

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

19 APRIL 2024

**BUSINESS
NSW**

 **AUSTRALIAN
BUSINESS
INDUSTRIAL**

NSW BUSINESS CHAMBER AND AUSTRALIAN BUSINESS INDUSTRIAL

1. This reply submission is in response to the Commission's statement of 16 April 2024 regarding the interaction between the meaning of an "enterprise" in section 12 of the Fair Work Act 2009 (FW Act) and the meaning of "workplace delegate" in section 350C(1) of the FW Act.¹ It should be read in conjunction with BNSW and ABI's initial submission made on 17 April 2024.

Meaning of the word "enterprise"

2. Consistent with the submissions from all interested parties on this specific issue save for the Coal Mining Industry Employer Group, we reiterate that the word 'enterprise' in section 350C of the FW Act should be interpreted by the Fair Work Commission in accordance with the definition of the word "enterprise" in section 12 of the FW Act.

'Particular' enterprise

3. The use of the term 'particular' in section 350C(1) does not displace the meaning of the word 'enterprise', which is defined in section 12. Just as the words "genuine" and "new" similarly do not displace the meaning of "enterprise" in sections 172(2) and 172(3).²
4. Rather the context provided by section 350C(1) is that the use of the adjective "particular" is applied to an 'enterprise' that a person is appointed or elected to be a delegate or representative of.
5. In such a context, the term 'particular' should be given its clear, unambiguous, and ordinary meaning.³
6. It therefore stands, that a "particular" enterprise must be an enterprise "relating to some one person, thing, group class, occasion, etc., rather than to others or all".⁴
7. That is, a delegate cannot be a delegate or representative of an unspecified, unspecific, or general enterprise. A workplace delegate must have been appointed or elected to a specific "enterprise" being a specific "business, activity, project or undertaking" in order to be a workplace delegate for the purposes of section 350C of the FW Act.
8. Practically speaking, this means a workplace delegate cannot be appointed or elected a workplace delegate and be entitled to workplace delegates right for multiple enterprises in the workplace.

¹ 2024 FWCFB 212.

² *Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd* (No 2) [2022] FCAFC 5 at [4]-[5] per Bromberg J; [63]-[76] per Snaden J.

³ *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 at [39].

⁴ Macquarie Dictionary, Pac MacMillan Australia 2024

Interaction between the meaning of “enterprise” in section 12 and the rights of workplace delegates in section 350C

9. Whilst workplace delegates are entitled to be elected or appointed to represent members in a particular enterprise, any accompanying rights of a workplace delegates which arise by virtue of the operation of section 350C are not unfettered.
10. Firstly, contrary to some of the assertions made by unions in their submissions:
 - (a) a workplace delegate is only entitled to represent the industrial interests of those members and other persons eligible to be members in a particular enterprise; and
 - (b) many employees who may be entitled to representation will not seek the assistance of a workplace delegate and certainly have the right to choose to seek it or not.
11. In addition, just because a workplace delegate might be elected or appointed to represent workers in a particular enterprise, does not displace the duty of a workplace delegate to follow all reasonable and lawful directions of their employer whilst working at the enterprise to perform their normal work as an employee.
12. Secondly, just because a workplace delegate might be entitled to represent members on a site which might for example include multiple employers and labour hire workers, does not automatically mean that the workplace delegate is entitled to communicate with all members on site and access all workplace facilities.
13. As a workplace delegates right to communicate and access to the workplace and workplace facilities must be “reasonable” as enshrined in the legislation by section 350C(3).

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