TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BINET
COMMISSIONER LIM

AM2024/6 Variation of modern awards to include a delegates' rights term

cl.95, Schedule 1 - FWC to vary certain modern awards

(AM2024/6)

Sydney

10.00 AM, THURSDAY, 11 MARCH 2024

Continued from 10/04/2024

PN210

THE ASSOCIATE: The Fair Work Commission is now resumed for matter AM6/2024, the variation of Modern Awards to include a delegates' rights term, listed for consultation before the Full Bench.

PN211

VICE PRESIDENT ASBURY: Good morning. So I think the first person we've got up is Ms Glew.

PN212

MS GLEW: Good morning, Vice President. I wasn't prepared to ask any questions. I was just here to make the submission and listen to the consultation process and what other parties had put, after reading all the submissions. I just wanted to, you know, let the parties know that the Northern Territory public sector support the trade unions amongst our workforce and we already provide the workplace delegate rights in our enterprise agreement, which includes training and quite comprehensive rights there.

PN213

VICE PRESIDENT ASBURY: Okay. So you're supporting the ACTU and the CPSU submission, as I understand it?

PN214

MS GLEW: I did have - we supported the Fair Work model clause. We had a - with our submission we had a couple of questions that we weren't overly keen on and it was more in regard to our internal links on the union websites, ensuring the code of conduct is complied with and in regard to the - if there's any disputes in the Fair Work with any of the delegates appearing before any of the disputes, we're of a view that if there is disputes in the Fair Work it should be only the relevant parties, not open to all workplace delegates.

PN215

VICE PRESIDENT ASBURY: Okay. When you say you support the Fair Work model clause, do you mean the ACTU model clause?

PN216

MS GLEW: Sorry, yes.

PN217

VICE PRESIDENT ASBURY: Yes, great. Because we haven't got one that I'm aware of, Ms Glew, that's what we're here developing. So as I understand your submissions, and correct me if I'm wrong, is that you generally support the ACTU model clause. You also support the CPSU model clause, other than the areas of concern that you've raised, with respect to speaking publicly, accessing the internet, those sorts of things that you've highlighted in your submission.

PN218

MS GLEW: That's correct.

PN219

VICE PRESIDENT ASBURY: Great. Okay. Is there anything you want to add or clarify with respect to your submission?

PN220

MS GLEW: The only thing I thought there was a bit in the ACTU's submission about when we're doing enterprise bargaining that the workplace delegates want to be notified first, prior to any union - prior to the employer consulting with employees. We just thought - we didn't think that was quite relevant, in regard to we have to do the NERR and all that when we're looking at bargaining.

PN221

VICE PRESIDENT ASBURY: Okay.

PN222

MS GLEW: So I guess, basically, what we're saying there is we don't agree with – the way I read the submission was that they wanted the workplace delegates to be the ones that dealt with the employees, in the first instance.

PN223

VICE PRESIDENT ASBURY: I recall. You've made that point in your submission that you want to - you think the employer has to explain the terms of an agreement and deal directly with its workforce as well, with respect to enterprise bargaining.

PN224

MS GLEW: That's correct. Yes.

PN225

VICE PRESIDENT ASBURY: Yes, I understand. So it's while recognising the rights of delegates to deal directly with employees, in respect of enterprise bargaining, you don't want anything that restricts the rights of the employer to deal directly?

PN226

MS GLEW: That's correct. Yes. Thank you.

PN227

VICE PRESIDENT ASBURY: Yes, I understand. Thank you for that. Is that all you wanted to say?

PN228

MS GLEW: That is correct. Thank you.

PN229

VICE PRESIDENT ASBURY: Okay. Thank you for that, Ms Glew. If you can just - you're welcome to say as long as you like, if you just would mute your microphone that would be great.

PN230

MS GLEW: Thank you.

PN231

VICE PRESIDENT ASBURY: Thank you. Okay, Mr Patrick.

PN232

MR PATRICK: Thank you, Vice President.

PN233

From the outset I'd like to address a question posed by the Coal Mining Industry Employer Group, in correspondence to your Chambers on 6 April.

PN234

The Coal Mining Industry Employer Group asked the Commission whether it intended to deal with special circumstances, as they said, today or in the current process that's before the Commission.

PN235

The MEU says that there is appropriate submissions and material before the Commission to deal with all matters, with respect to the awards that we have made submissions on. However, if the Commission is of a different mind, we are ultimately in the hands of the Commission on this point.

PN236

VICE PRESIDENT ASBURY: Yes, I understand. So your submissions is that you do have special circumstances and that you've put sufficient material before the Commission for us to deal with those circumstances, in this round of the proceedings?

PN237

MR PATRICK: That is the case, yes.

PN238

VICE PRESIDENT ASBURY: I understand.

PN239

MR PATRICK: I'll address that a little bit more as the submission progresses.

PN240

VICE PRESIDENT ASBURY: Okay.

PN241

MR PATRICK: The MEU is here today speaking to the Commission with respect to the four industries that we've made - well, the four awards that operate, in the black coal mining industry, the mining industry, the electrical power industry, and with respect to the Coal Export Terminal Award 2020.

PN242

With respect to the black coal mining industry and the mining industry, we rely on the witness statement of Michael Weise. Vice President, I'm conscious that I didn't ask to tender Mr Weise's statement prior to the submission, but I'll do so at the conclusion.

PN243

VICE PRESIDENT ASBURY: Yes, that's fine. And, as I understand it, we put a direction out that said if anyone wanted to cross-examine Mr Weise, or any witness, they were required to notify by a particular time, and nobody has. So, as I understand it, the statement can be received without objection.

PN244

MR PATRICK: Thank you, Vice President. With respect to the Electrical Power Industry Award and the Coal Export Terminal Industry Award, the MEU has not filed detailed evidence in support of it's position, I acknowledge that. It is our submission, however, that many of the matters that appear in Mr Weise's statement equally can be said to be - or equally said could apply, concerning the industries in which those awards operate. And, as I said, I'll highlight those factors as I move through.

PN245

A delegates' rights term is a term that provides at least for the exercise of the rights of workplace delegates, as they appear in section 350C of the newly amended Fair Work Act. In our respectful submission, when providing for the exercise of these rights the Commission would further detail the principles that the legislature has outlined in that section.

PN246

I'd like to start today by addressing the right to represent. The right to represent is found in section 350C(2). It is a right to represent members and potential members, with respect to their industrial interests.

PN247

In our respectful submission, the Commission would first determine the content of the right, as it appears in section 350(2), before determining how to express it, in the awards. We have filed detailed written submissions arguing that the right to represent would not be unduly confined. We submit that the right to represent is limited in only two ways.

PN248

The right to represent extends to representation of members and potential members. We say this is a matter of constitutional construction of the relevant registered organisation and it is not something that is particularly relevant for our purposes today.

PN249

More relevant is the requirement that the representation be limited to industrial interests of the members and potential members, and this is the matter I'll spend the majority of my time, with respect to this section, addressing you on.

PN250

We say this is the key limitation, however, on its correct construction it encompasses the matters outlined in the MEU's proposal. For clarity, we say the right to represent extends to representation in matters with the eligible individual's employer, as well as with the owner or operator of an enterprise at which the eligible individual works; representation before a court or Commission, as well as

representation before the decision making body of the registered organisation for which the eligible individual is a member.

PN251

We also say it is representation by way of political - by participating in political delegation or political lobbying party. Finally, we say it is representation by way of asking and eligible individual to become a member of the registered organisation. We submit that the right to represent also extends to the preparation for advocacy. I do not need to tell anybody in this room today that effective advocacy is the product of preparation.

PN252

The UWU have filed a number of witness statements in this matter, prepared by workplace delegates. In preparing those witness statements the delegates were representing the members of the UWU. Had they been required to attend this proceeding and be cross-examined they also would have been representing the interests, the industrial interests, of the members of the UWU.

PN253

We say that the right to represent, on its correct construction, extends to all of these matters. In this regard we adopt the submissions of the ACTU, in their submissions in reply, that outlines the common law or the understanding of the right to represent, as it appears in other areas of the Fair Work Act.

PN254

In addition to these submissions, I would like to raise the following four points that we say support a construction of an industrial interest which is not unduly confined.

PN255

Firstly, industrial interest is a composite expression. It is to be understood as a whole. We say the drafters of the Fair Work Act use the phrase 'industrial', or the term 'industrial' in composite expressions when they wish to communicate connection to work and the organisation of workers. As much is clear in the composite phrase, 'industrial law'.

PN256

'Industrial law' is defined, in the Fair Work Act, to include both the Fair Work Act itself and the Registered Organisations Act. Relevantly, the Fair Work Act governs more than just the relationship between employees and employers. The Fair Work Act also governs the relationship between regulated workers and the constitutional corporation for which they have a contract with.

PN257

Additionally, the Registered Organisation Act regulates employee organisations. We submit that industrial interests would be construed similarly to extend to both matters pertaining to the individual's work and matters pertaining to the registered organisation for which they are a member.

PN258

VICE PRESIDENT ASBURY: Mr Patrick, do you think it's necessary to define 'industrial interests' because isn't that a matter - I mean the legislature hasn't seen fit to do it so, arguably, if the clause defined it, it could constrain it. The High Court hasn't defined the content. All the case law seems to be dealing with the related issue of the right to represent, whether the union rules allow it to represent, without looking at the content of industrial interests?

PN259

MR PATRICK: I agree. Exactly Deputy President. I agree that case law has looked at it through the lens of the ability of a union to essentially sign up or represent an individual. We don't say that you need to define industrial interests. All we are asking you to do is to accept that the matters that we have listed, in clause 2.2 and 2.3 of our proposal, are matters that are contained within the right - within an industrial interest or right to represent industrial interests. We're not asking you to definitively define that phrase.

PN260

The second matter that we say supports a construction that is not unduly confined is that the clause - sorry, section 350(2) clarifies that the right includes representation in disputes with their employer. So the right includes the ability for a delegate to represent the eligible individual in a dispute with their employer. We say that the two matters can be drawn from this express inclusion on this clarification in 350(2).

PN261

Firstly, elsewhere in the Fair Work Act reference to 'dispute' is routinely qualified, and it's not so qualified in this section of the Act. We say that this supports a construction that industrial interests encompasses any dispute between an employer and an employee.

PN262

The second aspect of this clarification is that the legislature have chosen to use the word 'includes'. This suggests that the right to represent is not limited to disputes between the employer and the employee. The necessary implication is that there are other matters, other disputes with other parties that the right to represent enables the delegate to represent the eligible individual.

PN263

Thirdly, we say that 350(3) provides three supplementary rights and that 350(2) should be construed, cognisant of those rights. Each of these rights are exercisable in the course of representing an individual, while exercising the right in 350(2). We say that this appears, and I'm not going to take you to the explanatory memorandum, but it appears at paragraph 826 of the explanatory memorandum, where this point is clarified.

PN264

We say that the right to represent - that industrial interests would be construed such that a delegate would be given an opportunity to exercise the facilitative rights, in the course of that representation.

PN265

Fourthly, and finally, on this point, when determining the limit of the right to represent, the legislature chose to extend the right beyond members, but it didn't choose to extend the right to all employees on a worksite. It limited the right to persons eligible to be members.

PN266

The necessary implication of this choice that the legislature made is that the right was intended to extend to delegates engaging in activities that build the employee collective. In doing so, they recognise that members of a union have an industrial interest in their delegate asking other employees to join that union.

PN267

From 21 to 24 of our 1 March submissions, we noted how the right to represent has been expressed both in the history and, contemporaneously, in the awards we operate. We accept that these are not matters that you can consider when construing 350(2). However, from these submissions we say that you can draw solace that we are not asking you to reinvent the wheel, that these are practices that are accepted in all of the industries, in some way or another.

PN268

I'll now turn to the facilitative rights, contained in 350(3). With respect to each of the right to communication, access to facilities and right to access paid time, we have filed, again, detailed written submissions outlining the constructions we advance.

PN269

I'm not going to go into each of those submissions, rather, I'm going to talk about what we say is the key limitation and I think it's an uncontroversial statement to say that the key limitation is the reasonableness qualification. Each of these rights is subject to the qualification that the content of the Act is reasonable.

PN270

Relevant to the right to communication and access to facilities, we say that the statement of Mr Weise supports the following findings, which are relevant to the assessment of reasonableness. Sorry, before I go there, I'll just quickly note that we say that 350C(5) provides the matters that the Commission should consider, when assessing reasonableness, with respect to the right to communication access to workplace facilities and access to paid time for trading. The matters that we say that Mr Weise's statement establish that are relevant to that assessment are as follows:

PN271

> *Mines are typically large and remote enterprises. Work occurs in geographically distinct areas of the mind. Work is carried on at various locations in the mine at any one time. Movement is highly regulated between different sections of the mine.*

PN272

Vice President, I know you're familiar with the coal mining industry so forgive my indulgence, but for an individual to move from one section of an underground coal mine to another, they have to communicate with the major who is in charge

and seek approval. If they don't obtain that approval, they are not allowed to travel between those two sections of the mine.

PN273

In addition, is the case that the employer or one of the managers must know who is underground at all times. There's very stringent safety regulations around where people can and can't be, that may stand in the way of individuals, or delegates, in the black coal mining industry, from exercising these rights, if it is not appropriately specified in the relevant awards.

PN274

We say that you can find that workers are often required to operate machinery where a two-way radio is the only method of communication. So here we're talking about an open cut mine where a crew has been allocated to work in a certain section. There may be an individual operating a dozer, an individual operating an excavator and a number of individuals operating various dump trucks, or the sort. The only way that these individuals are able to communicate while working, is through a two-way radio, and that communication is not free. They can't talk about what's happened on the weekend, or they can't talk about what they want in the next bargaining round. The communication is regulated and it is recorded by the employer. It's an inappropriate mechanism of communication to allow the right to communication to occur.

PN275

In addition, workers are separated onto roster panels and into crews and breaks are often staggered and occur at various locations of the mine. It's common for mines to have more then one crib room or break room.

PN276

We accept that mines are not the only enterprise in the black coal mining and mining industries, however, in our respectful submission, they are the prevailing enterprise in these industries and they are also the enterprises that a vast majority of our delegates work at.

PN277

VICE PRESIDENT ASBURY: Can you just clarify a couple of things? With respect to, say, a typical coal mining site, what do you say is the enterprise? Is it the mine site as a whole, or is it a contractor who's operating on the mine site, with its own supervision and facilities, is that an enterprise of itself, or is it an enterprise that's part of - is it considered to be part of the enterprise that is the mine overall?

PN278

MR PATRICK: Vice President, we'd say it's the former. It's the more expansive view of enterprise. That it's defined by the geographic location. Support for that proposition can be found in a recent Full Bench decision, the reference is - has slipped my mind, but - - -

PN279

VICE PRESIDENT ASBURY: You can send it later, that's fine.

PN280

MR PATRICK: Essentially, it was a case run by the Mining and Energy Union, at the Helensburgh Coal Refinery.

PN281

VICE PRESIDENT ASBURY: Yes.

PN282

MR PATRICK: It sounds like your familiar with the case. In that case it was found that the operators' enterprise, that's Peabody's enterprise, was - consisted of not just their directly engaged employees but also employees of contractors engaged at that point. I'll send that through, thank you for the indulgence.

PN283

VICE PRESIDENT ASBURY: So does that mean you would construe the meaning of 'workplace delegate' as a workplace delegate can represent employees of an employer that doesn't employ the workplace delegate?

PN284

MR PATRICK: We would, Vice President. We'd say that the right to represent the industrial interests of the employee, of the relevant individual, extends to both representation with their employer and representation with respect to the proprietor or operator of the site in which they're on and certainly would extend to the matter that you've just identified there.

PN285

COMMISSIONER LIM: Mr Patrick does that have any unintended consequences, I guess, in terms of - I appreciate you haven't reached this in your submissions, but the operation of the paid trading link?

PN286

MR PATRICK: How so?

PN287

COMMISSIONER LIM: If your proposition, as I understand it, is that the enterprise is the entire mine site and the operator is, effectively, the enterprise. If you have, for example, subbies or contractors on that site, does that impact on their ability to be able to elect their own delegates? Secondly, when it comes to the recognition of paid training leave, how does that flow on, if the enterprise is the site owner?

PN288

MR PATRICK: I understand. So the person responsible for paying the delegate the leave would be their employer. The right doesn't, as far as I can - bear with me one moment.

PN289

VICE PRESIDENT ASBURY: So that means the employer may have to pay a delegate who is not employed - who is actually employed by them but is representing workers of other employers?

PN290

MR PATRICK: Yes, that is the case. On our submission, that is the case.

PN291

With respect to some context in how the MEU's lodge, as we refer to them, on a particular enterprise work, is that there'll be a lodge attached to the geographic location at which the mine is operating and there will be a lodge executive, who are elected by the individuals on that site. It is not confined to the employer that employs those individuals. In a given - say, Appin Lodge, which is at the Appin Mind on the south coast, there are employees of various contractors who are members of that lodge, as well as employees, directly engaged individuals, who are members of that lodge.

PN292

VICE PRESIDENT ASBURY: So your way it would be optional. It might be that the workforce of the contractor would appoint their own delegate, or the delegate may be employed by the operator of the mine?

PN293

MR PATRICK: We would say that they have that capacity but - - -

PN294

COMMISSIONER LIM: It effectively goes through the lodge mechanism.

PN295

MR PATRICK: In the main, it would go through the lodge mechanism.

PN296

Returning to the right to reasonable communication and what we say these matters support the finding of, so those matters that I've previously listed. We say that given the geographic isolation and the isolation that characterises the work that is undertaken by delegates and eligible individuals on these enterprises, we say it is necessary, or in our respectful submission, it is necessary for the right to communication to include right to speak as mass meetings and to address new employees during their onboarding process.

PN297

VICE PRESIDENT ASBURY: So could that mean, effectively, the right to call a mass meeting and have a stoppage of work that would be industrial action?

PN298

MR PATRICK: We wouldn't say it was industrial action because it may not be during the course of bargaining. It also wouldn't be in support of a claim that was being advanced. It would be the workplace delegate exercising their right to exchange information with the people that they are representing on the site, either during the course of bargaining, to focus the lens on the important issues in the bargaining, or to deal with some other matter, outside the course of bargaining, that may be relevant to the entire workforce.

PN299

VICE PRESIDENT ASBURY: But that could mean that there's an enterprise agreement in effect. So, effectively, no protected industrial action could be taken and the - you say the workplace delegate could conduct a mass meeting, using the right to represent, that would otherwise be a stoppage of work that would be industrial action?

PN300

MR PATRICK: On our respectful submission, that is the position we're advancing. We say that given the unusual segregation of employees on these enterprises that it is reasonable for a workplace delegate to be able to engage a large number of employees at a similar time.

PN301

VICE PRESIDENT ASBURY: With or without the employer's permission?

PN302

MR PATRICK: Well, if it was subject to the employer's permission, we say there would need to be some sort of mechanism, such that the right could actually be exercised and not just denied at every opportunity.

PN303

VICE PRESIDENT ASBURY: So, for example, 'Permission not to be unreasonably withheld'?

PN304

MR PATRICK: I don't think we could cavil with that position.

PN305

With respect to the right to access facilities, in the context of these matters that we've outlined, we say that the following issues are critical for - critical to include in the award terms, such to give effect to those rights. We say that transport and freedom of movement within the workplace is a critical matter in the mining and coal mining industries, for the reasons that we've provided. We say that a lockable noticeboard, in a high traffic area, is similarly critical. It allows the communication of messages in an indirect way but in an effective way.

PN306

In addition we say the ability to send electronic messages and make telephone calls is similarly facilitative of the rights, so the access to technology that allows them to do so.

PN307

With respect to the reasonable access to paid time for training, we say that the matters that arise from Mr Weise's evidence that support our claim that a delegate should be afforded no less than five days of paid time are as follows.

PN308

The mining and black coal mining industries, and I'll address the electrical power industry and coal export industry shortly. They're male dominated workplaces. Delegates may be called on to assist in complex disputes which require best practice, trauma informed approached.

PN309

VICE PRESIDENT ASBURY: I'm sorry, I'm just not really understanding that submission. I was going to ask you, what difference does it make that it's a male dominated industry, to the quantum of leave or the complexity of the matters that are being dealt with?

PN310

MR PATRICK: So as evidenced by the recent Senate inquiries in these industries, sexual harassment is a significant issue.

PN311

VICE PRESIDENT ASBURY: I understand. Okay. So it's dealing with matters that could involve sexual harassment complaints against members, or by members.

PN312

MR PATRICK: Or against members. It's being in the sphere of those sorts of issues requires training and we say that that should be - the courts should be cognisant of that. We say that the enterprises are industrial, complex environments. There's a range of different employers, as I outlined, as I outlined in Appin. There would be the mine operator, as well as a number of contractors. With that comes numerous industrial instruments. The award or - a number of awards could apply, either directly or by incorporation in the enterprise agreement. We all know that that is not a simple proposition.

PN313

In addition, there would be a number of species of contract, full-time, part-time, casual, fixed term, and a range of work patterns that interact with these industrial instruments in a multitude of different ways.

PN314

Additionally, they are complex regulatory environments and in response the employers have, rightfully, implemented complex policies and procedures to comply with their obligations. We say that the delegates need to be abreast of all of these matters.

PN315

Additionally, union coverage is not a simple issue and is relevant to who the delegates can represent. They must understand union rules so they aren't erroneously asserting this right, with respect to individuals that don't fall within the union's constitutional coverage. Constitutional coverage, at least with respect to the MEU and other unions that have craft rules is a very difficult subject matter to appreciate. It's the subject of a large number of judicial comment.

PN316

We say that all this is set against a Fair Work Act that is proscriptive and complex and that a workplace delegate needs to understand all of these issues to be able to effectively represent their members.

PN317

While not outlined Mr Weise's statement, we say that these issues, particularly, are the male dominated workplace, the complex industrial environment, the complex regulatory environment, and the Fair Work Act and the union's rules, and that is which apply equally in the coal export terminal, with respect to the industry in which the Coal Export Terminal Award operates, and the Electrical Power Industry Award.

PN318

The training of delegates is a matter that the MEU takes very seriously. As the MCA pointed out yesterday, we currently offer three days of training to delegates, however I believe the MCA looked at paragraph 27 of Mr Weise's statement in this regard. However, as outlined at paragraph 28 of Mr Weise's statement, the MEU has identified that our delegates would benefit from more training.

PN319

To give effect to the intention to train our delegates further, we've hired a national training officer, for the purpose of developing and administering that training.

PN320

The last matter I'll touch on, with respect to the right to access paid time, is with respect to the rate. There have been submissions made by the employer groups that this rate should be something other than the rate that they would have been paid if they were at work. Now, there is nothing in the words or within section 350(3) that supports that position. The fact that the section is silent suggests that the legislature intended the rate to be that which would have been paid, had they been performing duties at that time.

PN321

COMMISSIONER LIM: Can I take it, Mr Patrick, you're relying on 350(3)(b)(ii), where it talks about, 'During normal working hours?'.

PN322

MR PATRICK: That is correct, yes. It is the right to be dismissed from duties, it's not a right for leave, as it appears in other sections of industrial instruments, that may need to have carried a rate with it. That training may occur on site, it may occur off site, what the right extends to is to be released from duties for the purpose of that training, for a certain period of time, and we say that period of time should be five days and it should be paid as if they had attended work and performed their duties.

PN323

VICE PRESIDENT ASBURY: So because the 10 normal working hours is used, instead of ordinary working hours, for argument's sake?

PN324

MR PATRICK: That is correct.

PN325

VICE PRESIDENT ASBURY: I understand.

PN326

COMMISSIONER LIM: Do you have any views, Mr Patrick, if that encompasses anything else? Because there have been submissions regarding - I'll retract that. As I understood your earlier submissions, you're talking about the travel, which people might do between mines, or as I understand from your written submission, most of the industry is FIFO or DIDO, do you way that anything else is covered by that clause?

PN327

MR PATRICK: Training? So it's the right to access - - -

PN328

COMMISSIONER LIM: Travel or accommodation, do you say that's covered?

PN329

MR PATRICK: We say that the clause should accommodate circumstances where training occurs away from the workplace, in our circumstance, or in the circumstances of mining enterprises. It may be required that individuals are required to travel to access that training. The MEU currently has our trainers travel to the site, or close to the site, to administer that training and we're not proposing to drastically change the way that we operate to allow delegates to take more time off. In Mr Weise's statement he said that the MEU intends only to allow people to access training in circumstances that would meaningfully improve the representation that they offer their workers. It's not something that we're going to take for granted.

PN330

The last matter I'd like to address you toady on is the relevance of the Modern Award objective. Many employee groups have hung their hat on their submission that they say the Modern Award objective is relevant to the task that the Commission is performing today. We say that, similarly to the ACTU, that it is open to the Commission to find that the Modern Award objective does not apply to the current process. However, if the Commission is minded to consider the Modern Award objective, we have filed extensive written submissions of matters that we say support the clause that we've advanced fulfilling the Modern Award objective.

PN331

Those are the submissions of the MEU, unless you have any further questions.

PN332

VICE PRESIDENT ASBURY: Thank you. Thank you, Mr Patrick. We've got now Mr Maxwell.

PN333

MR MAXWELL: Thank you, Vice President.

PN334

I should say that although I think I've been allocated 30 minutes, I may stray slightly over the 30 minutes and would seek indulgence of the Full Bench if I do overreach my time.

PN335

VICE PRESIDENT ASBURY: Given we've got your - I'm not inviting you to go till 1 pm, Mr Maxwell, but we have got - - -

PN336

MR MAXWELL: No, I'll be - - -

PN337

COMMISSIONER LIM: You're between us and food so live cautiously.

PN338

MR MAXWELL: Yes. Thank you, Vice President, Deputy President and Commissioner.

PN339

This Full Bench has been established by the President to undertake a process to vary all Modern Awards by 30 June 2024, so that they include a delegates' rights to the workplace delegates. The processes required for in the passage of the Fair Work legislative amendment closing loopholes at 2023.

PN340

In accordance with the timetable set by the President, on 1 March 2024, the CFMMEU Construction General Division filed a submission which included a proposed delegates' rights for the construction awards in Appendix A. By Construction Awards we mean Building and Construction (General Onsite) Award 2020, the Joinery and Building Trades Award 2020 and the Mobile Crane Hiring Award 2020.

PN341

The CFMMEU Construction and General Division filed a reply submission on 28 March 2024 which addressed those initial submissions of the employer parties that could be seen as being relevant to the construction awards. We rely on both those submissions.

PN342

There were no employer submissions that proposed a specific delegates' rights (indistinct) in the construction awards. The submissions of the ACCI, the Business NSW through the ABI, which I think I will just refer to as the ABI, for the purpose of these, and the AiG all concentrated on what should be included in a model term.

PN343

Even in reply, except for the brief submissions of the ACCI and AiG, those listed there was little detailed consideration or comment on the term proposed by the CFMMEU. The HIA did provide a very brief submission, but that was generally in opposing an industry specific approach.

PN344

Before responding to the specific issues raised in reply submissions on the CFMMEU's proposed clause, there are a number of general observations we wish to make that address the other issues raised by the employer parties.

PN345

The delegates' rights term is defined in section 12 of the Fair Work Act as a term in a Fair Work instrument that provides for the exercise of the rights of workplace delegates. The note, in section 12, refers to the rights of workplace delegates being set out in section 350C and that a delegates' rights term must provide at least for the exercise of those rights.

PN346

Significantly, section 350C only sets out the rights of workplace delegates. It does not say anything about how those rights are to be exercised. According to the online Cambridge Dictionary, 'exercise', in this context means, 'An action or actions intended to improve something or make something happen'. Accordingly, a delegates' rights must elaborate on how the rights, under section 350C, can be actioned by the delegates, not simply repeat those rights.

PN347

The revised explanatory memorandum provides useful guidance on the interpretation of the legislation, and I wish to draw the Commission's attention to the following references to the delegates' rights term contained within it. I have provided a copy of the Commission. I note that it was in a number of submissions and I thought, to be prudent, it would be worthwhile providing a copy.

PN348

In paragraph 23 it states that:

PN349

Part 7 of Schedule 1 would insert statutory workplace rights for workplace delegates to support their role in representing workers and a general protection for workplace delegates to facilitate the exercise of these rights. It would also provide for Modern Awards and enterprise agreements to detail the specific requirements for various industries, occupations and workplaces.

PN350

It is clear, from this paragraph, that Modern Awards need more than a model term, more than a repetition of section 350C, and that they should contain the specific requirements to facilitate the exercise of the rights in the industries, occupations and workplaces covered by the award.

PN351

VICE PRESIDENT ASBURY: Sorry, Mr Maxwell, is that paragraph 23 or paragraph 21 of the ex mem?

PN352

MR MAXWELL: That's paragraph 23 of the revised explanatory memorandum that I provided to the Commission last night.

PN353

VICE PRESIDENT ASBURY: Okay. Thanks.

PN354

MR MAXWELL: I believe there was the initial explanatory memorandum and then a revised one.

PN355

Paragraphs 83 to 86 refer to workplace delegates' rights. Paragraph 83 states the following:

PN356

Part 7 of Schedule 1 would positively engage the rights to the enjoyment of just and favourable working conditions by improving access to representation for workers and the ability of workplace delegates to provide such representation. These provisions engage and promote operative articles of the Workers' Representative Convention 1971, number 135 of the ILO, ILO convention 135, which Australia has ratified.

PN357

This is a significant consideration relevant to the content of the delegates' rights term and the delegates right to paid time to perform their representative responsibilities, a matter I'll come back to shortly.

PN358

Paragraph 84 notes that:

PN359

A key function of a workplace delegate is to be a point of contact for members within the workplace and to represent the concerns of workers to the employer or business. The bill would positively engage the right to just and favourable conditions of work by ensuring that workplace delegates have substantive rights to represent the industrial interests and concerns of their (indistinct) and workers.

PN360

Paragraph 85 states, in part that:

PN361

The bill would further support this right by requiring that the details of various supporting rights for workplace delegates be included in Modern Awards and enterprise agreements which would allow them to be tailored to particular industries and enterprises.

PN362

Paragraphs 168 and 169 also deal with delegates' rights. Paragraph 168 provides that:

PN363

Part 7 of Schedule 1 would positively engage the right to a fair hearing by creating a right for workplace delegates to represent members who are in dispute with their employer or relevant regulated business. This would improve the ability for workers to access representation by their workplace delegates. The proposed rights to reasonable communication with members

and reasonable access to the workplace would also support the efficacy with which workplace delegates can perform their roles.

PN364

It goes on to say:

PN365

Which improving the workers to seek assistance from the workplace delegate and remove barriers to delegates providing such representation or assistance would help to maintain the procedural fairness of these processes.

PN366

paragraph 169 refers to the right to an effective remedy, upon establishing the process of workplace delegates in new sections 350A and 350B, to challenge behaviour which is inconsistent with the rights of delegates provided for by the new section at 350C.

PN367

Paragraphs 184 to 189 also refer to:

PN368

The civil remedy provisions available where an employer unreasonably fails or refuses to deal with a workplace delegate, knowingly or recklessly making a false or misleading representation to a workplace delegate or unreasonably hindering, obstructing or preventing the exercise of the workplace delegate's rights.

PN369

Paragraphs 254 to 257 deal with workplace delegates' rights. Paragraph 254 states that:

PN370

Workplace delegates have various roles and responsibilities necessary for the ongoing support and functioning of registered employee organisations. They can serve as the first point of contact for members of an employee organisation within the workplace, including when a worker is considering joining an employee organisation, and represent worker concerns in the workplace.

PN371

Paragraph 257 states that:

PN372

These amendments will positively engage the right to freedom of association, particularly article 8(c) of the ICESCR, which guarantees a right for trade unions to function freely, subject to no limitations other than those prescribed by law. These amendments will ensure that workplace delegates are afforded these basic primary rights in the workplace to carry out their delegates' duties.

PN373

I should note that the ICESCR is the International Covenant on Economic, Social and Cultural Rights.

PN374

The specific amendments to the Fair Work Act are further dealt with at paragraph 791 to 854. In paragraph 791 it, again, refers to part 7 providing for Modern Awards and future enterprise agreement to provide more detailed rights for specific industries, occupations and workplaces.

PN375

Paragraph 814 to 817 deal with the protections of delegates, under section 350A. Paragraph 814 makes it clear that:

PN376

A delegate is only protected from an employer on reasonably failing or refusing to deal with the workplace delegate or unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.

PN377

And that:

PN378

As a result employers would still be able to undertake reasonable management action carried out in a lawful way.

PN379

Paragraph 815 reaffirms that the onus is on the employer to establish the conduct of the employer is not unreasonable.

PN380

These paragraphs leave no uncertainty that management prerogative does not override the lawful exercise of the rights of a workplace delegate.

PN381

Paragraph 824 refers to subsection 350C(2) as providing the key right for workplace delegates to represent the industrial interest of members and other persons eligible to be a member of the relevant employee organisation, including in a dispute with that employer.

PN382

Paragraph 825 makes it clear that 350C(2) does not infringe on a workers right to choose their own representative in a dispute but that it creates an enforceable right between a workplace delegate and their employer.

PN383

Paragraph 827 spells out that:

PN384

The rights in 350C(2) and (3) are specified at the level of principle, with the expectation that for most employees Modern Awards and enterprise agreements will provide greater detail for particular industries, occupations or enterprises.

PN385

And the final paragraph I wish to refer to, from the EM, is paragraph 829, which makes it clear that:

PN386

> *While small business are exempt from providing workplace delegates paid time to undertake training, under section 350C(3)(b)(ii), small businesses may otherwise have obligations to do so, for example, under an enterprise agreement.*

PN387

Clearly there is no blanket exemption for all small businesses, under the legislation.

PN388

In light of the paragraphs just identified from the revised explanatory memorandum, it should be more than apparent that what the delegates - apparent that the delegates' rights terms, proposed by the employer organisations, fail to do what is required, that is, provide for the exercise of the delegates' rights and that they should therefore be rejected by the Full Bench.

PN389

This plainly applies to the term proposed by the ABI, as set out in Annexure A to their 28 March 2024 submission, which does nothing more than replicate the rights in the legislation.

PN390

The AiG's model clause, set out in section 7 of their 2 April 2024 submission should also be rejected as, apart from mirroring the rights under the legislation, the clause is more concerned with restricting the rights of delegates to represent workers or providing for unfavourable conditions.

PN391

For example, X.5 refers to the minimum rate of play for an employees' classification rather than the employees' ordinary time rates where they undertake training. X.6 seeks to make any other representative activity in the workplace unpaid. X.9, which limits paid training to two days per year, when five days already exists in many awards. X.11 requiring delegates to undertake representative activities outside of working hours. X.12, requiring the agreement of the employer before a workplace delegate can hold a meeting with an employee. And X.16, which seeks to limit what are the industrial interests of employees.

PN392

The AiG clause fails to provide the right to just and favourable conditions of work, as referred to in paragraph 83 of the revised explanatory memorandum. This paragraph of the revised explanatory memorandum identifies that these provisions engage and promote the operative articles of the Workers' Representative Convention 1971.

PN393

The ILO makes conventions and recommendations. According to the ILO a convention lays down the basic principles to be implemented by ratifying countries while a related recommendation supplements the convention by providing more detailed guidelines on how it could be applied.

PN394

In this case, the relevant convention is C135, the Workers' Representative Convention 1971 and the relevant recommendation is R143, of the Workers' Representative Recommendation of 1971.

PN395

For the purposes of these proceedings, article 1 and article 2 of the convention are relevant. Article 1 provides that:

PN396

Workers' representatives, in the undertaking, shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or union membership or participation in union activities insofar as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

PN397

Article 2 provides, in (1):

PN398

Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.

PN399

In (2):

PN400

In this connection, account should be taken of the characteristics of the industrial relations system of the country and the need, size and capabilities of the undertaking concerned.

PN401

And in (3):

PN402

The granting of such facility shall not impair the efficient operation of the undertaking concerned.

PN403

We note that the ACTU briefly dealt with the ILO recommendation in its initial submission, on 1 March 2024. But we would refer to the Full Bench to the following paragraphs of recommendation R143 which indicate what the delegates' rights term should at least include to provide for the exercise of those rights.

PN404

Paragraphs 5 and 6, which deal with unjustified termination of workplace representatives and unfavourable changes in their conditions of employment or to unfair treatment. Paragraph 9, which deals with the facilities to be afforded to workers' representatives in order to enable them to carry out their functions promptly and efficiently.

PN405

Paragraph 10, which sets that:

PN406

Workers' representatives are to be afforded the necessary time off from work, without loss of pay or social and fringe benefits, while carrying out their representation functions.

PN407

Paragraph 11 which provides that:

PN408

In order to enable workers' representatives to carry out their functions effectively, they should be afforded the necessary time off, without loss of pay or social or fringe benefits, for attending trade union meetings, training courses, seminars, congresses and conferences.

PN409

Paragraph 12 which provides that:

PN410

Workers' representatives should be granted access to all workplaces in the undertaking whereas such access is necessary to enable them to carry out their representation functions.

PN411

Paragraph 13 which provides that:

PN412

Workers' representatives should be granted, without undue delay, access to the management of the undertaking and to management representatives empowered to take decisions as may be necessary for the proper exercise of their functions.

PN413

Paragraph 14 which provides that:

PN414

In the absence of other arrangements, the collection of trade union dues, workers' representatives authorised to do so by the trade union should be permitted to collect such dues regularly, on the premises of the undertaking.

PN415

Paragraph 15 which provides that (1):

PN416

Workers' representatives should be authorised to post trade union notices on the premises in a place or places agreed on with the management and to which the workers have easy access.

PN417

And in (2):

PN418

Management shall permit workers' representatives to distribute news sheets, pamphlets, publications and other documents of the union, among the workers of the undertaking.

PN419

Paragraph 16, which provides that:

PN420

Management shall make available to workers' representatives such material, facilities and information that may be necessary for the exercise of their functions.

PN421

We say that the AiG clause fails to include many of the basic requirements, as set down by the ILO convention and recommendation. The delegates rights is to engage and promote.

PN422

The ACCI have not provided a proposed term, as such, they have only suggested key details to be included in the term. These key details are similar in character to those of the AiG and are more an attempt to limit and put in place unnecessary obstacles on the ability of workplace delegates to perform their roles.

PN423

Turning to the more specific issues raised in the employer reply submissions, the ABI, at paragraphs 7 to 11, raise the issue of delegates being subordinate to the lawful and reasonable direction of the employer and refer to the decision of *Grubisic v Chubb Security Services Limited*.

PN424

Paragraph 814 of the revised explanatory memorandum referred to earlier explains that:

PN425

Employers will still be able to undertake reasonable management action carried out in a lawful way as long as it does not unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate.

PN426

As for the decision in *Grubisic v Chubb Security*, we submit that that is of no assistance on the matter.

PN427

As Hamilton DP, in paragraph 33 stated the following, under the heading 'Trade union membership and activities':

PN428

Mr Grubisic contended that he was targeted by management because of his role a union workplace delegate and OH&S representative who persisted in representing AVOs with respect to safety concerns about the implementation of the PVA on the two main crew and guard site issues. In my view, on the material before me, this submission is without foundation. Mr Grubisic was an employee and, as such, is required to conduct himself in accordance with the reasonable and lawful directions and policies of his employer. He failed to do so. I have summarised the instance of those failures. None of the evidence or either evidence before me discloses the targeting of Mr Grubisic or any of his activities. If it did, I would have reached a different conclusion to the one I have reached in this decision.

PN429

In that unfair dismissal matter, Hamilton DP, the issues that he referred to was the failure to be dressed properly, the delaying of a truck leaving the yard and the most significant one was a failure of Mr Grubisic to have a hand - a gun hand free whilst transporting coins into the Commonwealth Bank. So it's clearly nothing to do with the activities of Mr Grubisic, in regard to any delegates' rights activities.

PN430

ABI, at paragraph 23, also raise the issue of the exclusion for small business from providing paid training leave, in section 350C(3)(b)(ii), and suggest that setting five says as the standard for trade union delegate training is a reckless disregard for small and medium businesses.

PN431

Paragraph 829 of the revised explanatory memorandum explains that a small business exclusion is not an overarching exclusion and does not override any obligations under an industrial instrument.

PN432

The Building and Construction (General Onsite) Award 2020 already provides, under clause 39.10, for up to five days per year training leave for an eligible employee representative, which would include a workplace delegate, irrespective of the size of the business. It is submitted this entitlement should not be disturbed.

PN433

We would also - - -

PN434

VICE PRESIDENT ASBURY: Would it be consistent with the Act though? Can the award be inconsistent with the Act?

PN435

MR MAXWELL: The award can supplement the entitlements under the Act. We would say that it is up to the Commission to determine what is appropriate to be

included in the award. The Modern Award already includes a right to five days training leave, under clause 39.10 of the Construction Award. There is nothing in the Act that says that that provision should be removed for small businesses.

PN436

VICE PRESIDENT ASBURY: But the Act says that:

PN437

Unless the employer of the workplace delegate is a small business employer, reasonable access to paid time during normal working hours, for the purposes of related training.

PN438

MR MAXWELL: Yes. But - - -

PN439

VICE PRESIDENT ASBURY: So you would say there's nothing that says that there's intention to disturb an existing award provision?

PN440

MR MAXWELL: That's correct.

PN441

VICE PRESIDENT ASBURY: I understand the submission. Sorry, while I'm interrupting you, Mr Maxwell, can you just clarify, in paragraph 41 of I think your reply submission, just bear with me. Yes, it's the reply submission, paragraph 41, page 11, 475 of the court book. You say, in 51 that AiG says, 'Minimum rate of pay', you reject the minimum rate of pay and you say, 'At the employee's ordinary time rate'. The statute is that, 'Paid time during normal working hours', so what do you say the ordinary time rate is? Is it ordinary time or where the employee works a shift, they work an extended roster or something like that, where everything is loaded in to - what do you say? Because 'ordinary' has a meaning, doesn't it, that excludes overtime.

PN442

MR MAXWELL: It does. And under the Building and Construction (General Onsite) Award, there is a definition of ordinary time.

PN443

VICE PRESIDENT ASBURY: Okay. Yes.

PN444

MR MAXWELL: If you bear with me.

PN445

VICE PRESIDENT ASBURY: So there's a specific definition in the Building and Construction Industry Award?

PN446

MR MAXWELL: That's correct.

PN447

VICE PRESIDENT ASBURY: That you say should be the rate at which this leave is paid, for the purposes of that award.

PN448

MR MAXWELL: That's correct. It's a rate that would apply to the ordinary hours that the employee would work.

PN449

VICE PRESIDENT ASBURY: Okay.

PN450

MR MAXWELL: I should say that that matter was dealt with in (indistinct) and the 2012 award review, to remove any ambiguity under the award about what rate applies for any period of leave.

PN451

VICE PRESIDENT ASBURY: Thanks.

PN452

MR MAXWELL: The other point we'd make, in regard to small business, is that there has to be industrial reality here. Although small businesses may engage employees who are union members, not all small businesses would have a union delegate.

PN453

The ACCI reply submission, at paragraphs 33 to 35, continues with our obsession to try and define 'industrial interests'. By doing so, limit what matters a workplace delegate can be involved in.

PN454

We refer to paragraphs 19 and 20 of our reply submission to better explain why it would be inappropriate for the Commission to follow such a course of action and in those paragraph we refer to the High Court decision in Rex.

PN455

VICE PRESIDENT ASBURY: Yes.

PN456

MR MAXWELL: The ACCI, at paragraphs 36 to 42, claim that the clause proposed by the unions are inconsistent with the Modern Awards objective. The CFMMEU disagrees and refers to paragraphs 25 and 26 of our reply submission, which show why our proposed clause is consistent with the Modern Awards objective.

PN457

The ACCI also have a difficulty understanding how an obligation to provide an iPad to a workplace delegate can adequately be described as a minimum safety net. I know this did attract a bit of media attention in the mainstream media.

PN458

We say that they apparently failed to comprehend that an iPad, or similar electronic device, is a necessary tool in the modern world, as a means of carrying

around copies of awards, the Fair Work Act and other relevant legislation, for example in the building industry there are various portable long service leave arrangements.

PN459

VICE PRESIDENT ASBURY: You can fit it on an iPad, Mr Maxwell, I'd be interested to know how. I have to put it in three blocks on my laptop to access it, it's so long.

PN460

MR MAXWELL: I do have a copy of my iPad that I do carry around with me. But the other perks of the iPad is for accessing correspondence from employers, which these day is mainly conducted by email and also for checking contributions to superannuation and redundancy funds, particularly for members who have a low level of English language proficiency or digital proficiency. I am aware in my various dealings with delegates and members where they seek to access to check that, for example, the contributions for the redundancy fund are up to date. They have difficulty accessing - because most email services is now provided online, through apps, and therefore they seek assistance of the delegate to explain how they can actually access that information to check that their entitlements have been paid.

PN461

COMMISSIONER LIM: This might be a dumb question, why an iPad as opposed to, say, a computer?

PN462

MR MAXWELL: Well, we are not fixed on an iPad, it should be an electronic device. So it could be a laptop but these days an iPad, or a mini iPad, which is what I use, is easy to carry around.

PN463

COMMISSIONER LIM: All right. I didn't think the CFMMEU had become a store for Apple or anything like that, I was just curious about the specific detail there.

PN464

MR MAXWELL: No, we don't - perhaps we should clarify as to that clause and say an iPad or similar electronic device.

PN465

It would seem to us that the ACCI believes that all such information is still provided in paper form. The construction industry has moved on from the building sites of the 1970s and the use of iPads and other electronic equipment is now commonplace, and there you'll see most forepersons and leading hands on construction sites walking around with iPads.

PN466

The provision of an iPad or similar electronic device is a necessary requirement to enable a workplace delegate to carry out their functions promptly and efficiently, as required under article 2 of the ILO Convention.

PN467

The ACCI raise the issue of reasonableness, in paragraphs 43 to 49 and complain that the union proposed clauses do not provide any clarity as to what is reasonable. Our response to this is that, first of all, contrary to the submission of the ACCI, the issue of what is reasonable only arises in regards to section 350C(3), as specified in 350C(5), and is not relevant in regard to the representation rights in 350C(2).

PN468

Secondly, there is no need to expand on what is considered reasonable because the relevant issues to be considered are spelt out in section 350C(5) and the relevance of these will vary, depending on the circumstances of the particular employer of the delegate.

PN469

The ACCI, in paragraphs 50 to 54, attempt to portray the union proposed clauses as an attempt to make delegates full-time union officials in the workplace. They suggest that workplace delegates should not be allowed to ask fellow workers to join the union or represent union members at a tribunal. These alarmist and unfair restrictions should be rejected.

PN470

As already noted, under Australia's international obligations, in accordance with ILO conventions, workplace delegates should be entitled to carry out their representational activities without loss of pay. Such representation activities include recruiting new members, as recognised under article 11 of the ILO Convention 87, concerning freedom of association and protection of the right to organise.

PN471

These rights and the right to represent either themselves and/or other union members, in disputes with their employer which obviously would include representation in a tribunal dealing with disputes, are clearly envisaged to be covered by the delegates' rights term as explained in paragraphs 168, 254, 257 and 824 of the revised explanatory memorandum.

PN472

In paragraphs 131 to 151 the ACCI addresses the union's proposed delegates' rights term for the construction awards. In paragraph 131 the ACCI expressed the view that the CFMMEU construction general attempts to secure several new rights and that these are outside the scope of the term and go beyond the Modern Awards objective. We disagree.

PN473

Our clause is consistent with the ILO conventions. The expectation expressed in paragraph 83 of the revised explanatory memorandum, that the delegates' rights term would provide for just and favourable working conditions and engage and promote operative articles of the ILO Workers' Representative Convention. And, as set out in paragraph 25 of our reply submission, is consistent with achieving the Modern Awards objective.

PN474

In paragraph 138 the ACCI suggests that the right of workplace delegates to perform representative activities, without loss of pay, represents a significant over reach. We reject this assertion. The rights of delegates to represent workers in working time, without loss of pay, is a long-standing award condition. It's referred to in paragraphs 9 to 13 of the union's 1 March 2024 submission and is consistent with Australia's obligations, under ILO conventions.

PN475

In paragraph 145 the ACCI assert that the union's proposed subclause for union delegates' facilities should not be accepted and is out of scope. We disagree. The provision and access to delegates' facilities are necessary for the delegates to exercise their right to represent and communicate with members and workers eligible to be members.

PN476

The telephone is a vital means of communication both for members and the employers, in regard to matters potentially in dispute. The issue of the iPad has already been addressed. A filing cabinet and lockable area are required to store any confidential records/correspondence of members. Access to stationery and other administrative facilities is self explanatory. The provision of a table and chairs and air conditioning/heating are consistent with construction site amenities. The need for a suitable workplace location to conduct confidential discussions is self explanatory. It should also be recognised that this is to be an agreed facility which will obviously take into account the number of workers and the size and location of the worksite.

PN477

The final issues raised, in paragraphs 148 to 151 of the ACCI's submission is the union's proposed union delegate training leave provision. We reject the ACCI's assertion that the clause should provide an exemption for small business, for the reasons already articulated today in our written submissions.

PN478

We reject the ACCI's suggestion, in paragraph 149, that employers should have some veto over the curriculum or the content of the union provided training. This is objectionable and clearly an attempt to interfere with the operations of trade unions, which is inconsistent with Australia's obligations, under article 3 of the ILO Convention 87, concerning freedom of association and protection of the right to organise.

PN479

The suggestion by ACCI, in paragraph 150, that the clause should include a requirement that the training must be provided by an RTO, that is a registered training organisation, is absurd. A quick search on training.gov.au, the government website for accessing information on accredited training identifying RTOs as having the training on scope would find that there is no accredited course and no RTO has industrial relations training on scope.

PN480

We also reject the ACCI proposal, in paragraph 151, that there should be a limit on the number of delegates who can access paid training leave. There is no existing limitation, under clause 39.10, dispute resolution and procedure training leave, for the Building and Construction (General Onsite) Award. To put this into some industry context, in the construction industry employers will have workers on various sites. So to give an example, the head contractor, and although we recognise that head contractors would normally have enterprise agreements, but if you take, for example, Lendlease. Lendlease will have approximately 30 different sites across Australia. It would be impracticable to have one delegate seeking to represent all those sites. The normal practice is that there will be a delegate for each of the sites, so that they can deal with the disputes and the matters that arise for the workers on those sites.

PN481

VICE PRESIDENT ASBURY: Will the delegate typically deal with disputes arising with workers of other employers, say subcontractors on the site?

PN482

MR MAXWELL: They would raise them where the dispute with an individual employer may have implications for the rest of the site. I suppose an example would be - let's say there have been cases on this, where there is an issue with the quality of the meals that are provided on a worksite. Normally if there is a canteen on the site, those meals would apply to all the workers on the site, so there it would be appropriate that if it's raised by a delegate of one employer that they have concerns with the meals - - -

PN483

VICE PRESIDENT ASBURY: Probably the principal contractor who's provided the utility and got the contract with the catering.

PN484

MR MAXWELL: Yes. So the delegate, let's say, the concreters would then go to the delegate of Lend Lease and say, 'We have an issue with the meals', and the delegate of Lendlease would then take it up with Lendlease.

PN485

VICE PRESIDENT ASBURY: So you would see that contractors may have their own delegates?

PN486

MR MAXWELL: Yes.

PN487

VICE PRESIDENT ASBURY: And the employees who are directly employed by the principal contractor would have their own delegate and there'd be - so, technically, every subcontractor could have a delegate who is entitled to some form of paid training leave?

PN488

MR MAXWELL: That's correct.

PN489

VICE PRESIDENT ASBURY: And you say that's the current position in any event, because the award provides for that?

PN490

MR MAXWELL: That's correct. And that's the standard practice that operates in the industry.

PN491

VICE PRESIDENT ASBURY: Yes. So there's no exemption in the award for small business?

PN492

MR MAXWELL: No.

PN493

VICE PRESIDENT ASBURY: I understand. Thanks.

PN494

COMMISSIONER LIM: So I guess that kind of - (indistinct) as I understand, the draft clause which you put forward relies on the definition of 'delegate', which is in 350, in which case it picks up that enterprise word. What's specifically CMG's definition of what 'enterprise' is?

PN495

MR MAXWELL: Well, the enterprise is the - in our industry would be the direct employer of the workers.

PN496

VICE PRESIDENT ASBURY: So any contractor - let's say the earthmoving contractor or the sub, I won't say electrical, that all - the earthmoving contractor or the piling contractor, or whatever, you would say that is an enterprise - - -

PN497

MR MAXWELL: That's correct.

PN498

VICE PRESIDENT ASBURY: - - - within an enterprise on site?

PN499

MR MAXWELL: Yes.

PN500

VICE PRESIDENT ASBURY: Okay.

PN501

MR MAXWELL: They are the practicalities of working on the site that may have 100 contractors. So you'll have, as you say, a piling contractor, a concreting contractor, a formwork contractor. You will have a contract providing site services, in terms of the site sheds. The way the construction industry operates is that there are many different contractors on the site.

PN502

COMMISSIONER LIM: Just need to get your union's perspective on it, because I mean if we contrast with, say, Mr Patrick's submissions earlier, as I understand, that particular industry is perhaps more cohesive in terms of how different contractors come together, whereas in construction you have a much more phased approach, as it moves through the different parts of a project.

PN503

MR MAXWELL: That's correct. Whereas a mining site is, the workforce is more stable in that they're engaged for the ongoing operation at the mine site.

PN504

VICE PRESIDENT ASBURY: Yes. What they do doesn't change, where as a major project or a building finishes and various contractors come and go.

PN505

MR MAXWELL: People come and go, yes. There'll be some contractors that are there for 12 weeks, there'll be others that are there for six months. But given that most building projects are completed within 18 months to two years.

PN506

VICE PRESIDENT ASBURY: They type of - even if the principal contractor does a bigger scope of works itself, I guess the type of labour that it engages could change over time as well, because the earthworks, concrete would probably be at the beginning, whereas the service - later. Yes, I understand. Okay.

PN507

MR MAXWELL: Typically the head contractor would have a workforce that would stay for the duration of the project but the other contractors would come and go. You asked me about the situation where the workforce actually moves between employers, depending on who wins a contract for a particular job. So there's a high degree of mobility of labour in the construction industry.

PN508

VICE PRESIDENT ASBURY: Yes.

PN509

MR MAXWELL: If I can then turn to the AiG submission, reply submission. The first substantial issue that they deal with is the scope of a delegates' rights term, which is dealt with in paragraphs 13 to 55. The AiG claim, in paragraph 14, is that unions are seeking terms that deal with subject matter which is beyond scope. We disagree and, further to our earlier submission in response to similar claims by the ACCI about the CFMMEU (indistinct).

PN510

In paragraph 15 the AiG raise the issue of possible consequential amendments being required to existing clauses and awards whilst the delegates' rights term for an award is finalised. We actually agree with the AiG on this point, that this may be necessary in particular awards and it should be something that can be easily addressed, given that the Commission has already undertaken an audit of terms in awards that potentially deal with the rights of delegates.

PN511

So, for example, it may be that in regard to the dispute resolution training leave, in 39.10 of the Building Award, if you have the delegates - the training for delegates under a delegates' rights term, you would say that 39.10 doesn't apply to a delegates' right - the delegates' rights term would apply, but it will still apply to - because the award provides for other employee representatives, that they would still have their entitlement, under 39.10.

PN512

The AiG raised, in paragraph 16, a curious argument that many of the provisions proposed by the unions are not terms that would be permissible, pursuant to section 136. And, in paragraph 17, claim that many of the provisions could not constitute delegates' rights terms as contemplated by section 12 and section 149E of the Fair Work Act. We disagree.

PN513

As noted earlier, the delegates' rights term is defined in section 12 of the Fair Work Act as a term and a Fair Work instrument that provides for the exercise of the rights of workplace delegates. The definition does not limit how those rights may be exercised. The union's proposed term meets this definition.

PN514

Section 149E of the Fair Work Act, which is found in subdivision C of division 3, terms of Modern Awards, requires that:

PN515

Modern Awards must include a delegates' rights term for workplace delegates covered by the award.

PN516

There is nothing in section 149E that limits the scope of a delegates' rights term.

PN517

As section 149E is found in subdivision C, then the inclusion of delegates' rights terms meets the requirements for section 136(1)(b) of the Fair Work Act. As long as the delegates' rights term meets the definition of section 12, then it is a permissible term, under section 136. We would also point out that as the proposed term deals with procedures for representation it would also be permissible, under section 139J.

PN518

In paragraph 29 the AiG make an assertion that communication could not be for the recruitment of members. We reject this assertion and repeat our earlier submission, recruiting new members is consistent with article 11 of the ILO Convention 87.

PN519

In paragraph 32 the AiG again raised the issue of entitlement to paid time. As the union has already identified, the issue of paid time is part of the just and favourable conditions referred to in paragraph 83 of the revised EM and is a matter covered by paragraph 11 of the ILO 143 Workers' Representatives

Recommendation 1971, which provides that in order to enable workers' representatives to carry out their functions effectively, they should be afforded the necessary time off, without loss of pay or social or fringe benefits, for attending trade union meetings, training courses, seminars, congresses and conferences.

PN520

In response to the CFMMEU's submission, the AiG, in paragraph 122 reiterates it's view that the Commission should take a conservative approach in these proceedings and that there is merit in adopting a similar and potentially uniform approach to the framing of delegates' rights terms in awards. The CFMMEU would point out that this is not what is required and, inconsistent with paragraphs 23, 85, 791 and 827 of the revised explanatory memorandum.

PN521

In paragraph 125 the AiG complain that the CFMMEU union delegate facilities clause does not provide any caveat that requirement would only operate to the extent to which it is reasonable. As previously noted, it should be recognised that this is to be an agreed facility which will obviously take into account the number of workers and the size and location of the worksite.

PN522

In conclusion, the CFMMEU submits that the union has a long and proud history of representing workers in the building and construction industry and has developed, over a considerable period of time, a sophisticated and well understood delegate structure to enable the representation of our members.

PN523

The rights of delegates to representation, communication and training are now once again enshrined in legislation, as provided for in section 350C and there is a requirement, in section 149E that awards must contain a clause that provides for the exercise of those rights.

PN524

The union has developed a delegates' rights term based on those contained in current enterprise agreements, and those enterprise agreements are with employers. It is a clause that is well understood by industry. As building and construction sites may involve many different employers with different industrial instruments, i.e. awards or enterprise agreements, applying to their employees, it is crucial that there is a high degree of commonality between the delegates' rights terms that apply. We say it is also appropriate where there is a higher degree of mobility of labour between employers.

PN525

Our proposed clause deals with the exercise of the rights to represent workers, the provision of appropriate facilities to exercise communication and how training is to be provided, including notice to employers, arranging the training to minimise adverse effects and setting out what payment is required. Our clause is consistent with Australia's obligations under the ILO conventions and recommendation and the definition of delegates' rights terms under the Fair Work Act.

PN526

The CFMMEU therefore submits that the Full Bench should adopt the union's proposed clause for the construction awards.

PN527

They are the submissions to the Full Bench, unless there are any questions?

PN528

COMMISSIONER LIM: I just got a question about the paid training leave provision in your proposed clause. It doesn't seem to specify how much notice or a set amount of notice. It just says, 'advance notice'.

PN529

MR MAXWELL: Just bear with me while I find the clause.

PN530

COMMISSIONER LIM: It's the effects clause, sub (3), 'The application for leave shall be given to the employer in advance of the date of the commencement of the course'.

PN531

MR MAXWELL: I mean the normal practice would be to give two weeks' notice, but we never felt the need to actually insert a set time period.

PN532

COMMISSIONER LIM: Yes. I just wanted to clarify if it was meant to be in there or if it was just 'advanced notice'.

PN533

MR MAXWELL: Even then, it depends, in our industry the delegates' training, it could be a one day course, it could be a two-day course, it could be a three-day course, depending on the time of the year and the issues to be addressed. Therefore, giving two weeks' notice of a one-day training course, we don't think is unreasonable.

PN534

COMMISSIONER LIM: Yes.

PN535

VICE PRESIDENT ASBURY: But you've also got seven - the employer being required to advise the union delegate, within seven clear working days, of whether it's approved. So I guess there's de facto - - -

PN536

MR MAXWELL: There's a minimum seven days.

