

## IN THE FAIR WORK COMMISSION

### Approval of enterprise agreements – genuine agreement – Statement of Principles

#### SUBMISSIONS OF THE ACTU

##### I. INTRODUCTION

1. On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (**SJBP Act**) received Royal Assent.
2. Taking effect from 6 June 2023, the SJBP Act amends the FW Act provisions which govern when the Fair Work Commission (FWC) can be satisfied that a proposed enterprise agreement has been genuinely agreed to by the employees to be covered by the agreement.
3. The FWC will be required to publish a Statement of Principles on Genuine Agreement (pursuant to s 188B) (**Statement of Principles**), which it must then take into account in approving an agreement (pursuant to s 188).
4. On 3 March, following consultation, the FWC President Justice Hatcher published a draft Statement of Principles (**FWC Draft Statement**).
5. The ACTU makes these submissions in relation to that Draft Statement of Principles.

##### A. The ACTU

6. The Australian Council of Trade Unions (**ACTU**) has been given leave to intervene in this proceeding and files this submission pursuant to that permission. This outline of submissions replaces the ACTU's earlier outline of submissions.
7. Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For over 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

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8. The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 42 ACTU affiliates. They have approximately 1.8 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

### **B. The ACTU Submission**

9. Filed with these submissions is a draft Statement of Principles prepared by the ACTU (**ACTU Draft Statement**). The ACTU Draft Statement takes, as its starting point the FWC Draft Statement. Changes between the two are marked in the ACTU Draft Statement.
10. It is submitted by the ACTU that the amendments proposed by the ACTU in the ACTU Draft Statement should be incorporated into the final Statement of Principles. Save and except for the marked changes between the ACTU Draft Statement and the FWC Draft Statement, the ACTU supports the FWC Draft Statement.

### **II. AN APPROPRIATE LEVEL OF PRESCRIPTION AND FLEXIBILITY**

11. We tend for a scheme which is prescriptive where it needs to be, but flexible where it can be.
12. Throughout this submission, we support a number of provisions in the FWC Draft Statement.
13. The ACTU Draft Statement adopts a similar approach to the FWC Draft Statement.
14. However, we also support additional of further safeguards by way of prescription, as well as making more explicit the option for employers, workers and employee organisations, who are all familiar with particular workplaces and the needs of workers within them, to agree to procedures which are tailored to the circumstances of those workplaces.
15. It is our view that a level of prescription is warranted for a range of reasons, including:
  - a. It provides employees and their representatives with greater certainty as to the protections which are in place to ensure that they will ultimately be covered by an enterprise agreement for which there was genuine agreement;
  - b. It provides employers with a document that they can follow to identify what is required of them in order to have their enterprise agreement approved;
  - c. It ensures that in circumstances where employees are not represented in bargaining by an employee organisation, the FWC has the power to adequately assess whether agreement was genuine.

16. It is also our view that in circumstances where an employee organisation has participated in bargaining, that providing the option for a more streamlined procedure that addresses the legislative requirements is also warranted for the following reasons.
  - a. It would allow for seasoned industrial participants to tailor the approach that they take to ensure that there is genuine agreement according to their knowledge of the workplace and the employees.
  - b. It would ensure that there are appropriate safeguards in place, as any alternative process would require agreement between the employer and employee organisations, and be subject to the democratic functioning and accountability of those organisations.
  - c. It recognises that in many cases, where employee organisation actively participate in bargaining, that certain notification, explanation and agreement approval procedures are undertaken directly by the employee organisation(s).
17. Accordingly, the ACTU Draft Principles create two available pathways. The first, where safeguards for employees' interests are brought about by an appropriate level of prescription, and a second where arrangements are tailored to the circumstances of the workplace and employees' interests are safeguarded by the participation of their employee organisation.
18. It is submitted that employee organisations, through their internal democratic procedures, are well placed to agree an alternative to the level of prescription otherwise required, given that they are aware of the workplace and its needs. Such an arrangement would undoubtedly make for a more efficient process for employers and employees alike.
19. The relevant safeguard attaching to the proposed scheme lies in the nature of the participants.
20. Registered employee organisations, and officers thereof, have significant duties to their members imposed by legislation, their rules and their own democratic procedures. For example officers are required to act in good faith in the best interests of members, and for a proper purpose. Ultimately, however the strongest underpinning safeguard affecting the operation of registered employee organisations comes through their democratic functioning – again mandated by statute and rules.
21. In this context, it is submitted that it is entirely appropriate to allow seasoned industrial participants who are familiar with the workplace and have a strong understanding of the legislative requirements to determine the manner in which information is to be provided and a process of endorsement is to be carried out.

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

**A. Informing Employees who commence after the notification time**

22. The ACTU Draft Statement includes a requirement to notify employees who commence employment after bargaining starts of the matters set out in paragraphs (1)(c) – (e). It is submitted that this inclusion should be adopted in the Statement of Principles as it would ensure that all employees who are affected by the outcome of bargaining, and are employed during the bargaining round, would be aware that bargaining is occurring and of their rights to representation.
23. If this provision is not included, it would mean that employees who start during, but not before, bargaining commences might not be aware that their future terms and conditions of employment might change, and that they can be represented in bargaining, until bargaining has concluded a voting process is commenced.

**B. Providing Information that assists employees in understanding collective bargaining and their right to be represented**

24. The ACTU Draft Statements includes provisions which require an employer to notify employees of the name and contact information where they know which employee organisation is operative in the workplace or otherwise eligible to represent their employees' industrial interests. The ACTU Draft Statement also ensures that workers are given information to better understand what bargaining actually is, and how it works, as well as relevant information about current conditions.
25. It is submitted that these inclusions give life to the requirement to notify that bargaining has started and that an employee may be represented. The ACTU Draft Statement adds specificity to the requirements and ensures that employee are aware of the significance of bargaining from the outset. The requirement is phrased to arise in circumstances where the employee organisation is known to the employer, so would not create additional burden in circumstances where no employee organisation was known to be active in the workplace.
26. It is submitted that these inclusions supplement the requirement to merely inform that an employee may seek representation, by requiring the provision of information which directly assists the workforce in understanding the specific content of who it is that they might be represented by.

**C. A streamlined option**

27. The ACTU Draft Statement provides that provision of information pursuant to (1)(c) – (e) may be performed by an employee organisation.
28. It is submitted that this will allow this information to be provided in a way that presents little to no administrative burden for employers. Further, it would be preferable to the employer in many cases for the information to be presented by an employee organisation that is familiar with industrial and legislative requirements and directly undertook some or all of the activities to meet the requirement. Doing so will ensure that these requirements are carried out and will assist employees by placing them in a more informed position about the process of collective bargaining as well as in exercising their right to be represented.

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

29. The FWC Draft Statement provides that an employer should provide employees with a reasonable opportunity to consider a proposed enterprise agreement, before voting on it, so that they may do so in an informed way.
30. The FWC Draft Statement sets out the requirements, including a timeframe, for achieving this.
31. For there to be genuine agreement, an employer must provide a full copy of the agreement and any other materials incorporated by reference.
32. It is submitted that this requirement cannot reasonably be quibbled with – it would be almost impossible for employees to vote in an informed way on a proposed agreement that they do not have a copy of. Similarly, an employee would require a copy of any other incorporated materials which will be relevant to setting their terms and conditions in order to make a truly informed choice.

**A. A reasonable time period**

33. The FWC Draft Statement requires the information referred to above to be provide at least 7 full calendar days prior to the day on which voting starts. The ACTU Draft statement also adopts this.
34. The requirement to provide certain information to employees 7 days prior to the day on which they vote for an agreement has been part of the industrial landscape since the introduction of the Fair Work legislation.

35. This means that:

- a. It is difficult to find a rationale as to why it should no longer be present;
- b. Employers are aware of and used to complying with it;
- c. Employees rely on and expect it.

36. It is submitted that including a general requirement (which may be displaced in certain circumstances) is warranted, as it represent no more than a continuation of the status quo (with which all participants are familiar).

37. Further, it is submitted that any attempts to submit against the inclusion of a requirement to provide information 7 days prior to a vote are merely opportunistic and seek to reduce the rights of workers to be fully informed about the true nature of what will regulate their terms and conditions of employment for the coming period.

#### **B. Circumstances and Needs**

38. FW Act s 180(5)(b) requires an explanation to be provided in a manner that is appropriate, taking into account the circumstances and needs of the employees. Section 180(6) provides a non-exhaustive but informative list.

39. Both the FWC Draft principles and ACTU draft principles adopt this in a way that is consistent with the legislation.

#### **C. A streamlined option**

40. Paragraph 23 of the ACTU draft principles provide for an alternative to paragraph 6 of the FWC Draft principles and the ACTU draft principles.

41. It is intended that this sets up a predisposition toward the level of prescription which we have defended above, but allows for a more tailored option to be available where there is general agreement between all of the parties to an agreement.

