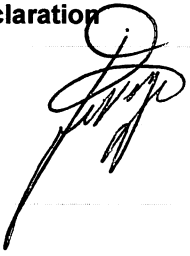
1. We disagree with the employer's response to paragraph 2.3. The employer did not take all reasonable steps to give notice of their right to be represented by a bargaining representative to each employee who will be covered by the agreement. As mentioned above, warehouse staff were not mentioned in the NERR.
2. We disagree with the employer's response to paragraph 2.8. The date that voting commenced was in fact 11 December 2017, when employees received ballot papers and instructions on how to return them, not 21 December 2017.
3. We disagree with the employer's response to paragraph 3.5, as it does not include terms in relation to part-time employees, which are less beneficial than under the HPSS Award.
4. We disagree with the employer's response to paragraph 3.6, as we do not agree that the agreement passes the better off overall test, because part-time employees are not better off under the Agreement.

6. Does the Union give notice pursuant to section 183 of the Fair Work Act 2009 that it wants to be covered by the agreement?


Yes

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act 1959*, and I believe that the statements in this declaration are true in every particular.

Signature of person making the declaration

Signature	
Declared at (place)	Adelaide Magistrates Court 260-280 Victoria Square, Adelaide SA
on (day) of (month) (year)	16 / 01 / 2018

Before me,

Signature of person before whom the declaration is made	
Full name of person before whom declaration is made	KEVIN ALEXANDER STACEY J.P. 16259
Qualification of person before whom declaration is made	Justice of the Peace for South Australia
Address of person before whom declaration is made	Adelaide Magistrates Court 260-280 Victoria Square, Adelaide SA
Suburb	Adelaide Magistrates Court 260-280 Victoria Square, Adelaide SA
State or territory	Postcode
Phone number	0418 293 557

Note 1: A person who intentionally makes a false statement in a statutory declaration is guilty of an offence, the punishment of which is imprisonment for a term of 4 years—see section 11 of the *Statutory Declarations Act 1959*.

Note 2: Chapter 2 of the *Criminal Code* applies to all offences against the *Statutory Declarations Act 1959*—see section 5A of the *Statutory Declarations Act 1959*.



A statutory declaration must be made before a **prescribed person**. For a full description of prescribed persons please see the Commission's Guide—Statutory declarations.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS