

IN THE FAIR WORK COMMISSION

Fair Work Act 2009 (cl.95, Schedule 1)

Matter Number: AM2024/6

Matter: Variation of modern awards to include a delegates' rights term

Mining and Energy Union's response to the 16 April 2024 Statement

1. In its Statement of 16 April 2024,¹ the Full Bench invited interested parties to comment on the following matters:
 - a. 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?
 - b. 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 350C(3)(b)(ii)?
2. The Mining and Energy Union (**MEU**) has had the benefit of reviewing the ACTU's intended response to the above questions. The MEU supports the ACTU's response. Additionally, the MEU makes the following submissions concerning the above questions.

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?

3. The *Fair Work Act 2009 (Cth)* (**FW Act**) defines *enterprise* as a business, activity, project or undertaking.² Unless the context of the definition indicates otherwise, the definition of *enterprise* would give effect to the disjunctive 'or'.³ No such context is discernible with respect to s.12 of the FW Act. Thus, enterprise is understood to be a business or, activity or, project or undertaking.
4. When a term is defined by an act, it should be presumed that the term is used as defined. Another meaning will only be assigned to the term if a contrary intention is apparent in the context in which it is used.⁴
5. In our respectful submission, there is nothing in s. 350C, which indicates that *enterprise* would be given any meaning other than the one outlined above. On the contrary, the legislature would be taken to have intended the section to operate flexibly to accommodate the multitude of organisational structures prevalent in the Australian economy.

¹ [2024] FWCFB 212

² FW Act, s.12.

³ See *Pileggi v Australian Sports Drug Agency* [2004] FCA 955, at [36]-[37] (Kenny J);

⁴ DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 318 as accepted by Campbell J in *Official Trustee in Bankruptcy v Buffier* [2005] NSWSC 839 at [30].

6. In our respectful submission, for the purpose of any delegates' rights clause, the Commission would define *enterprise* exactly as it appears in s. 12 of the FW Act. It is a matter for the relevant registered organisation to determine with respect to what enterprise a delegate is to be elected or appointed. For example, members of the MEU form lodges (a lodge is essentially a local grouping of members) and elect delegates at each mine where the MEU has a presence. These individuals are workplace delegates with respect to the mine at which they work. In other words, the mine is the enterprise for the purposes of s. 350C of the FW Act. Thus, the workplace delegates can represent the interests of members and potential members at the mine regardless of their employer. However, they are not able to represent individuals who do not work at the mine.
7. Equally, it is open to the MEU to form a lodge and elect delegates for members who work for a specific employer, for example, OS MCAP Pty Ltd (**BHP OS**). For context, BHP OS is a labour-hire company that provides labour to several mines in Queensland. In this example, BHP OS is the enterprise for the purpose of s. 350C of the FW Act, and the delegates are able to represent employees of BHP OS regardless of the mine at which they work. However, they are not able to represent employees of other employers that may work at the same mine.

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 350C(3)(b)(ii)

Section 350C(2) - The workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer.

8. The phrase ‘*those members*’ in s. 350C(2) of the FW Act refers to the members for whom the delegate has been appointed or elected to represent as required by 350C(1). Thus, the capacity of a workplace delegate to represent members and potential members is confined to the representation of members and potential members who work in the enterprise for which they are the workplace delegate. See [6] – [7] above for illustrative examples.

Section 350C(3)(b)(i) - The workplace delegate is entitled to, for the purpose of representing those interests, reasonable access to the workplace and workplace facilities where the enterprise is being carried on

9. Enterprise as it appears in s. 350C(3)(b)(i) of the FW Act is to be understood as the enterprise with respect to which the delegate has been appointed or elected as required by s. 350C(1). Thus, the workplace delegate will have reasonable access to the workplace and workplace facilities at any location where that enterprise is being carried on. If the enterprise is a mine, then the workplace delegate would have reasonable access to the mine and workplace facilities at the mine.

Section 350C(3)(b)(ii) - The workplace delegate is entitled to, for the purpose of representing those interests, 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

10. The definition of enterprise has no impact on the right to access paid time during normal working hours, for the purpose of related training. The employer of the delegate is to pay the delegate while they access paid time for the purpose of training related to their duties as a delegate.
11. Further to the above question, during the proceedings on 10-12 April 2024, the Commission asked several parties whether reasonable access to paid time, during normal working hours, for the purposes of related training allowed shift workers to miss a shift proximate to but not at the same time as the training.
12. The MEU respectfully submits that the right to access paid time allows shift workers to miss a shift proximate to but not at the same time as the training. For example, a delegate who normally works the night shift would be excused from attending their shift in circumstances where they have attended training on the day preceding their shift. In this regard, we note that s. 350C(3)(b)(ii) of the FW Act states that the time off is to be during *normal working hours* but does not state that the training is to occur during these hours. Rather, the term is couched permissively, and the time off needs only to be for the purpose of the training.
13. If training must strictly occur at the time the delegate is excused from performing duties, then a delegate who works night shift would not benefit from the right as it is highly unlikely that training relevant to the delegate's role would be offered outside regular business hours. We respectfully submit that if the legislature had intended this result, they would not have used the permissive phrase *'for the purpose of'* in section s. 350C(3)(b)(ii) of the FW Act.

Jack Patrick

Mining and Energy Union

17 April 2024