PN537

VICE PRESIDENT ASBURY: Some provision in there.

PN538

COMMISSIONER LIM: So, as I understand, from what I recollect from the ACCI and AiG submissions, they talk about a minimum notice period of six to

eight weeks. Maybe some thoughts on whether that's practicable for your industry?

PN539

MR MAXWELL: Not really. Given that within an eight week period a delegate may have moved on to another employer or to another job or go interstate. A number of the contractors would be able to, for example, work in New South Wales one week and in four weeks time they could be working in Victoria. We wouldn't expect a delegate that moves, let's say to Victoria, would do a training course in Queensland. It would also be a training course relevant to where that work is located.

PN540

COMMISSIONER LIM: I did notice, in your proposed clause, at X.4, at 8, provides the right of deduction if there's no proof of attendance provided.

PN541

MR MAXWELL: That's correct.

PN542

COMMISSIONER LIM: Is that normal in the - - -

PN543

MR MAXWELL: That's standard, yes.

PN544

COMMISSIONER LIM: Okay.

PN545

MR MAXWELL: We don't write and say we seek a delegate be given leave to attend a delegates' course and then they don't turn up, we don't believe that they should be paid in those circumstances.

PN546

VICE PRESIDENT ASBURY: Thank you. We'll adjourn until 2 o'clock. Thank you.

LUNCHEON ADJOURNMENT **[11.44 AM]**

RESUMED **[2.04 PM]**

PN547

VICE PRESIDENT ASBURY: Sorry about the room change. We had another matter in here that was a bit squished so it was changed and then we didn't have to change it because that matter had finished. But anyway here we are. So who have we got? The AMWU?

PN548

MS A DEVASIA: That's correct. It's Ms Devasia for the AMWU.

PN549

VICE PRESIDENT ASBURY: Thanks, Ms Devasia, would you be ready to make your submissions?

PN550

MS DEVASIA: Yes, I am.

PN551

VICE PRESIDENT ASBURY: Thank you.

PN552

MS DEVASIA: If the Commission pleases, if I might begin.

PN553

We refer to our submissions that we made in reply, on 24 March, and that's essentially the content on which we will be relying on. I won't belabour the points that we've raised in our written submissions too much, but I might just give a brief overview of where we stand on those issues that have been raised.

PN554

In the submissions that we made in reply, we make some commentary in regard to the submissions made by both the employer groups, particularly by the ACCI and also by the AiG. One of the points that we would like to, I guess, put on the record, in terms of our submissions today, are three matters. The first of which is the assertion by ACCI, in relation to specifying the limit of the number of delegates that would be - that might be elected or made available at each worksite for the employers.

PN555

In doing so, ACCI essentially states that they are primary duty is that of being an employee and I think that kind of misses the point around two matters. One, essentially, the underpinning rationale of the legislation that's been put into play that gives rise to these delegates' rights, which is Australia's adherence to the ILO conventions that give rise to the fact that workplace representation, elected for and by workers, is what's being addressed in the legislative framework.

PN556

The second would be, no less important, which would be Australia's rich tradition of civic engagement. We have workplaces that have many volunteer capacities that do work, such as firefighters or other types of volunteer work that is factored into what is, essentially, not exactly related to their workplaces but also commitments that must be honoured.

PN557

I think, in light of those kind of traditions that not just underpin the way that legislation has tried to encapsulate it in the work - in the delegates' rights legislation. The clause that the AMWU proposes, that doesn't set that kind of limit on the number of delegates to each worksite. That is the framework within which the Commission ought to be considering what ACCI's submission is saying.

PN558

We say that it essentially undermines the significant responsibility that workplace delegates are taking on, in a volunteer capacity. They're doing so because, in many cases, that the workplaces may not address the needs that they particularly have. They're evolving needs and evolving conditions of work that are not always met by the best intents of HR companies - of HR provisions within a workplace. In many cases, the needs of workplace employees - of employees that are trying to address a particular fundamental wrong or a - from a minor thing like a wage underpayment, right through to a major event that might be like discrimination may not be dealt with properly or to the satisfaction of the employee, without - free of the fear that there may be, had any adverse action taken against them. Not within the meaning of the Act, as such, but more so about a personal fear about raising this issue within the workplace.

PN559

Having a workplace delegate that is elected for and by workers, in a site that has got strong union representation, or even if it doesn't, where you have a strong workplace delegate structure, provides the kind of support that some workers might need. Putting restrictions on the number of who or what those delegates can be undermines the entire purpose of what we say the legislation is trying to do.

PN560

We also would say that, as we raised in our submission, at paragraph 8, that the legislation already considers the reasonable needs of the employers, based on the size and nature of the enterprise and that's a fair and reasonable test by which to determine how many delegates, if there needs to be a particular number put in it. Not that we say, in any way, that there should be. It's a flexible approach to delegates' rights that takes the consideration of an enterprise but only within the extent of what exactly the delegates' rights might be or the delegates' role might be, within that particular workplace.

PN561

The freedom of association part seems to have been missed by both employer groups in their submissions. It is not something that is restricted by the grant or the grace of the employer, it's an underlying right that workers have, that Australia has signed on to and now has worked its way into the legislation and that kind of particular right that is given to delegates and to workplaces to have that freedom of association is probably something novel, in terms of some employer groups in understanding what a workplace right is for delegates or what the role of a delegate is but that doesn't mean it's based merely on headcount. It's about the comfort that workers have on that site to elect someone that will represent their needs in that workplace.

PN562

In relation to - I'm not going to press too much about the term defining what 'industrial interests are'. I understand that the ACTU makes some substantial submissions on that, both in their written and their oral submissions yesterday. There's nothing further that we would add to that, other than reiterating that any type of overly prescriptive definition of what industrial rights are would not be going the job that it needs to, essentially. My apologies, I just lost my page.

PN563

VICE PRESIDENT ASBURY: By trying to define it you're going to limit it in a way that the statute doesn't envisage.

PN564

MS DEVASIA: Exactly. And I think one of the things that doesn't' take into account is the evolving nature of what is considered to be a workplace right, or what is considered to be an industrial right. So, for example, three years ago, if you were to say, you know, the right to have a workplace that's free of sexual harassment would be considered to be almost a niche event of certain workplaces, depending on who arises that as a general proposition around, you know, a person to be free from sexual harassment. It wasn't - - -

PN565

VICE PRESIDENT ASBURY: Do you mean industrial interests?

PN566

MS DEVASIA: Industrial interest.

PN567

VICE PRESIDENT ASBURY: Yes.

PN568

MS DEVASIA: So actually advocating or taking action about that might be something that's evolved over the next decade or so, and I think to have something prescribed at this point in time, or any point in time, about what is exactly an industrial rights or industrial interests undermines what the nature of this kind of legislation or right is supposed to do. It is supposed to reflect the evolving nature of the work that the delegates might be trying to raise an awareness of or raise industrial activity about.

PN569

As we've said, in our submissions, that defining that kind of industrial interest we say may have the unintended consequence of working against what is potentially a freedom of association.

PN570

In relation to our submissions about a right to training without a loss of pay, in our submissions we've talked a little bit about what this means to workplaces that the AMWU has particular interest in. For example, in preparing for today, although we had not put on any formal submissions or formal statements or witness statements about this, the AMWU, for example, conducts, generally, about 60 training sessions a year, around the country, of delegates. In those training sessions they can go from a day to a couple of days, we have, on average, maybe about 15 people that attend this training. In the nature of the training obviously some people - some delegates are required to come vast distances and/or come to a central point to be able to attend training that's facilitated by the AMWU, at the site that they choose, which is not always, obviously, at the workplace that they might be at. What we've found, in our experience, is that for every 10 or 12 delegates that arrive for training at least three will chose not to because they're going to lose pay, where either the employer has refused to pay for that time or for

whatever circumstance that pay is not going to materialise if they attend that training or they are taking their own leave entitlements to do that and therefore will be losing pay.

PN571

What we say is that kind of flow on effect is that it limits the ability of delegates to be able to actually fully exercise the right for which they're elected. We would, as with the ACTU, support the position that delegates be paid their full rate of pay when they're exercising their right to training. It should include any entitlement that they may have had in their ordinary pay, around travel allowances, overtime or any other - anything else that would constitute their full rate of pay.

PN572

VICE PRESIDENT ASBURY: As well as ordinary time earnings some of the submissions say it would be the award rate. So I take it your submissions apply in response to those submissions as well?

PN573

MS DEVASIA: Yes, that's correct.

PN574

I would also like to speak to, essentially, that - excuse me a moment again. I'm using a new form of trying to use an iPad so I use less paper and it turns out that it's not as easy as it looks.

PN575

VICE PRESIDENT ASBURY: No. Well, the other week, on a Full Bench, the President referred to some of us as the paper members. I had a big folder, so I'm - - -

PN576

MS DEVASIA: I'm trying, but failing, apparently. Excuse me a moment while I bring up my notes that have disappeared on me.

PN577

VICE PRESIDENT ASBURY: It's okay, take your time.

PN578

MS DEVASIA: Thank you. It's like those moments on TV where you wish that someone would just hurry up and it doesn't happen.

PN579

VICE PRESIDENT ASBURY: It's okay.

PN580

MS DEVASIA: In particular, I might speak to just around the issue around why we say training is so important and why - paid training is so important and also why the duration of that is quite important. The AMWU's submissions is, essentially, that we have five full days of paid training for delegates. Five full days is actually - at least a minimum of five days, if not more. As I've said, the AMWU conducts up to 60 sessions of delegate training a year, that is over a series

of - the courses are set up in such a way that they have an accumulative effect and given the nature of changes that have happened over the past three years, let alone over the past five to 10 years, in terms of what delegates are supposed and must know, in terms of enacting their rights or providing the support that they need to, to workplaces.

PN581

There is a range of changes and a range of technical skill that's involved in actually addressing that. The type of training is, at a minimum, at least five days worth of work. We would say that any kind of change made to any delegate clause that goes into an award should take that very much into account. Limiting any type of access based on tenure, on past attendance, or restraining the ability of members - of delegates to attend for more days of training, or limiting the amount of pay that they're paid for that, only derogates from that ability to get the training that they're required to have to fully enliven the rights that they enjoy.

PN582

The AMWU also strongly opposes the Ai Group's proposal that delegates' communication with employees should be subject to any type of oversight or access. The right to privacy of employees to their information is an ongoing conversation that employers and unions have. But, in this instance, considering the nature of what a delegate's work is essentially there to do, which is to represent the rights of workers at the site. That might not always be in the interests of the employers, as such, and is about providing them with the support they need to push back against an unreasonable ask or something that is occurring at the workplace. Any kind of scrutiny or any type of access to the private communications of the delegate and the worker they're representing will just have a chilling effect on any of that trust that they might enjoy or the support that they can give.

PN583

It's untenable that those, essentially, privileged types of conversations the delegates may have with their workers, or the fact that it should be vetted by employers as to what training might be or what the conversations might be about or the type and nature of the communications that are had between delegates and the workers that they represent is just unreasonable, at the highest.

PN584

We've also made some modifications to the ACTU's model clause, seeking that any delegate that attends training at a time when they're not usually rostered to work, and if they're then required to attend for a shift afterwards, should not be required to do so and should not suffer any loss of pay where that attendance on that shift might cause fatigue and/or was on back to back to the time that they were attending training.

PN585

I think we've made that amendment to the, or suggested amendment to the model clause of the ACTU. The reason that we've essentially talked about that and asked for that to be entered into, in the clause, is because of the basic fact of fatigue. If you had a delegate who was a worker who was attending training, for whatever purpose it might be, at their workplace and they would then have a shift

straight after, it's not just a health and safety matter, in that it's unnecessary fatigue that's been suffered by the worker, it's also the fact that it then again acts as a chilling effect on the delegates to be able to do that kind of training. For example, if they know that they have to do, say, six hours of training, or have come to the Commission to assist someone in a workplace matter and then are required to go back to do a full 12-hour day, a 12-hour shift, it's something that's just going to discourage them from actively engaging in the role that they have, or in the responsibility that they have.

PN586

Many of AMWU's members are workers - most of AMWU workers are workers who work shift. They work on rolling shifts and they work in night time shift work as well, where they - which are not exactly the business as usual hours for the Commission or for HR professionals, I guess, on the 9 to 5 spectrum. They are workers who work outside of that. When you're providing support, if you are then awake for a 12-hour period and then are required to go back to work and also, to sweeten it, you also lose pay for that period, it's just simply not fair really, at the core of it.

PN587

Attending workplaces - attending that kind of training is an upskill for particular workers who provide skilled support to the workers that they represent. A good example of that is, say, for example, a roadside assistance worker who may have been required to attend training provided for by their workplace about the new sexual harassment obligations that have now been rolled out. It's not specifically about their work but it's about the workplace culture that they have and the workplace - what's the word I'm looking for, the social mores that have now become part of the workplace culture that they operate in.

PN588

If they were to attend that training for a full day and then had to work later that night, there are two things that happen at that workplace. Most of our agreements would provide for them not to have to attend for that training because there is a fatigue element, and even if they did, it was done at, say, overtime, because that's still kind of paid time that they've attended the training at.

PN589

VICE PRESIDENT ASBURY: Because their employer required them to attend the training?

PN590

MS DEVASIA: That's right. But it's more than that. It's not just specific to their work, it's about a workplace issue in general, you know. There's a crossover between what is the cultural norm and the cultural expectations around the workplace about how they operate as representatives of the employer, but it is also a requirement on them - yes, you're right - by the employer to ask them to attend that training, but the role that they have been elected to as a delegate is also a reciprocal responsibility between the workplace, the worker and the delegate about the role that they perform.

PN591

So we would say even though, again like I said, although it would not be specific to their work, it's still a workplace issue, and they are given the opportunity to make a better choice. For example, workers who were suffering from COVID during the COVID time, who had the full right to stay at home, particularly casual workers, they chose not to stay at home, although it was a poorer choice, because of the loss of pay or because of other pressing circumstances. Similarly, workplace delegates, who may be attending training and then know they face a loss of pay if they don't attend that shift, may decide to make a different choice.

PN592

Part of the legislative intention here is to make the ability of delegates to be able to take on that responsibility and smooth the way for that responsibility in whatever way they can do so. The employers, whether kicking or screaming, have to be brought along to that because it's part of that reciprocal arrangement that happens where a workplace has to facilitate - must facilitate - the kind of responsibilities that a delegate has to discharge.

PN593

So we would say, for that reason, that delegates who are required to attend training outside of their normal shift should be able to not attend work after that if the shift work then presents a risk to their health and safety, and also that they should still be paid for it.

PN594

Unless there's any other questions that you may have for me, that would be the entirety of our submissions, other than our written submissions today.

PN595

COMMISSIONER LIM: I do have a question. This is a question which we have asked some of the other parties today. What is the AMWU's view around what's an enterprise in relation to 350C? The reason I ask that is because we have discussed with other parties about where you may have work sites or projects where there is perhaps more than one employer, or you have multiple subbies or labour hire contractors. You then may run into different variations of what's the enterprise and how does that flow on to the entitlement to training leave, for example.

PN596

MS DEVASIA: I don't think we have directly engaged with that question in our submissions - and I might come back to that if I have anything else to add - but I think our view on that would be that the definition of what we consider to be an enterprise would cover not just the employer that you are directly engaged by, but also, like you said, any type of joint venture operation that they might be at. So it would cover the entirety of the - actually, I might have to think about how we phrase that.

