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IN THE FAIR WORK COMMISSION

Fair Work Act 2009 cl.95, Schedule 1– FWC to vary certain modern awards

Matter no: (AM2024/6)

Party: “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Union (AMWU)

VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES’ RIGHTS TERM (AM2024/6)

Introduction

1. We refer to the Fair Work Commission’s (FWC) process to vary modern awards to include a delegates’ rights term (AM2024/6), and to its Statement of the 16 April 2024 inviting comments from interested parties on the following questions at para 5:
 - I. In a workplace where the workforce is comprised of employees of different employers. Including employees of labour hire providers, how does the definition of an enterprise in s.12 interact with the provisions in s.350C?
 - II. How does the meaning of an “enterprise” in s.12 interact with the rights of a workplace delegate in ss. 350C(2), 350C(3)(b)(i) and 350(3)(b)(ii)?”

2. On those questions the AMWU makes the following submissions:

Question 1

3. The AMWU believes that the definition of “enterprise” for the purposes of the Modern Award should remain as adaptable to the relevant workplace as the definition of “enterprise” in the Act. The nature of workplaces ranges from ones where the same entity employs all workers and controls the site, to others where the entity that controls the site does not employ any workers at all. The rights of a workplace delegate has to apply in all these situations.
4. In the AMWU’s view, the requirements of a PCBU under Work, Health and Safety legislation provides a relevant analogy as to how the term “enterprise” can be applied flexibly where necessary in order to ensure that Workplace Delegates, and the workers they are entitled to represent, maintain the benefits envisaged in the Act.

The concept of PCBU

5. As the Commission is aware, the primary duty under Work, Health and Safety legislation are owed by the Person Conducting a Business or Undertaking (“PCBU”). That person owes the primary duty of care to:
 - a. workers engaged or caused to be engaged by the person; and
 - b. workers whose activities at work are influenced or directed by the person while the workers are at work in the business or undertaking.¹ (emphasis added).
6. This dual concept of owing a primary duty of care to both workers that are engaged by the PCBU and workers influenced and controlled by the PCBU recognises that a workplace may contain both employees of the PCBU and other workers. While ever the worker is at work in the business or undertaking, the PCBU owes that primary duty to them, regardless of any direct contractual relationship.
7. Similarly, the primary duty of care is not negated if an employee does not work at the same workplace as their employer. For example, the “business or undertaking” of a labour hire company is the supply of labour to other employers. A worker at a labour hire company is likely to perform work at premises controlled by another company. However, that worker is “at work” in the business or undertaking of the labour hire company regardless of wherever

¹ *Work, Health and Safety Act* (NSW) 2011 section 19. The model law as applied in most states carries this definition. In Victoria, which has not implemented the model law, the definition is: “An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health..... the duties of an employer under those subsections extend to an independent contractor engaged by the employer, and any employees of the independent contractor, in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control.” *Occupational Health and Safety Act* 2004 section 21

they are working. Their employer retains the primary duty of care for that worker, even if it is at a site that the labour hire company does not otherwise run or control.

“Enterprise” vs “Employer”

8. The definition of “Workplace Delegate” as set out in section 350C is set out in such a way that allows for a Delegate to represent workers who are not solely employed by a singular employer, but in a “business, activity, project or undertaking”.² As such it can recognise the flexibility that is required for different workplaces, particularly those that may involve numerous employers (such as contractors and/or labour hire companies), but where there is a commonality of issues built around the workplace.
9. The rights of the Workplace Delegates are framed as their ability to represent the industrial interests of their union’s members, and those who are eligible to be members of their union at an enterprise³ and to be able to communicate with those members (and eligible employees) in relation to those interests.⁴ This is broader than solely the interests that may be relevant only to the delegate’s or their members’ direct employer.
10. This is particularly relevant where one company controls the business activities undertaken at a particular site. There is likely to be a commonality of industrial interests between workers on site, whether they are employed by the entity who controls the site or other entities. An obvious example of this is the nature and quality of the amenities provided on the site, but this could also extend to conditions such as when and how work is performed – encompassing rostering, hours of work and breaks.
11. In addition, it is a corporate reality that a company that controls a site may not be the employer of any workers on that site. Companies can and do use related entities to employ workers, as well as using contractors and labour hire to provide the workers needed to perform the business, activity, project or undertaking that the company may be engaged in at a particular site. For example, joint ventures in projects may run a site, however workers are engaged by individual partners within the joint venture, or contractors or labour hire firms.⁵
12. In these scenarios it makes sense for there to be flexibility in the use of the term “enterprise” rather than relying solely on the term “employer”. The right of the Workplace Delegate is to