42. This would allow industrial participants who are familiar with the workplace and its needs to agree to a customised process which would achieve efficiencies in terms of the informational process. It would not override the legislative requirements (i.e. s 180).

43. Moreover, paragraph 23 sets up a rebuttable presumption, meaning that it would be open to the FWC to look beyond the process followed and be satisfied of its own accord. Furthermore, it

is to be noted that this would occur in the context of a statement of principles which is not ultimately binding upon its very nature.

**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**

**A. Circumstances and Needs**

44. For the reasons above, it is submitted that this requirement should also take into account the circumstance and needs of the employees.
45. To achieve this, reliance is placed on paragraphs 18(a)– (g), in order to maintain consistency of obligations.
46. Further, it is submitted that the circumstances and needs of employees should be a consideration throughout the agreement making process and therefore appropriately form part of the obligations on employers both in relation to explaining the agreement, as well as informing them of the vote – it would be counter-intuitive to leave open a scenario in which the agreement must be explained in a way that is cognisant of the circumstances and needs of the employees (for example, in a language other than English), but that the critical information relating to how, where and when the employee can have their say is not similarly communicated.

**B. 7 days' notice**

47. For the reasons above, it is submitted that the general requirement to provide 7 days notice of voting arrangements is appropriate and warranted.
48. Additionally, it is submitted that the significance of information about the vote is of such significance that it warrants 7 days notice in its own right.
49. In terms of enfranchisement, the moment at which an employee votes on a proposed enterprise agreement in circumstances where they are not represented might likely, in the event they are not represented in bargaining, be their first opportunity to indicate their individual position in relation to the terms and conditions of employment by which they are to be regulated in future.
50. In this context, any step which might avoid their being disenfranchised – for example, by not being able to make the relevant arrangements to be present, to participate in voting assumes a particular significance. By contrast, reducing the obligation could run the risk of disenfranchising employees.

### **C. Agreement of Employee Organisations**

51. In circumstances where an employee is represented by an employee organisation that is representing them in bargaining it is open and appropriate to take a different approach.
52. Paragraph 8(b) of the FWC Draft Statement, reproduced as paragraph 11(b) of the ACTU Draft Statement achieves this.
53. Those paragraphs allow for the employer to reach agreement with employee organisations in relation to the timing of providing information about the vote.
54. It is submitted that this is a desirable feature in both draft statements, on the basis that it allows for industrial participants who are familiar with the operation of the workplace to make arrangements that are tailored and specific. It might be that they recognise the unique swing and shift patterns and determine that a longer period is appropriate. It might also be that they look to a smaller workplace in which everyone is present at the same time and determine a shorter period and an overall more efficient process. In either scenario, it is important to note that the time period determined is by agreement, and that adequate safeguards to the interests of employees are present through their representation by an employee organisation.
55. A point of difference between the FWC Draft Statement and the ACTU Draft Statement is the way in which each formulate the pre-condition for reaching agreement with an employee organisation.
56. It is submitted that the ACTU Draft Statement's formulation is preferable. The ACTU Draft Statement requires the agreement to be reached with all employee organisations who are bargaining representatives. This would ensure that there is consensus at every step of the way, with all relevant parties. Moreover, it would avoid a scenario in which calculations as to whether or not a majority is represented are necessary.

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

57. As has been noted by the Federal Court in relation to a failure to meet the obligation to explain the terms of an agreement, the *'requirement imposed by s.180(5) is an important obligation imposed upon an employer to ensure that employees are as fully informed as practicable. The requirement is not a mere formality. Whatever steps may be necessary will depend upon the*



*facts and circumstances of each particular case: but those steps are not satisfied by a person reading – without explanation – the terms of an agreement to an employee’.*<sup>1</sup>

58. It is submitted that the procedural requirements present in the FWC Draft Statement and the ACTU Draft Statement are therefore necessary, and in line with the requirements of s 180(5), which remain.

### **A. Modern Award Comparison**

59. The ACTU Draft Statement include a requirement that employer explain the effect of terms with respect to any applicable or forthcoming award entitlement.
60. It is submitted that this should be included in the Statement of Principles on the basis that it protects against any changes to the statutory minima which might be decided but not yet determined undercutting the agreed standard.
61. The point of departure between the ACTU Draft Statement and the FWC Draft Statement related to the circumstances and manner in which the relationship between the proposed agreement and the relevant award is to be explained.
62. The FWC Draft Statement requires, in the case of a rollover agreement, comparison to any terms which have changed in the modern award. The ACTU Draft Statement requires explanation of any terms less favourable in the proposed agreement and leaves it open to the employer to justify this on the basis of any more favourable terms.
63. It is submitted that the ACTU Draft Statement’s formulation is preferable, particularly as it ensures that employees who have commenced employment after the existing agreement was negotiated to be fully appraised of the comparison to award conditions. A similar formulation is adopted with respect to agreements that are not “rollovers”.

