

Variation of modern awards to include a delegates' rights term

(AM2024/6)

1. This submission is made by the Coal Mining Industry Employer Group (**CMIEG**) in response to the Commission's statement of 16 April 2024.

The question

2. The CMIEG notes that the Commission wishes parties to address the interaction of the phrase "particular enterprise" within s. 350C of the Act, the definition of "enterprise" within s. 12 of the Act and the situation where a number of different employers may be present working at a particular site or work location which might be considered an "enterprise" under the Act.
3. The CMIEG notes that such a circumstance may be the case at some black coal mines but that it is by no means particular to the black coal mining industry or unusual for such a situation to occur. Examples of other situations where this may occur include:
 - a. Any location where work is done by employees of a labour hire firm
 - b. Any location where work is done by a contracting organisation (for instance a maintenance contractor)
 - c. Locations where a number of different companies or organisations may share a common work location e.g. major hospital, building site, shopping centre etc

Ordinary meaning of the words

4. The CMIEG submits that the ordinary and normal meaning of the word "delegate" is a person elected by their fellow employees to represent them.
5. The CMIEG notes that while the Act generally refers to "enterprise" that s. 350C refers to "particular enterprise".
6. The CMIEG submits that the qualifying word "particular" in this instance should be given its normal meaning of "used to single out an individual member of a specified group or class".
7. The CMIEG submits that it is available to the Commission, when determining the content of the delegates' rights clauses that should be inserted in Modern

Awards, to adopt a more precise or confined meaning for the phrase “particular enterprise” to apply in reference to s. 350C than is contained in s. 12 of the Act when defining the word “enterprise”.

8. The CMIEG submits that an available and ordinary usage of “particular enterprise” in reference to s. 350C, is the enterprise of a particular employer carried out at a particular location.
9. Furthermore, taking into account the normal usage of the associated word “delegate” that this is a preferred usage,

Preferred meaning of “particular enterprise”

10. The CMIEG submits that when considering this issue that the Commission should bear in mind previous submissions made by employer groups that delegates are and remain employees. The role of the delegate is to represent a group of their fellow employees, it is different to the role of an elected or appointed union official.
11. We submit that this distinction is instructive when considering the question posed. It is the role of union officials to be a general representative of the union at a broad location or area, whereas delegates are employees who represent their fellow employees.
12. The CMIEG submits that the phrase “particular enterprise” in s. 350C is most practically and sensibly used to mean a group of employees employed by the same employer at a geographically or operationally distinct location.
13. Such a meaning ensures that delegates for a “particular enterprise” would be chosen by their fellow employees and would be entitled to “delegates’ rights” while they are representing their fellow employees. We submit that this is the properly construed intent of the legislation.

Practical considerations

14. If the Commission does not adopt accept this submission then it might under some alternative definition be possible for an employee of one company to be recognised as the delegate able to represent employees of another company, and to receive the benefits of s. 350C while doing so.
15. In this circumstance a number of complicating matters arise which we respectfully say must be capable of sensible resolution if the Commission is not to follow our primary submission.
16. The process by which a delegate is appointed or elected.

- a. The CMIEG submits that It would be a remarkable and inappropriate outcome if a group of employees “who work in a particular enterprise” were not directly involved in the process which selects the delegate who is recognised by s. 350C as being able to represent them.
- b. So, for instance, if an employee of Company B is to be recognised for the purposes of s. 350C as the delegate for employees of Company A, then we submit that employees of Company A must be able to equally participate in the process which lead to the appointment of that delegate.
- c. As a matter of practicality we submit that might be accomplished by an election process which involved employees of a number of different employers all voting together to select one delegate, or it might simply be an election process at which a group of employees selects an employee of another company as their delegate. However, it should not be an imposed appointment in which the employees have little or no say.
- d. The CMIEG notes that we do not seek to interfere with union rules regarding the appointment or election of delegates generally, but simply with the circumstances under which a person is entitled to be considered a delegate for the purposes of s. 350C.

17. Which delegates’ rights provision applies?

- a. If a person can be the delegate for the employees of an employer other than their own, then it is possible that a different Modern Award or Enterprise Bargaining Agreement might apply to the delegate and the employees they represent. These Awards or Agreements may contain differing delegates’ rights provisions.
- b. The CMIEG submits that the Commission should clarify in such a circumstance whether the rights applying under the industrial instrument which covers the employment of the delegate, or the rights applying under the instrument which covers the rights of the employees being represented, applies to the delegate while performing that task.
- c. Depending on answer to the question above, and the particular content of an Award or Agreement delegates’ rights clause, we also see some difficulty arising if a delegate is not employed by the same employer as the employees being represented. For instance, if the industrial instrument applying to the employees being represented provides some rights or benefit to a defined delegate, is the delegate entitled to that benefit and if so who should provide it? The reverse is equally problematic – could an employer be bound by the terms of an industrial

instrument applying to another employer which for instance prescribes particular rights for delegates, simply because the delegate representing their employees is covered by it?

18. Ability to represent employees of another employer during working time

- a. The CMIEG submits that it should be made abundantly clear that a delegate has no right pursuant to a Modern Award delegates' rights clause to absent themselves from work and/or expect payment for any time spent representing persons employed by an employer other than their own.