² Section 12 of the *Fair Work Act 2009*

³ Section 350C (2)

⁴ Section 350C(3)(a)

⁵ Work being performed by the “Future Generation JV” for the Snowy 2.0 project is a case in point re *Application by SC Hydro* [2021] FWC 5110 at [14]

- be able to represent and communicate with members of their union within the enterprise.
There is no restriction in the Act to only those who share the same employer.
13. These industrial interests are similar to the work, health and safety interests of all workers at a workplace, regardless of who is the actual employer of those workers. In these scenarios, the PCBU is the person “controlling” the enterprise as well as every employer of a worker at that enterprise also being a “PCBU”.
 14. Putting it bluntly, an employer’s statutory duty concerning work, health and safety is not abrogated if the worker is not on their site. Further, the controller of a workplace is not absolved from any duties owed to workers that it does not employ. As such, there should not be a limitation in how the rights of a workplace delegate to be provided with facilities that enable them to carry out their duties are not the responsibility of both their direct employer and/or the controller of the workplace.
 15. In any event, employers of workers covered by Modern Awards must abide by the terms of the Modern Award regardless of whether those employees are engaged in work that they directly control, or if they are engaged in work at other sites. Employers of labour hire workers must abide by the terms of the Award in relation to rostering and related pay rates, even when they have no control over the rostering conditions at a client’s site. This dual responsibility should not necessarily be an issue for the Commission to prevent them from drafting a clause that both the controlling entity of the enterprise and the actual employer have an obligation to provide.

Question 2

16. Following from the above, the AMWU argues that when considering the wording in sections 350C(2), 350C(3)(b)(i) and 350(3)(b)(ii) of the FW Act the interpretation of “enterprise” we propose is the logical one.
17. Notably, section 350C(2) explicitly states that a workplace delegate is entitled to represent the industrial interests “of those members, and any other persons eligible to be such a members, include in disputes with their employer”⁶, emphasizing the delegate’s role across the broader “enterprise” rather than being restricted to a single employer.

⁶ Section 350C(2) Fair Work Act 2009

18. Furthermore, section 350C(3)(b)(i) enhances this by entitling delegates to “reasonable access to the workplace and workplace facilities where the enterprise has been carried on”⁷, which distinctly uses the term “enterprise” rather than limiting the right to the delegate’s direct employer.
19. In the context of section 350C(3)(b)(ii) which read “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”⁸, the provision clearly delineates the responsibilities of the employer with respect to training. The section specifically uses the word “employer” rather than enterprise. We argue, therefore, that this section attaches the specific obligation to provide paid leave for related training to the employer of the delegate. The obligation to provide training exists in respect of the training related to representing the industrial interests of persons who are members of the organization who work in a particular enterprise, and another other persons eligible to be such members.

Conclusion

20. In conclusion, the interpretation of the FW Act’s provisions concerning workplace delegates and their interaction with the concept of “enterprise” holds significant implications for the representation and protection of workers across diverse employment settings.
21. The AMWU interpretation of “enterprise” recognizes the complexity of the modern work environment and ensures workplace delegates can effectively advocate for and represent all eligible employees within the enterprise.
22. There are examples that already exist in both the application of modern awards and in work, health and safety legislation where obligations are placed on both the controller of an enterprise and a direct employer (if they are not the same entity) in relation to individual workers. Any problem concerning the interaction between “enterprise” and “employer” can be overcome by having regard to the “reasonableness” that is already built into the Act.
23. It is essential that the FWC recognizes and upholds this interpretation to foster fair and effective workplace relations that align with the evolving dynamics of modern workplaces.

National Research Centre

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⁷ 350C(3)(b)(i) Fair Work Act 2009

⁸ 350C(3)(b)(ii) Fair Work Act 2009