### **B. Terms and their Effect**

64. A further point of difference between the ACTU Draft Statement and the FWC Draft Statement is that the latter makes explicit the requirement to explain the terms of an agreement and their effect, in circumstances where the agreement will replace the award.
65. Whilst it is accepted that this requirements is already contained in s 180(5), it is submitted that this is an important signpost to ensure that employers comply with the requirement.

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<sup>1</sup> *One Key Workforce Pty Ltd v CFMEU* [2017] FCA 1266, 270 IR 410 at [103].

## **VII. OTHER MATTERS CONSIDERED RELEVANT**

### **A. Sufficient Interest and Sufficiently Representative**

66. Both the FWC Draft Statement and the ACTU Draft Statement address the issue of sufficient interest and the cohort being sufficiently representative.
67. The point of departure occurs in relation to casual employees. Each casual employee for whom the agreement is relevant deserves a say, however the ACTU Draft Statement ensures that the FWC might examine

## **VIII. A STREAMLINED OPTION**

68. The ACTU Draft Statement (at [23]) includes an option for employer and employee organisation to come to an agreement as to how the process of voting - and the information alongside – is to be managed.
69. It is submitted that that this would allow for agreements to be reached between parties familiar with the workplace, that would tailor an appropriate response to the needs of the workplace.
70. Again, it is submitted that the relevant safeguard would be the involvement of employee organisations. Accordingly, FWC would reasonably be able to believe that the process undertaken was one that lead to genuine agreement, on the basis of it being one that the employer and employee organisations (upon whom significant duties are placed) were satisfied with.
71. Further, it would be open to FWC to make additional enquiries as to any process undertaken as the agreed process between parties as the ACTU Draft Statement simply sets up a rebuttable presumption as to genuine agreement.
72. The ACTU Draft Statement adopts the requirement that all employee organisations agree to the process, for the reasons above, to ensure that there is complete agreement.

## **IX. CONCLUSION**

73. For the reasons above, 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.



## **[DRAFT] Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023**

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The Fair Work Commission makes the following instrument.

Dated

Name of maker **DRAFT ONLY—NOT FOR SIGNATURE**

Title

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## 1 Name

This instrument is the *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023*.

## 2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument.	At the same time as Part 14 of Schedule 1 to the <i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i> commences.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

## 3 Authority

This instrument is made under section 188B of the *Fair Work Act 2009*.

## 4 Definitions

Note: A number of expressions used in this instrument are defined in definitions section of the *Fair Work Act*, including the following:

- (a) *bargaining representative*;
- (b) *employee*;
- (c) *employee organisation*;
- (d) *employer*;
- (e) *enterprise agreement*;
- (f) *Fair Work Commission* or *FWC*;
- (g) *genuinely agreed*;
- (h) *made*;
- (i) *modern award*;
- (j) *notification time*;
- (k) *organisation*.

In this instrument:

*employee organisation* means an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009*;

*Fair Work Act* means the *Fair Work Act 2009*;

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*notice of employee representational rights* means the notice in Schedule 2.1 to the *Fair Work Regulations 2009*.

## **5 Statement of Principles on Genuine Agreement**

For the purposes of section 188B(1) of the Fair Work Act, the statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement is made as set out in Schedule 1 to this instrument.

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## Schedule 1—**[DRAFT]** Statement of Principles on Genuine Agreement

### Informing employees of bargaining for a proposed enterprise agreement

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

1. The employer should ensure that employees of the employer who will be covered by a proposed enterprise agreement and are employed at the notification time for the agreement (as defined in section 173(2) of the *Fair Work Act 2009* (Cth) (the Fair Work Act)), or after that time but before the agreement is made, are informed:

(a) that the employer is bargaining for an enterprise agreement and of the proposed coverage of the agreement, and

(b) of the employees' rights to be represented in bargaining for the agreement, including by an employee organisation or by another bargaining representative of their choice, and how to exercise those rights,

(c) the name and contact number of any employee organisation that is known by the employer to be an organisation that is eligible to represent the industrial interests of the employees;

(d) that enterprise bargaining is the process of negotiating an enterprise agreement - which sets applicable terms and conditions of employment - between employers and employees and their bargaining representatives, such as their union

~~(b)~~(e) 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);

at such a time and in such a manner that the employees have a reasonable opportunity to be represented in bargaining for the agreement.