PN597

VICE PRESIDENT ASBURY: If you want to put in something in writing in the next couple of days - - -

PN598

MS DEVASIA: Yes.

PN599

VICE PRESIDENT ASBURY: - - - or, sorry, maybe by Monday, that's fine, but I think it's an important consideration because in a workplace as Commissioner Lim described, you could have a number of separate employers. So does each of them get a delegate, essentially, and does each of them get - because are they a separate enterprise, or are they one enterprise, or what's the consensus?

PN600

MS DEVASIA: I would say that it would depend on the nature of what the operation is, not so much the enterprise. We don't say that, you know, delegates' rights arise from an individual contract of employment. That's not how it works. It's about representative of the workers at that particular site, and what that site might be. It might be a combination of different workplaces, so for example, like you said, a large workplace that has not just contractors but also labour hire employees and other kind of different types of entities that make up that particular site.

PN601

I don't think we can specify to say that each enterprise or each entity there gets one delegate, or that that's how it would operate. I think the AMWU's position would depend on the type of work site it is and the type of issues that arise, and the different types of - the mix of workers that are on the site. I would need to think about that a little bit more before I put that as our complete answer, but, yes, I think that's where we would stand on that.

PN602

VICE PRESIDENT ASBURY: Okay.

PN603

COMMISSIONER LIM: I would be interested to hear because, given the breadth of the AMWU's coverage, you have the example of, say, a mining site, where perhaps you have a more cohesive integration of workforces, but, as I say, the engineers covered by the AMWU at Qantas, where there is a different level of integration.

PN604

MS DEVASIA: Yes, that's right, and so we've got examples in some of the joint venture project sites in New South Wales, for example in the Snowy River project, which is a smorgasbord of contractors that make up that particular site that cover different aspects of our coverage as well. So each different entity that is engaged in that site has a different type of our coverage, but they are all workers for our purposes that are within our coverage, but also have different elements of - different issues that give rise to why they might choose a delegate in that particular site across all the different enterprises.

PN605

I think it might be best explained by an example, more than anything else, in terms of how we would see that arising, and I am happy to provide that, if needed.

PN606

VICE PRESIDENT ASBURY: Okay. Because the Act's got a definition of 'enterprise' that's just not particularly - - -

PN607

MS DEVASIA: Helpful.

PN608

VICE PRESIDENT ASBURY: - - - helpful in this case, and where they are all separate entities. Some labour hire just integrates into the host workforce.

PN609

MS DEVASIA: That's correct.

PN610

VICE PRESIDENT ASBURY: Other contractors have their own operation in a workplace. For example, on a mine site, you might have, you know, a major equipment repairer who has its own operation on the mine site and operates on the site but as its own entity.

PN611

MS DEVASIA: Correct.

PN612

VICE PRESIDENT ASBURY: And you could have sites where there's a multiplicity of those kinds of arrangements, and does the Act require that each of those - are they each of them an enterprise and do they each get a delegate with a right to leave and to other recognition?

PN613

MS DEVASIA: I understand what the question is there and, you're right there, the definition of what 'enterprise' means within the Act doesn't actually provide a useful answer for the purposes of what a delegate's rights should be or how that arises, and I think we should put something with some more thought into how exactly we think that should be answered because I think, again because of the nature and extent of the AMWU's coverage, the way that that operates is quite nuanced, depending on where it is. You can have single shops, but certainly, for example, like you're saying in mining, we also have issues where you have one enterprise that has got, say, service technicians that are on the site, but then also move from site to site.

PN614

VICE PRESIDENT ASBURY: Yes.

PN615

MS DEVASIA: But are engaged by a particular enterprise. I wouldn't consider that to be allocating just one delegate for that enterprise because there's obviously such a multiplicity of places that they go to.

PN616

VICE PRESIDENT ASBURY: Yes. While you are on that train, you might think about whether the Act requires that the workplace delegate is employed by the same employer as the people that they are representing.

PN617

MS DEVASIA: Yes, that did cross my mind. We'll have to turn to that.

PN618

VICE PRESIDENT ASBURY: I am not asking for an answer now. I am happy for you to take that on notice.

PN619

MS DEVASIA: I will take that on notice and we might put something further on to answer that can give a little bit more of a surgical answer to it than a broad one.

PN620

VICE PRESIDENT ASBURY: Yes.

PN621

DEPUTY PRESIDENT BINET: Do you think the reference to the reasonableness part of it might assist in determining delegate numbers rather than focusing on the enterprise, because you talk about in your submissions that you might, for example, have people working different shift patterns, so that, you know, you need a delegate per roster, or if you've got people that work in FIFO, they don't actually ever see - - -

PN622

MS DEVASIA: Each other.

PN623

DEPUTY PRESIDENT BINET: - - - each other, and so the use of the reasonableness element of it allows you to determine the number of delegates which is appropriate for that enterprise. So in a particular enterprise, that might vary.

PN624

If you have got a school where all of the hundred teachers are all going to be in the lunch room, a reasonable number of delegates for that enterprise might be one because they can get to everyone all at once and hear it, as opposed to a FIFO operation where there's four shift patterns and those shift patterns never overlap. The same number of employees might justify four delegates, for example, because otherwise there's no access to - and particularly if they are coming from the west, they might be in a remote location, so it's not like you can even roster them to cross over with the other shift patterns, or if they're out to sea, or however that works.

PN625

MS DEVASIA: Yes, I think that's one of the - I think the ACTU spoke to this as well yesterday in terms of how reasonableness could be used as a way - the way that the reasonableness is factored into the legislation, or iterated out in the legislation as a concern - as a consideration - is probably the best test for

determining how an enterprise decides, or what is reasonable for an enterprise, but in our response to exactly what an enterprise is, or how we consider that to be operating, I think we will take that into account and we can address that in our written responses.

PN626

DEPUTY PRESIDENT BINET: Because the definition of an enterprise might not address your problem in terms of no overlap on shift patterns and things like that.

PN627

MS DEVASIA: No, it doesn't, but I think that when we talk about - in our submissions, I think we have raised the issue of trying to address when rostering has to be taken into account when you're thinking about how a delegate would operate across the sites.

PN628

If I might rephrase the question to you, you are asking us whether the question of reasonableness is a useful test for considering how a delegate might be allocated to a particular enterprise and/or a particular work site?

PN629

DEPUTY PRESIDENT BINET: What strikes me is the word 'enterprise' is pretty inflexible.

PN630

MS DEVASIA: Yes.

PN631

DEPUTY PRESIDENT BINET: And if you apply it as per employer, that doesn't make sense in some situations because you might have 10 electrical subbies and 12 people in the workplace, two of them direct employees and the rest are subbies.

PN632

MS DEVASIA: Yes.

PN633

DEPUTY PRESIDENT BINET: The employees and the employers wouldn't contemplate having, you know, a delegate for each of those two employees from each of the subcontractor, but if you talk about it in terms of for that enterprise, that building site, for example, it might be in the contemplation of the parties that it would be reasonable that there's one delegate, but, in another situation where there are separate employers which operate discretely, that model of an enterprise does make sense, and so it's a way to get around the - 'enterprise' is an inflexible term. Once you decide what it is, you're stuck with that, and that gives an artificial outcome in some circumstances.

PN634

MS DEVASIA: Yes, but I also think, on the face of it, though, that the test of using just reasonableness about how to determine how many delegates you have can also be just as inflexible in that the reasonableness test might not be - if you're

looking only at size and the scope of the enterprise, or whatever 'enterprise' might mean, I think the definition of reasonableness in the Act is a little bit broader than that; it looks at what is the nature of the workplace as well.

PN635

DEPUTY PRESIDENT BINET: Yes, and you would have to have some categories about how you work out what's reasonable, taking into account things like shift pattern or work locations, things like that.

PN636

MS DEVASIA: Like you said, it's specific to the type of work that's being done and the distinction between a desk-based office, where you have a lunch room, to something, which is where our workers tend to be, our coverage tends to be, which is maybe in remote areas where there's no one, you know, within cooee, as they would put it, and it's a very different proposition as to what is reasonable and how that test is applied to that.

PN637

VICE PRESIDENT ASBURY: And I guess it's where reasonableness can apply because only some of the provisions are subject to reasonableness, so the part about the workplace delegate is a person appointed as a delegate, however described, for members of the organisation who work in a particular enterprise isn't subject to the reasonableness of the numbers of delegates that are appointed, but the reasonableness comes in in terms of communication.

PN638

So it might be that there's some interplay that you don't need eight delegates to communicate with a group of workers who all work 9 to 5, but if you have eight panels on a roster and none of them ever interact, you might need a delegate that - that's, I guess, the difficulty that I'm grappling with. How does reasonableness come into it when you've got, arguably, a right for a particular enterprise to have a delegate?

PN639

MS DEVASIA: Yes, and I think again we can be - we should be cautious around thinking about reasonableness as something that has to be - the onus of proving that reasonableness is still not up to the delegates to sort of say, you know, 'We say that it's reasonable' at this point.

PN640

VICE PRESIDENT ASBURY: Yes.

PN641

MS DEVASIA: It's going to be a moving feast. I think it depends very much on - and I don't think you can have - I don't think the intent of the legislation, as to how the AMWU understands it, to be something that's fixed in point of time; it has to be something that takes into account the different variants that present, and it's up to the employer to - it's up to the employer to demonstrate that hardship as to why they should not be - the reason as to why there shouldn't be eight delegates of that type, for example. There might be a need for eight delegates of that type because

it might not be about the nature or the type of the enterprise that it is, it's about the nature of the workplace and the issues that are arising in it.

PN642

VICE PRESIDENT ASBURY: Anyway, if you want to put in a written submission and then anyone who wants to reply can reply.

PN643

MS DEVASIA: Yes.

PN644

VICE PRESIDENT ASBURY: By the end of the week, so we've got time to have regard to that. So if you put it in by, say, close of business on Monday, we can give other parties until close of business on Friday if they want to respond, and we will issue something in writing, as given not everybody is in the proceedings all at the same time.

PN645

MS DEVASIA: The same time, yes.

PN646

VICE PRESIDENT ASBURY: Yes.

PN647

MS DEVASIA: I think other union parties would be interested to make that as well.

PN648

VICE PRESIDENT ASBURY: Yes.

PN649

MS DEVASIA: If I can raise that with them and find out as well.

PN650

VICE PRESIDENT ASBURY: Yes, sure.

PN651

MS DEVASIA: Great.

PN652

VICE PRESIDENT ASBURY: Thanks. Is that your submission?

PN653

MS DEVASIA: That's all.

PN654

VICE PRESIDENT ASBURY: Thank you very much.

PN655

MS DEVASIA: Thank you.

PN656

VICE PRESIDENT ASBURY: Ms Lawrence.

PN657

MS T LAWRENCE: Yes.

PN658

VICE PRESIDENT ASBURY: I understand there's someone from Clubs Australia online, but not wanting to - wanting to make an oral submission or not?

PN659

MR J McGRATH: Yes, thank you, Commissioner. This is Jackson McGrath from Clubs Australia. Thank you. We intend to rely on our written submissions and don't intend to provide an oral submission today, thank you.

PN660

VICE PRESIDENT ASBURY: Great. Thanks for that. Sorry, Ms Lawrence.

PN661

MS LAWRENCE: Thank you. If it pleases the Commission, Lawrence, initial T, appearing on behalf of Business New South Wales and Australian Business Industrial.

PN662

Vice President and members of the Full Bench, Business New South Wales and ABI have filed a comprehensive submission and reply submission already as part of this consultation process. We seek to rely on those submissions, and I do not intend today to repeat all the issues traversed in them in any significant detail. I would, however, like to address this afternoon 10 issues with the Commission, broken down across four areas.

PN663

Firstly, the nature of the Commission's task. This is not a broad-ranging review, but by the operation of section 149E of the Act, the Commission has a limited window of time to complete this legislative task. This task is a narrow one: to create a delegates' rights clause as contemplated under the legislation in all modern awards.

PN664

It is our understanding that many parties have to date been approaching this process somewhat on the basis of an assumption that the Commission will be developing a model term to insert into awards. We believe that the time-limited nature of this process, along with the civil penalties regime that is in place, reinforces the Commission taking such an approach to developing a model term. It is, however, clear that some parties, including the MEU and the CFMEU, have sought to advance specific clauses for specific awards which divert from a proposed model.

PN665

Of course, the Fair Work Commission can develop industry-specific delegates' rights terms which amend such a model clause in subsequent proceedings, if it is appropriate and the case is appropriately made out with sufficient

evidence. Whilst perhaps obvious, I think it's important to recognise that this is not a hearing, this is a consultation process, and it shouldn't become a substitute for one at a specific award level because that's not currently how the process appears to us to be structured.

PN666

It is important because procedural fairness needs to be afforded to everyone. So should a party be seeking to have a delegates' rights clause that departs from a model, we say they should make an application to that effect, and it should be subject to a far more rigorous process, which is properly contested with a proper timeline and the ability to test any evidence by virtue of cross-examination, in a hearing before the Commission to justify such a departure.

PN667

VICE PRESIDENT ASBURY: Ms Lawrence, is it the case, though, that unions or organisations who wanted to have a departure from the clause, some of them have actually filed witness statements, and all the parties were given an opportunity to advise if they wanted to cross-examine the witnesses, and anyone could have filed a witness statement if they wanted to?

PN668

MS LAWRENCE: I think maybe to the first point, I think it does appear to us that some parties were not aware at the start of the proceedings of how they were operating, and they may have operated under a presumption that we were dealing with a model clause and then moving to specific awards. We raised this because we did note quite a number of parties quite late to this consultation process sought to become involved, which, to us, appears as if they maybe were scrambling to realise that they may need to participate.

PN669

To the second point, in terms of cross-examination, we do note that the actual notice said to ask questions, not to cross-examine, and because this is a consultation process, we didn't believe it would be appropriate because we're not all putting on evidence and going through the usual rigmarole, but if we are looking to divert from something which is a model, we say that the appropriate way to do that would be to enable proper evidence be put forward to justify such a departure.

PN670

VICE PRESIDENT ASBURY: Okay. I understand.

PN671

MS LAWRENCE: The second issue I would like to discuss is the modern awards objectives themselves. The relevance of the objectives in section 134, by virtue of the operation of section 138 of the Fair Work Act, should be somewhat uncontroversial. Awards can only contain terms that are necessary to achieve the modern awards objectives. Awards are about providing a minimum safety net for working with a core objective of fairness. This is, by its very nature, requiring a limited variation only to the extent necessary to achieve the awards' objectives, not an expansive approach, as suggested and proposed by the ACTU and some other unions.

PN672

I don't wish to labour this point too much because I am aware both AiG and the Mineral Council both addressed this significantly yesterday in the consultation, and we agree with their submissions on that fact, except to highlight that many of the proposed terms in the ACTU model clause and other unions' specific award clauses go far beyond anything that could be regarded as minimum, and we say it is clearly overreach. If there are things that particular unions wish to pursue, they should be done so in bargaining and at the workplace level, not through a modern award process.

