

**From:** Sunil Kemppe <skemppi@actu.org.au>  
**Sent:** Friday, 24 February 2023 1:58 PM  
**To:** Chambers - Hatcher J <Chambers.Hatcher.J@fwc.gov.au>  
**Cc:** Liam O'Brien <lobrien@actu.org.au>  
**Subject:** re: ACTU Draft Statement of Principles

Dear Associate,

Please find attached a set of draft principles prepared by the ACTU.

These draft principles are provided by the ACTU to assist in outlining our position as to the content and form of the Statement of Principles during the consultative process. They capture the position outlined by the ACTU during our meeting with the President and Deputy-Presidents.

We intend to make fuller submissions and respond to the matters raised in the Discussion Paper (which may include amending or adding to these principles) according to the issued timeline.

We hope this is of assistance to the President and the Deputy-Presidents.

Regards,

Sunil Kemppe

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We acknowledge Aboriginal and Torres Strait Islander peoples as the Traditional Custodians of the land, and we pay our respect to their Elders, past and present. The ACTU supports the call of First Nations peoples for a Voice to Parliament to be enshrined in the Constitution.

## FAIR WORK COMMISSION

### CONSULTATION ON STATEMENT OF PRINCIPLES ON GENUINE AGREEMENT

#### ACTU DRAFT PRINCIPLES

##### *Specified mandatory content of the statement of principles*

- 'informing employees of bargaining for a proposed enterprise agreement', and
  - 'informing employees of their right to be represented by a bargaining representative'.
1. An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to ensure that each employee who:
    - a. will be covered by the agreement; and
    - b. is employed at the notification time for the agreement, or after that time but before the agreement is made, is informed:
      - i. that the employer is bargaining for an enterprise agreement and of the proposed coverage of the agreement; and
      - ii. of their rights to be represented in bargaining for the agreement and how to exercise those rights; and
      - iii. the name and contact information of any employee organisation that:
        1. is known by the employer to be an organisation that the employee is eligible for membership of; or,
        2. would be covered by the proposed agreement.
      - iv. that enterprise bargaining is the process of negotiating an enterprise agreement - which sets applicable terms and conditions of work - between employers and employees and their bargaining representatives such as their union;
      - v. the name and expiry date of the current industrial instrument (if any) which covers and applies to the employee and the relevant award that covers the employee (if that award is not the industrial instrument that applies to the employee);
      - vi. at such a time and in such a manner that the employee has a reasonable opportunity to be represented in bargaining for the agreement by a bargaining representative of their choice (which must be prior to the commencement of bargaining meetings in the case of existing employees);
  2. The steps taken in Principle 1 will take into account factors relevant to the enterprise and its employees such as: operations; rosters; shift structures and arrangements; the size of

the workplace; and, employee attributes (such as age, gender, ethnicity and disability status).

3. An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must ensure that each employee organisation known, or who could reasonably have been known by the employer, to be entitled to represent the industrial interests of one or more of the employees who would be covered by the agreement is informed that the employer intends to bargain for an enterprise agreement and of the proposed coverage of the agreement, prior to taking any of the steps in Principle 1 above.
  4. If, as is the case with respect to a single-enterprise agreement that is not a greenfields agreement, the employer is required to provide a Notice of Employee Representational Rights (NERR), the provision of the NERR is taken to satisfy clauses 1.b.i and 1.b.ii above.
  5. For the purposes of clauses 1.b.iii to 1.b.iv above, the provision of such information by the relevant employee organisation shall be taken to be sufficient, where such provision is facilitated by the employer.
  6. A failure to provide the information required above shall not, of itself, mean that the FWC cannot be satisfied that there has been genuine agreement with respect to a multi-employer enterprise agreement.
  7. An employer that will be covered by a proposed enterprise agreement must not mislead an employee who will be covered by a proposed enterprise agreement about:
    - a. the employee's right to be represented by a bargaining representative; and
    - b. the status of an employee organisation as the default bargaining representative for its members.
- 'providing employees with a reasonable opportunity to consider a proposed enterprise agreement',
  - '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', and
  - 'explaining to employees the terms of a proposed enterprise agreement and their effect'.
8. Before an employer requests that the employees employed at the time who will be covered by the agreement approve a proposed enterprise agreement by voting for it, the employer must take all reasonable steps to ensure that the employees and their bargaining representatives:
    - a. be provided a copy of the agreement that will be put to the vote and any material incorporated by reference in the agreement; and
    - b. be provided an explanation of the terms of the agreement and the effect of those terms, in an appropriate manner, taking into account the particular circumstances and needs of the employees;

*Note: s 180(5) requires reasonable steps to ensure that the terms of an proposed agreement and their effect are explained in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.*