2. Where section 173(1) of the Fair Work Act applies to the employer in relation to a proposed enterprise agreement, the employer will be taken to satisfy sub-paragraphs 1(a) & 1(b) if, subject to paragraph 53, the employer gives a notice of employee representational rights in accordance with sections 173 and 174.

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 clause 1.

4. The provision of the information referred to in paragraphs 1(c) - 1(e) by one or

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more employee organisation(s) acting as bargaining representative(s) for employees to be covered by the agreement shall be taken to be sufficient in relation those employees whose industrial interests the organization is entitled to represent, where such provision is facilitated by the employer.

3.5. An employer should not mislead employees (by words, action or otherwise) as to:

- (a) the employees' right to be represented by a bargaining representative, or
- (b) the role of an employee organisation as the default bargaining representative of its members.

### **Providing employees with a reasonable opportunity to consider a proposed enterprise agreement**

6. The employer should provide employees with a reasonable opportunity to consider a proposed enterprise agreement before voting on it, so that the employees can vote in an informed manner.

Note: This paragraph operates subject to paragraph 23

4.7. The employer will be taken to satisfy paragraph 6.4 if, a reasonable time period



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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, and
- ~~(b)(c)~~ a full copy or access to the Fair Work Instrument which sets the employees current terms and conditions of employment.

5.8. An employee may be given the material specified in paragraph ~~7~~5:

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

6.9. In paragraph ~~7~~5, a **reasonable time period** will include:

- (a) at least 7 full calendar days before the day on which voting starts (for example, if the voting is to start on 9 May, employees are to be given the materials on or before 1 May), taking into account the circumstances and needs of the employees specified in 18(a) - 18(g), or
- (b) such other reasonable time period as is agreed with ~~with one or more~~all employee organisation(s) acting as bargaining representative(s) for ~~a significant proportion of the employees~~ employees to be covered by the agreement.

**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**

7.10. Employees should be given a reasonable opportunity to vote on a proposed enterprise agreement in a free and informed manner. This should include:

- (a) a voting process that ensures the vote of each employee is not disclosed to or ascertainable by the employer, and
- (b) a method and period of voting that provides all employees eligible to vote with a fair and reasonable opportunity to cast a vote, taking into account the circumstances and needs of the employees specified in 18(a) - 18(g).

Note: This paragraph operates subject to paragraph 23

8.11. Employees should be informed of the time, place and method for the vote:

- (a) at least 7 full calendar days before the day on which voting starts, taking into account the circumstances and needs of the employees specified in 18(a) - 18(g) (for example, if the voting is to start on 9 May,

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employees should be informed on or before 1 May), or

- (b) by such other reasonable time before the day on which voting starts as is agreed with ~~one of more~~all employee organisation(s) acting as bargaining representative(s) for ~~a significant proportion of the~~ employees to be covered by the agreement.

### **Explaining to employees the terms of a proposed enterprise agreement and their effect**

~~9.12.~~ Under section 180(5) of the Fair Work Act, before an employer requests that employees vote on a proposed enterprise agreement, the employer must take all reasonable steps to ensure that:

- (a) the terms of the agreement, and the effect of those terms, are explained to the employees employed at the time who will be covered by the agreement (section 180(5)(a)), and
- (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees (section 180(5)(b)).

~~10.13.~~ Section 180(6) provides that, without limiting section 180(5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with section 180(5)(b):

- (a) employees from culturally and linguistically diverse backgrounds
- (b) young employees, and
- (c) employees who did not have a bargaining representative for the agreement.

~~11.14.~~ 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. In explaining this:

- (a) where a proposed enterprise agreement will replace an existing enterprise agreement—it will generally be sufficient to explain:
  - (i) the differences in entitlements and other terms and conditions between the proposed agreement and the existing agreement, and

- ~~(ii) the differences in~~Any entitlements and other terms and conditions ~~that are less favourable between in~~ the proposed agreement ~~compared to and~~ any applicable modern award

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~~provisions that have been varied since the existing~~

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~~agreement was made~~ (including award variations that have not yet come into effect). The employer may also explain any entitlements and other terms and conditions which are more favourable in the proposed agreement; or

(b) where a proposed enterprise agreement will not replace an existing enterprise agreement—it will generally be necessary to explain:

(i) The terms of the proposed agreement and their effect; and  
~~(iii)~~(ii) the differences in entitlements and other terms and conditions between the proposed agreement and any applicable modern award, including by identifying any terms and conditions of the proposed enterprise agreement which are less favourable, or more favourable, than those of the applicable modern award.