PN673

The final overarching issue I would like to address is in relation to the knowledge of an employee's workplace delegate's status in an enterprise. To ensure the practical application of some of the rights in section 350C, which are limited by the threshold requirements of reasonableness, it is necessary for employers to be able to ascertain at any given point in time the number of appointed or elected workplace delegates it has in its workplace or enterprise.

PN674

Given this, BNSW and ABI are not opposed to an obligation or requirement of some kind being imposed in the delegates' rights terms to be inserted in all modern awards that a workplace delegate be required to notify an employer or employers at an enterprise once elected or appointed, as proposed by ACCI and AiG. Any potential negative ramifications which could, allegedly, flow from such an obligation or requirement, we say, is already ameliorated by the general protections provisions, which protect the status of an employee as a workplace delegate.

PN675

The second area I would now like to turn to is the issue of section 350C(2), the right of workplace delegates to represent the industrial interests of members and prospective members, to some extent. On this issue, I would like to address three points.

PN676

The first is in relation to freedom of association. Sections 350A and 350C are contained in Part 3-1 of the Act, dealing with the general protections provisions, which enshrines freedom of association as a foundational proposition.

PN677

There have been assertions made by some unions in these proceedings that the term 'freedom of association' is freedom of association, not freedom from association, and, to that end, they have suggested that consent of workers to have their industrial interests represented by workplace delegates should not be pre-conditioned to workplace delegate representation in a particular enterprise. We say, if the Commission was to adopt such an approach, it could potentially lead into jurisdictional error given the operation of freedom of association and the objects of the Act.

PN678

The Fair Work Act protects freedom of association in the workplace by ensuring that persons are free to become, or not become, members of industrial associations, are free to be represented, or not be represented, by industrial associations, and are free to participate, or not participate, in lawful industrial activities.

PN679

The legislature also made clear in its note to section 350C(2) that the parliament did not intend for the right of workplace delegates to represent the industrial interests of members and prospective members to displace this right.

PN680

Agency for workers in choosing who can and who does represent them, we say, is vital to a worker's choice and to their freedom of association, particularly in circumstances where workers may have been victims of some kind of inappropriate or unlawful conduct in the workplace. The Commission should be, therefore, wary, we suggest, of any propositions advanced by the ACTU and others that seek to directly or indirectly undermine this.

PN681

With respect to how the rights contained in this section interact with an employer's right to give lawful and reasonable directions and management prerogative, we say the following: workplace delegates should not interfere with the effective work of the employer; an employee who is a workplace delegate must continue to follow the lawful and reasonable directions of their employer. Any further characterisation given to this entitlement by the Commission, we say, should be framed in a way so as to minimise the extent possible of the impact on workplace productivity and disruption.

PN682

Such an approach is consistent with the modern awards objectives and the likely impact on business, including productivity, employment costs and the regulatory burden. It is also consistent with previous Fair Work Commission authorities referenced in our submissions, in particular the case of Garden Island Docklands, as well as the more recent decision of former Deputy President Hamilton in - apologies for my pronunciation - *Grubisic v Chubb Security Services Limited.*

PN683

We say that the submissions of the unions on this matter, which would allow for workplace delegates to ignore employer directions, or, at any time, simply walk off the job and stop work, could, and would likely, have hugely detrimental ramifications for workplace productivity and harmony, and could also be contrary to the modern awards objectives. We say, accordingly, that this should not be read into the Act and should not - should not be read into the Act and should also not therefore extend into any modern award term.

PN684

We say this issue should be reconciled by any modern award term by making clear the primacy of the workplace delegate as, first and foremost, an employee. Any other such finding would simply be unworkable. Take, for example, a manufacturing facility with manning minimums on a production line,

as is the case in many manufacturing enterprise agreements. Should the workplace delegate be able to simply walk off the job, without notice, in pursuing the rights to represent the industrial interests of, say, a member? The entire line would have to be stopped and the remaining workforce stood down.

PN685

To perhaps take a more extreme example of the minimum four-crew requirements of fire crews operating for Fire Rescue Victoria on primary operational vehicles, if a fire delegate was entitled to walk off the job or simply get off the truck to exercise their workplace delegate rights to represent the industrial interests of members, and eligible members, this would mean the fire truck would be unable to legally leave in order to be able to fight fires and the remaining crew would have to be stood down.

PN686

I am sure it is, no doubt, self-evident to the Commission how such a circumstance could result in deadly outcomes, particularly during the bush fire season, particularly as these minimum crew requirements have related impacts on the ability of volunteers to the (indistinct) crews to operate fire trucks in Victoria.

PN687

With respect to the issue of whether employees should lose pay as a result of them exercising their right to represent the industrial interests of members, we note that the ACTU, and particularly the CFMEU, have sought to draw the Commission's attention to the ILO Convention 87 on 'Freedom of Association and Protection of the Right to Organise Convention'. This is despite the fact that there is no pay term in this clause; conversely, there obviously is one in relation to training.

PN688

In relation to the reference to this ILO convention, we did want to point out that it is up to each individual country to interpret the ILO convention into their own law. There is no evidence that the legislature has sought to interpret the ILO Convention 87 in a manner which would result in a workplace delegate being paid for anything other than reasonable training.

PN689

If a non-government tripartite member believes the ILO Convention 87 is being violated by legislation or practice, they are entitled to make an application to the ILO Committee on Freedom of Association, who will determine whether it's in breach. This is something the ACTU has experience in history in doing, having previously made six complaints to the ILO Committee on the Freedom of Association regarding Australian industrial law.

PN690

This is not the forum, we say, where this issue should be raised as the interpretation of the Convention in Australian law by the legislature in the (indistinct) legislation is clear and unambiguous. Delegates are not entitled to payment when representing industrial interests, communicating or accessing facilities, only in relation to reasonable paid time for training - a matter I will come to very shortly.

PN691

Finally, there has been much controversy regarding the term 'industrial interest' in these proceedings. I don't seek to traverse the issue of a definition beyond what we have already set out in our submission around our preferred approach of not actually defining the term. I do, however, just wish to make one point about the rights of workplace delegates to represent the industrial interests of members and eligible members in terms of the ACTU's model.

PN692

At clause 2 of their model regarding the rights to represent, explicitly, they seek to take workplace delegates into the realm of other defined representatives in industrial law. We believe that they are effectively making bargaining representatives de facto - sorry, workplace delegates, they are effectively making them de facto bargaining representatives by virtue of the scope of their ability to represent industrial interests, and also making them, in some circumstances, perhaps, de facto HSRs. This is in direct conflict with these roles which already exist in industrial law.

PN693

To this end, we say the Commission should be careful not to create a situation, in entertaining such a debate, that will create a role for workplace delegates that is in direct conflict with these existing roles, particularly given the existence of these roles typically comes with specific statutory conditions, such as the obligation to engage in good faith bargaining, or not undertake their functions for an improper purpose into HSRs, and which we say would be undermined by adopting the ACTU model clause.

PN694

COMMISSIONER LIM: Ms Lawrence, I just have two questions for you on that point.

PN695

MS LAWRENCE: Yes.

PN696

COMMISSIONER LIM: Are you saying that bargaining and occupational health and safety are not industrial interests?

PN697

MS LAWRENCE: It depends on your interpretation in this particular part of the Act. We would say that it should be constrained by the fact that there are already individuals in the workplace to represent those particular interests and, therefore, somebody couldn't just, in bargaining, say that they were automatically a bargaining representative simply by virtue of being a workplace delegate, that they would need to follow the normal course in being appointed as a delegate or automatically having the right in certain circumstances.

PN698

Similarly, in terms of HSRs, we don't believe that just because a workplace delegate is on a site that they should somehow morph into a HSR, which has a particular role that has particular obligations that come with that role.

PN699

COMMISSIONER LIM: As I understood your oral but also your written submission, which seems to be advancing the position that industrial interest should not be defined in any way - - -

PN700

MS LAWRENCE: Yes.

PN701

COMMISSIONER LIM: But I also understand that your organisation largely supports the submissions from ACCI and AiG?

PN702

MS LAWRENCE: No, not in totality, not on this issue. I think I have said that we were happy to support them in relation to their desire to have to have a delegate identify themselves in the workplace. On that particular issue, we are supportive. Otherwise, we stand alone on our own submissions. We don't seek to sit here and say that we are supporting entirely the ACCI's way or AiG's I think, on many points, we actually diverge quite significantly.

PN703

COMMISSIONER LIM: Thank you for clarifying that because, on that particular point, there does seem to be some diverse - - -

PN704

MS LAWRENCE: Yes, we are, probably quite unusually, almost in agreement here with the ACTU on the point that it should not be defined. However, we believe their model does somewhat define it.

PN705

COMMISSIONER LIM: Yes, thank you for clarifying that.

PN706

MS LAWRENCE: Thank you.

PN707

I now wish to move to the next area of the construction of section 350C(3)(a) and (b)(i), the right of workplace delegates to reasonable communication and reasonable access to the workplace and workplace facilities, which I will try to address in tandem.

PN708

Firstly, not wanting to labour the point, but we do think it is worth noting that section 350C(3)(a), that nothing in this section gives individual employees the right to communicate during work hours with a workplace delegate. The right to communicate with members and eligible members only flows in one direction, from the workplace delegate to the employee. We say there is no ambiguity in the legislation regarding this. It does not contain a right for employees to cease work to communicate with a delegate.

PN709

I now wish to turn to specific issues regarding both of these concurrent rights.

PN710

The first is access to members' and eligible members' personal details in order to communicate and interact and the interaction of this with the Privacy Principles. The ACTU model term, at clauses 4 and 5, proposes that an employer must facilitate reasonable communication between a delegate and a union member, or person eligible to be a union member, which may include the provision of access to the workplace and means of communication used in the workplace. Clause 5(2)(e) correspondingly provides for the workplace delegate's entitlement to access facilities shall include electronic address lists of the workforce.

PN711

A number of other union submissions, including the NTEU, suggest that there is a belief that the right to communicate entitles a workplace delegate to the provision of email addresses and distributing lists for the purpose of representing workers' industrial interests.

PN712

In response to employer concerns that such an expansion of workplace delegates' entitlements infringes upon the privacy of employees' personal information, the ACTU, in its reply submission at paragraph 47, justifies such access by suggesting that it would be covered by the employee exemption from the provision of privacy legislation. We say the Commission should be cautioned against such a belief.

PN713

Earlier today, I provided the Commission with an authority that I wish to take the Bench to now, if it's possible. It's the decision of the Office of the Australian Information Commissioner on 28 May 2919 of *QF & Others and Spotless Group Limited*. We say this case directly contradicts the assertions made by the ACTU about the application of the employee records exemption to any distribution of email lists containing workers' details that they seek to be entitled to. In this particular case, Cleanevent had given the names of some of their employees to the Victorian branch of the AWU and paid their membership fees without their consent. The 14 complainant employees contended that the disclosure of their names to the union without their knowledge or consent was an unlawful interference with their privacy under the Commonwealth Privacy Act, being in contravention of the then applicable National Privacy Principles relating to use, disclosure and security of personal information, which is now covered by the Australian Privacy Principles.

PN714

In considering Spotless's argument that the disclosure of the complainants' names to the union was not unlawful because it was permitted by the employee records exemption provided for in the Privacy Act, the Commission held - and I draw you attention to paragraphs 48 and 49 in particular here, and it's the second sentence of paragraph 48:

PN715

...exemption only applies to an act or practice that is directly related to a current or former employment relationship between the employer and the individual, and where an employee record is held relating to the individual. There is no dispute that employee names constituted employee records held by the respondent.

PN716

To fall within the exemption under s 7B(3), the act or practice must be directly related to the employment relationship, and not merely an act or practice having an indirect, consequential or remote effect on that relationship.

PN717

The OAIC goes on to find, at paragraphs 51 and 52, that the disclosure of an employee's information to a union via the employer had insufficient connection with the employment relationship to fall within the exemption in section 7B of the Privacy Act, with Spotless subsequently ordered to pay compensation to the 14 employees.

PN718

Whilst we acknowledge that this situation of providing records to a workplace delegate is slightly different to providing records directly to a union, the principle of insufficient connection between the employment relationship of the employee and the employer still remains and, at best, we say it would only meet the threshold of may be consequential to it.

PN719

Accordingly, employers, we don't believe, should be put in a position of being obligated to hand over employee information and/or records which we say would likely result in a breach of the Privacy Principles and the Privacy Act and, as a result, the operation of any delegates' rights terms inserted into the modern award would have a similar effect. Employees' personal information should not be infringed upon through entitlements to reasonable communication and reasonable access to the workplace and workplace facilities.

PN720

The second issue I would like to address is in relation to the ACTU's submission at paragraphs 81 and 82 in which they suggest their proposed model clause 4(6) to prohibit employers from infringing on the privacy of communication between delegates and their unions, union members and eligible members by banning employers surveilling, monitoring, recording, or otherwise infringing on the communication between workplace delegates and the respective members of the union.

PN721

I note that a number of other employer associations, including AiG, have canvassed the fact that this may pose an issue with respect to workplace policies dealing with issues of technology. I don't wish to canvass over those again. However, I do wish to bring, we say, a far more serious issue of concern to the Commission's attention.

PN722

We say the Commission should be cognisant of the fact that any such restrictions as proposed by the ACTU placed around the ability of employers to monitor their information technology systems and the users of those systems and the content being passed between them will also have potentially huge ramifications for businesses, small and large, in terms of their ability to comply with international IT standards. Specifically, we say that businesses will be unable to comply with, or will be in breach of, international standards of information security, cyber and privacy protection, namely ISO 270001 and SOC2 Type 2. These are international standards on information security.

PN723

In order for an ever-increasing number of businesses to work and contract with other businesses, particularly overseas entities, most now need to demonstrate that they are certified and operate in accordance with, and have policies in compliance with, either or both of these international standards, particularly anyone who wants to have dealings with any financial services institutions or any governments. For smaller businesses, particularly those in the start-up space, compliance with these standards is also increasingly common in terms of their contractual obligations for getting funding and grants, both in Australia and internationally.

PN724

IOS 27001 requires a business to have sufficient access management and input protection when it comes to IT systems. This requires both traceability - the ability to follow the evolution of a data or a file to know where it comes from, who made a modification, when, how, who it was sent to, et cetera - and explainability - the ability to track and explain the process that's taken place.

PN725

If a business was unable to monitor, log and trace the activities of any user in its IT system, whether it be by logging on to a device, sending an email, or using an intranet or any other similar activity proposed by the ACTU, when it comes to workplace delegates, we say that business would likely not be able to state that it's operating in accordance with, or be certified under, either of these international standards.

PN726

Accordingly, we say the flow-on implications from being unable to be accredited with IOS certification or failing in audits would be contrary to the modern award objective, not just the individual businesses but for the performance and competitiveness of the national economy as a whole, particularly in the heightened area of cyber security and cyber warfare that we all now live in.

PN727

Accordingly, we implore the Commission to act extremely cautiously in adopting any restrictions on employers in any delegates' rights terms it is seeking to include in a modern award by virtue of the operation of section 149E.

PN728

Finally, I would like to address four points with respect to the right of workplace delegates to reasonable access to paid time during normal work hours for the

purposes of related training, that being training in relation to representing the industrial interests of members and other persons eligible to be members in section 350C(3)(b)(ii). The legislation is clearly aimed at seeking to train delegates to exercise their responsibilities as provided under the Act in a proper and orderly way given the right is constrained. Only reasonable access to training must be provided. It is not an unfettered right to training or an unfettered right to leave.