- c. be provided relevant information for them to be able to vote in an informed manner, including, but not limited to:
  - i. how the proposed agreement would vary or affect their current terms and conditions of employment, and
  - ii. how the terms of the proposed agreement differ from the enterprise agreement (if any) that currently applies to the employee (for example, where there is minimal change from the current agreement applying to employees, it will be sufficient for the employee to indicate this and identify any terms which are being changes and the effect of those terms); and
  - iii. Whether and how any terms of proposed agreement are less favourable than the terms of the modern award that covers the employee. Employees may additionally be provided with information about any terms of the proposed agreement which are more favourable than the terms of that modern award
- d. be given a reasonable opportunity to access the employee organisation that is entitled to represent their industrial interests, to assist them in voting in an informed manner. This shall include:
  - i. providing the necessary time for employees to meet with the representatives of the employee organisation;
  - ii. the provision of such facilities as are necessary to representatives of the employee organisation (including its workplace delegates);
  - iii. providing representatives of the employee organisation (include its workplace delegates) access to the employer's worksites, whether those worksites are in person or online;
  - iv. facilitating distribution of the employee organisation's material in relation to the proposed agreement;
  - v. If the agreement is a multi-enterprise agreement, informing the employees are informed whether each bargaining representative that is an employee association has agreed to the employer's request for employees to approve the agreement;

*Note: Pursuant to s 180A(2) an employer cannot request that employees approve a multi-enterprise agreement by voting for it unless each bargaining representative for the enterprise agreement that is an employee organisation has agreed to the employer's request or a voting request order permits the employer to make the request.*

- e. at such a time and in such a manner as to enable them to make a reasonably informed decision as to whether or not to vote to approve the agreement. This will generally be no less than 7 days prior to the commencement of voting but may be a

different time subject to factors relevant to the enterprise and its employees such as: operations; rosters; shift structures and arrangements; the size of workplace; employee attributes (such as age, gender, ethnicity and disability status).

9. An employer that will be covered by a proposed enterprise agreement must take all reasonable steps to ensure that:
  - a. the employees (employed at the time who will be covered by the agreement) are informed of the arrangements (including but not limited to the time, place, method, ballot provider, and any arrangements to ensure that the employer is not aware of how individual employees vote) for the vote on the agreement; and
  - b. the vote on the agreement is conducted at such a time, in such a manner, and with such advance notice, that they have a reasonable opportunity to vote on the agreement. This includes ensuring that the employer does not know how individual employees vote, and that there is scrutiny registered employee organisations who are bargaining representatives.
  - c. the employees are provided with such facilities and/or accommodations as are necessary to enable them to vote (this may include paid time, breaks, rostering arrangements or (in the case of electronic voting) access to computers in the workplace.
  
10. An employer or employers that will be covered by a proposed enterprise agreement may make an agreement with each registered employee organisation that is a bargaining representative for the proposed enterprise agreement about the process to ensure that Principles 8 and 9 are complied with. If:
  - a. each employee organisation supports the approval of the enterprise agreement; and,
  - b. the agreed process is carried out; then,there shall be a rebuttable presumption that there has been genuine agreement on the basis of Principles 8 and 9.
  
11. An employer that will be covered by a proposed enterprise agreement must not mislead an employee who will be covered by a proposed enterprise agreement about:
  - a. the progress or outcome of negotiations with any bargaining representative;
  - b. the effect of the terms of the enterprise agreement; and
  - c. the circumstances in which the enterprise agreement is made (including but not limited to the financial position of the employer; or determinations to vary awards that have been made but have not yet taken effect; or the actual remuneration of employees; or number of contractors engaged by the employer and the conditions in those contracts); and
  - d. the consequences of voting to approve the enterprise agreement or not voting to approve the enterprise agreement; and
  - e. the agreement of any bargaining representative to the agreement that will be put to a vote.

*Any other matters the FWC considers relevant*

12. In considering whether there has been genuine agreement, the FWC should have regard to International Labour Organisation conventions number 87, 98 and 135, which Australia has ratified. Convention 98, together with Convention 87 on Freedom of Association and Protection of the Right to Organise, represents essential building blocks for a harmonious, stable and progressive industrial relations that can contribute to sustainable development by empowering workers and employers to find solutions through voluntary negotiations.
13. Where information is to be provided by the employer in accordance with these principles, it should (subject to Principle 10) be provided:
  - a. In writing, and may also be provided verbally;
  - b. Using a method of communication and/or distribution that is customarily used in the workplace;
  - c. In a manner that takes into account the attributes (including age, gender, disability status, cultural and linguistic diversity) of the employees. This includes making information available in languages that are present in the workplace.
  - d. At a time and place that takes into account the patterns of work (including rosters etc.) at the workplace as well as the location of the workplace and the employees.
14. In determining whether there has been genuine agreement, FWC shall have regard to:
  - a. Any pending applications that have been made in relation to bargaining for the proposed agreement, including applications for protected action ballot orders, good faith bargaining order, for the FWC to deal with a bargaining dispute or, for an intractable bargaining declaration.
  - b. Any other proceedings (whether on foot or determined) that are relevant to the bargaining or to previous rounds of bargaining between the employer and its employees or which demonstrate past contraventions by the employer;
15. Pursuant to s 188(2), the FWC must be satisfied that the employees have a sufficient interest in the terms of the agreement and are sufficiently representative.
16. Where one or more employee organisations participated in the bargaining and each such organisation:
  - c. supports the approval of the enterprise agreement; and
  - d. indicates that they do not have concerns that the agreement was not genuinely agreed; thenthe FWC will give this significant weight when considering whether or not there has been genuine agreement.