12.15. Section 180(5) will generally not be satisfied if the employer makes an incorrect representation or misleads employees (by words, action or otherwise) about a significant term of the proposed agreement or its effect.

13.16. In determining whether section 180(5) has been complied with, the Fair Work Commission (the FWC) may have regard to any explanation of the proposed agreement given to employees by ~~all one or more~~ employee organisation(s) acting as bargaining representative(s) for ~~a significant proportion of~~ the employees to be covered by the agreement, where the provision of such explanation is facilitated by the employer. However, a failure to comply with paragraph 15 will not be mitigated by virtue of this paragraph.

14.17. An employee may be provided with the explanation required by section 180(5):

- (a) in hard copy
- (b) by electronic means, provided the employee has a reasonable opportunity to read the materials both during and outside working hours, or
- (c) orally, but the FWC may take into account whether there is a written record kept of the oral explanation.

Note: Paragraph 15 deals with incorrect representations or misleading conduct.

15.18. In determining whether the explanation of the agreement was given in an appropriate manner as required by section 180(5)(b), in addition to taking into account the circumstances and needs of the kinds of employees in section 180(6), the FWC may take into account:

- (a) the location(s) where employees are working
- (b) the environment(s) in which work is performed (for example, office, workshop, field, operating equipment or machinery, driving between locations)
- (c) facilities available at the locations(s) or in the environment(s) in which

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work is performed (for example, internet access, computer facilities, ability for employees to access mobile telephones while working, printing/copying facilities, private space for employees to consider material or information)

(e)(d) The cultural and linguistic diversity of the employees, and any languages spoken within the workplace.

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~~(d)~~(e) hours of work or rosters which may limit access to relevant facilities or limit the time employees have to consider materials or information

~~(e)~~(f) the circumstances and needs of employees, including those who are absent from a workplace due to their roster cycle or for other reasons, and

~~(g)~~ the nature of the work performed by the employees.

~~(f)~~(h) Whether employees were provided an opportunity to meet with any employee organisation that is entitled to represent their industrial interests, and the facilities that were afforded to that employee organisation and its representatives;

### Other matters considered relevant

~~16~~.19. Section 188(2) provides that the FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employees requested to approve the agreement by voting for it:

- (a) have a sufficient interest in the terms of the agreement (section 188(2)(a)), and
- (b) are sufficiently representative, having regard to the employees the agreement is expressed to cover (section 188(2)(b)).

~~17~~.20. In considering the criteria in sections 188(2)(a) and 188(2)(b), the FWC may take into account:

- (a) whether the employees who voted on the agreement are to be paid the rates of pay provided for in the agreement, and
- (b) the extent to which the employees who voted on the agreement are employed across the full range of:
  - (i) classifications in the agreement
  - (ii) types of employment in the agreement (for example, full-time, part-time and casual) and any patterns of employment or engagement prior to the vote.
  - (iii) geographic locations the agreement covers, and
  - ~~(iv)~~ industries and occupations the agreement covers.

~~(iv)~~(v) The number of employees requested to approve the agreement and the reasonably foreseeable number of employees the agreement will cover.

~~18~~.21. An enterprise agreement will generally not have been genuinely agreed to by the employees covered by the agreement unless the agreement was the

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product of an authentic exercise in good faith enterprise bargaining.

19.22. In considering whether an enterprise agreement has been genuinely agreed to by the employees covered by the agreement, significant weight will be given to the

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views of ~~all one or more~~ employee organisation(s) acting as bargaining representative(s) for ~~a significant proportion of the~~ employees covered by the agreement, where the ~~all of those organisation~~ organization(s):

(a) Support(s) the approval of the agreement, and

(b) does not have concerns that the agreement was not genuinely agreed.

23. If the employer or employers and all of the employee organisation(s) acting as bargaining representative(s) for employees covered by the agreement:

(a) Make an agreement in relation to an alternate procedure for satisfying any or all of paragraphs 6 & 10; and

(b) the agreed process is carried out; then, there shall be a rebuttable presumption that there has been genuine agreement in relation to those paragraphs.

### **Variations of enterprise agreements**

20-24. The above principles apply to variations of enterprise agreements as provided for under sections 211, 216AD(2), 216CC(2) and 216DD(2) of the Fair Work Act.