PN729

Firstly, many of the issues raised by other parties to the proceedings with respect to the rights of workplace delegates to reasonably access paid time during work hours for the purpose of related training, such as how much notice an employer should be given, the content of the training, the number of days of the training, the number of delegates who can have paid time off, whether the employer can refuse a request to take training, proof of attendance, we say that each of these questions weigh on the question of reasonableness, which is inherently contextual to the enterprise.

PN730

Should the Commission see it necessary to put any constraints or minimum standards in place in modern awards in relation to this right, it would require a thorough consideration of each and every industry and occupation, as well as the character of enterprises within them. We say this task is far better left to employers and unions that wish to agree to something better and more concrete around the number of days or the number of delegates in enterprise bargaining, not something that the Commission should seek to set arbitrary lines around in a model term in modern awards.

PN731

There is, however, one matter related to the rights to reasonable access to paid time which has arisen during these proceedings which we say would benefit from some further guidance and instruction from the Commission in a modern award delegates' rights terms because it's not a matter which is fettered by reasonableness, and clarifying it will also reduce the likelihood of disputation arising as a result of the lack of clarity around the specific meaning. That is in relation to the term 'paid time'.

PN732

Whilst various submissions have proposed different approaches, the interpretation of the term 'paid time' for the purposes of award terms, we say that the presumption in these types of things has been long accepted to mean without loss of pay, meaning that workers would receive the pay for the hours of work which he or she would have normally worked had it not been for the absence due to the training. If the employee would not have normally had working hours on the days they attend the training, they would not be entitled to the payment.

PN733

VICE PRESIDENT ASBURY: So you differ from the proposal for going back to the award rate?

PN734

MS LAWRENCE: Yes.

PN735

VICE PRESIDENT ASBURY: You are saying it should just be the pay for their ordinary hours on the day and their rate.

PN736

MS LAWRENCE: Without loss of pay, yes.

PN737

VICE PRESIDENT ASBURY: I understand.

PN738

MS LAWRENCE: We do note that some have also sought to suggest that such a payment would also encompass things like travel and accommodation, and to this we would say two things.

PN739

DEPUTY PRESIDENT BINET: Sorry, just to briefly go into that.

PN740

MS LAWRENCE: Yes.

PN741

DEPUTY PRESIDENT BINET: When you say 'no loss of pay', how about in a situation where we're talking about where, for example, someone has got training during the day and they are due to go onto a night shift and they can't, for the fatigue requirements, start the night shift, so they have not lost pay during the day, but, as a consequence of attending the training, they will lose pay because they can't qualify to attend the night shift?

PN742

MS LAWRENCE: We say that wouldn't ordinarily be captured because there wouldn't be any loss of pay for the time that they would normally be not working during that period. However, I think that can be ameliorated by the time at which training is offered. It's only going to be in that area of shift work where that's really going to be a problem, and we would suggest that the union training which they are likely to be engaging in as a part of this right could simply be sought to be held at times when it would coincide with when they are working, or - - -

PN743

DEPUTY PRESIDENT BINET: I think the problem is that it doesn't coincide with the time that they are working that's a problem, is that normally it would be during the day and they normally work nights, so if they do the training during the day - - -

PN744

MS LAWRENCE: Yes.

PN745

DEPUTY PRESIDENT BINET: - - - under the company's policy they wouldn't be able to work at night because they would have fatigue issues.

PN746

MS LAWRENCE: Yes.

PN747

DEPUTY PRESIDENT BINET: So because they have attended the training, there is a loss of work.

PN748

MS LAWRENCE: Yes.

PN749

DEPUTY PRESIDENT BINET: Solely because of the training.

PN750

MS LAWRENCE: I think we are saying the solution is simply to change when the training is held if they wish to get paid during that period, rather than - - -

PN751

DEPUTY PRESIDENT BINET: Training at night?

PN752

MS LAWRENCE: Yes, rather than simply say that an employer has to then pay again for somebody not being present.

PN753

Just to the point on travel and accommodation, we say in relation to accommodation that it's pretty clear that that wouldn't be paid time, so it wouldn't be captured in anything. With respect to travel time, we say the presumption should be against getting paid for travel time. This is because it would be somewhat remiss to interpret the scope of this clause without acknowledging that it is somewhat developed from terms in enterprise agreements with similar effect, and is something which the union parties have drawn out in this proceeding already and in their submissions. We say these clauses overwhelmingly do not allow payment for travel time to training.

PN754

To this end, it is also perhaps worth observing that this subclause is the only place where the legislature chose to use the term 'paid' in reference to the new workplace delegates' rights. They did not choose to use the term in relation to any of the other rights, namely, the right to represent industrial interests, to communicate and access facilities.

PN755

We do acknowledge that there may be some consequential amendments that should be made to existing award clauses, such as the dispute resolution training leave clauses, that may arise by virtue of any model term that might be implemented. However, we say such entitlements can be reconciled with a new right to be inserted into modern awards at the individual award level, and that could be dealt with through a contested hearing where there is time for evidence about the impacts to be put on and tested, so that all relevant parties are afforded procedural fairness regarding any departure from a model term.

PN756

Finally, I just want to touch upon the issue of the exclusion of small businesses from the obligation, given the ACTU model clause as well as some of the other proposals, namely, that of the ANMF and the CFMEU, in their submissions at paragraphs 13 and 23 accordingly, suggest that this exclusion should not extend to small business at the delegates' rights term in modern awards. We say such a proposition is entirely inappropriate and is not subject to any sort of proper justification or explanation.

PN757

The intention behind the exemption for small business, as is set out in the Explanatory Memorandum, is clear at paragraph 733. Small businesses have been exempt in order to alleviate the cost burden of the amendment on small business. Maintaining the exemption is consistent with the modern award objectives on the likely impact on business, employment costs and the performance and competitiveness of the national economy.

PN758

We say this is particularly pertinent in circumstances where ABS employee earnings and our data, along with ABS industry data, makes it clear that small businesses in this country not only employ the lion's share of Australian private sector employees, but they also account for over a third of award-covered employees.

PN759

That concludes my submissions.

PN760

VICE PRESIDENT ASBURY: Thank you. Any questions?

PN761

DEPUTY PRESIDENT BINET: No.

PN762

VICE PRESIDENT ASBURY: Thanks very much.

PN763

MS LAWRENCE: No worries. If I could seek leave of the Commission just to make one more comments just around your earlier query about the understanding of the term 'enterprise'?

PN764

VICE PRESIDENT ASBURY: Yes, of course.

PN765

MS LAWRENCE: In the hearing in earlier proceedings, we did give some minor thought to it. I would say not anything of significant substance.

PN766

VICE PRESIDENT ASBURY: Yes.

PN767

MS LAWRENCE: But we are not so troubled by the definition in section 12 of the Act in terms of the meaning of 'enterprise' because we think that the way that it will be ameliorated is in terms of the reasonableness that will exist in the execution of every right, with the sole exception of, obviously, the right to represent industrial interests. In most circumstances, even where there might be multiple businesses operating, we think that it is very clear that where you have separate enterprises operating simply, you know, in a shopping centre, in a food court, or an airport, it's very clear where that demarcation may be, and where there is no clear demarcation, our interpretation of the legislation was that there can be an unlimited number, effectively, of workplace delegates, but that their ability to exercise rights is limited by the reasonableness of it, and that that will solve the issue, rather than trying to actually address a different definition of 'enterprise'.

PN768

VICE PRESIDENT ASBURY: And having a formula or something along those lines?

PN769

MS LAWRENCE: Yes, we think that you just let nature take its course. It's going to be different in every workplace, every situation, and putting constraints around it will actually probably make things more difficult than simply allowing the reasonableness factor to apply in each circumstance.

PN770

VICE PRESIDENT ASBURY: Because if you can get X number per number of employees, that's how many you'll get, and you might have got a more efficient number if you'd let it takes it course, as you suggest?

PN771

MS LAWRENCE: Yes, and having the delegates themselves doesn't change anything in the workplace. It's actually them exercising their rights that makes the difference.

PN772

VICE PRESIDENT ASBURY: I understand.

PN773

MS LAWRENCE: Thank you, Vice President.

PN774

VICE PRESIDENT ASBURY: If you want to put anything in in writing once the AMWU puts theirs in, you can feel free. We will publish something that says those aligned with the proposal of yours put theirs in at the same time as you and then responses, if anyone who wants to respond. Thanks.

PN775

MS LAWRENCE: Thank you.

PN776

VICE PRESIDENT ASBURY: Ms Sostarko, were you wanting to make any submissions on behalf of the Master Builders?

PN777

MS SOSTARKO: Yes, thank you, Vice President. We are very grateful for the opportunity to address the Commission today. We will keep our comments brief, but our overall position is this, that Master Builders Australia's overall position is that we support the submissions of both ACCI and HIA and the key points advanced therein.

PN778

We submit that any delegates' rights provisions should be simple, clear and adopted as a standard term across all modern awards. Such terms should reflect the legislative obligations at section 350C and do so only to the extent that it is necessary to achieve the modern awards objective pursuant to section 134 of the Act.

PN779

Taking this approach would recognise and comprehend some of the key features of the building and construction industry, which is incredibly diverse in nature. For example, it may be useful for the Commission to note that, using ABS data as at 13 June 2023, the building and construction industry consisted of 444,319 businesses. Of these, some 438,132 businesses are small, which represents 98 per cent of the sector and around 17 per cent of small businesses across all sectors. The industry is a significant employer with over 1.35 million people directly employed, of which some 85 per cent are full-time positions.

PN780

The work in our sector is diverse, covering everything from large civil projects to residential renovations, large commercial projects through to new homes, and occurs right throughout all areas of the country. Given the nature of the work that's undertaken, no two construction sites are the same, and each job or project will always be different and unique.

PN781

If I could just go to, briefly, the CFMEU submissions and those made dated 1 March 2024. Master Builders maintains an interest in several construction awards, and we note that the CFMEU's submission at appendix A contains a draft union delegates' rights clause. Master Builders opposes the CFMEU proposal and submits that there is no need for an industry-specific approach, nor would this be appropriate.

PN782

We adopt that position not only for the reasons already we have noted above, but for a range of additional reasons, some of which include that it appears to reflect provisions of pattern union agreements. These are likely to be used on large commercial or government projects, usually undertaken in large metropolitan areas. This is not appropriate for modern awards as a safety net, nor would it be capable of application in the diverse range of workplaces in the sector as I have just described.

PN783

I also note that not every agreement made in the sector has the CFMEU as a party, and the overwhelming majority of businesses in this sector operate under the award.

PN784

Finally, it is also unnecessarily prescriptive, that is the CFMEU's proposed term, lengthy, and it's inconsistent with the objects of the Act.

PN785

These are only two reasons for our position; however, I will leave our submission there and I am happy to assist the Commission further with any questions it may have. Thank you. If it pleases the Commission.

PN786

VICE PRESIDENT ASBURY: Thanks, Ms Sostarko. I think it might be useful to get the views of your organisation on that enterprise question.

PN787

MS SOSTARKO: I suspected, Vice President, that I would be asked that question, so we have given some thought to it.

PN788

VICE PRESIDENT ASBURY: Yes.

PN789

MS SOSTARKO: Noting Ms Lawrence's comments about the reasonableness that would be applied, or that they would anticipate would be applied, we do think that - it is our view that we wouldn't encourage any deviation from the existing approach in terms of the current definition. However, it is worth noting that that industry definition could be problematic for our sector, and I will explain why I say that.

PN790

Our sector, as the Commission would no doubt be aware, is, in its nature, project-based, so it's underpinned by specialist subcontractors, who are on site to perform specific construction work during specific phases of building.

PN791

If I can give an example from a residential construction perspective, a residential builder may have dozens of individual sites underway at any point in time, not always operating at the same time, and each of those individual sites may involve the use of 20 plus specialist subcontractors, so you will have roofers, concreters, fencers - we all understand what would be involved - and this would be over the life of the project. Each of those specialist subcontractors are often employers in their own right and are subject to a large range of other modern awards or instruments.

PN792

We don't necessarily have a solution to address this at this point, given that we have been asked this question reasonably without notice, but what we would say is there would be a need to avoid an unreasonable outcome of creating multiple

layers of burden, especially for those small businesses, which dominate the sector, which we have just explained, and who are also likely to be specialist subcontractors and employers in their own right.

PN793

Essentially, Vice President, that's a long-winded answer in saying that it is our view that those subcontracting arrangements would be deemed to be enterprise in their own right, and there could certainly be layers of burden that would come with that if that's the way it's interpreted in the application in this sense.

PN794

VICE PRESIDENT ASBURY: What is your view about the CFMEU Construction Division's submission about the current award provision in the building and construction industry award?

PN795

MS SOSTARKO: Are you referencing clause 39.10, Vice President? Which section - - -

PN796

VICE PRESIDENT ASBURY: I'm sorry, I haven't got a copy of the award in front of me. There was a reference in the CFMEU Construction Division's submission, and they spoke about it today, in relation to the existing award clause.

PN797

MS SOSTARKO: Yes. I think that's right. I stand to be corrected if my understanding is not quite right, but I think that Mr Maxwell was referring to clause 39.10 - - -

PN798

VICE PRESIDENT ASBURY: Yes.

PN799

MS SOSTARKO: - - - which talks about dispute resolution procedures around training leave. Now, that provision, being in 10(b), states that an eligible employee representative will be entitled to up to five days' paid leave per year to undertake training that will assist them in a settlement of disputes role. Now 39.10(a) talks about an ineligible employee representative being an employee who is a shop steward, a delegate or an employee representative duly elected or appointed by the employees in an enterprise.

PN800

I guess the point we would say is that, yes, the award provides for five days' paid training. However, it is more broad in its application as to who the award is contemplating would be the beneficiary of that. So it wouldn't necessarily be confined to union delegates per se.

PN801

VICE PRESIDENT ASBURY: Okay.

PN802

MS SOSTARKO: So the nature of your question, Vice President, is - - -

PN803

VICE PRESIDENT ASBURY: What would your view be about the effect of that clause if there was the workplace delegates' rights clause included in the award as well? Would it supplant that clause, would it operate in conjunction with that clause? How would it work?

PN804

MS SOSTARKO: On its face, we would say that the prescriptive nature of the CFMEU's proposal would cause some inconsistencies with the existing provision. I think that we would want to take on notice that question about how that should be dealt with, but noting my earlier comments that that the existing provision is quite broad in its existing application, whereas the delegates' rights term that the union is proposing is obviously confined to union delegates. So there could be some issues around that.

PN805

I certainly did note Mr Maxwell's comments earlier today with respect to inconsistencies with the Act. Now this goes to this question, I think, that you raised around the Act requiring there to be, for want of a better word, a small business carve-out, and if I recall correctly, Mr Maxwell's response was, 'Well, there is some precedent for that under the awards.' Now, we certainly wouldn't be aware of any provisions that that would be the case.

PN806

VICE PRESIDENT ASBURY: All right. Thank you for that.

PN807

Thank you, all, for your submissions. On that basis, we will adjourn. Good afternoon.

ADJOURNED UNTIL FRIDAY, 12 APRIL 2024 [3.22 PM]