IN THE FAIR WORK COMMISSION

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

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

SUPPLEMENTARY SUBMISSION OF THE CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION (CONSTRUCTION & GENERAL DIVISION)

17th April 2024

Construction, Forestry and Maritime Employees Union (Construction and General Division) ABN 46 243 168 565	**Contact Person:** Stuart Maxwell, Senior National Industrial Officer	**Address for Service:** Level 1, 1 Miller Lane Pyrmont NSW 2009	**T:** **E:**	(02) 8524 5800 smaxwell@cfmeu.org

Introduction

1. On the 16th April 2024 the Full Bench, established to determine variations to modern awards to include a delegates' rights term, issued a Statement ([2024] FWCFB 212) in which they noted that during the consultations they raised the interaction between the definition of an "enterprise" in s. 12 of the Fair Work Act 2009 (the Act) and the meaning of "workplace delegate" set out in s. 350C(1) of the Act.[1]

2. The Full Bench invited interested parties to comment on the following matters:

   (1) 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?

   (2) 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]

3. The Full Bench directed that any comments from interested parties be provided to the Chambers of Vice President Asbury by no later than 12.00pm on Wednesday 17th April 2024.[3]

4. This brief supplementary submission of the CFMEU (Construction and General Division) (the CFMEU C&G) is made in response to the invitation and in accordance with the directions of the Full Bench.

Interaction of the Definition of Enterprise with the Provisions of s.350C in Workplaces With Different Employers

5. The definition or meaning of "enterprise" in section 12 of the FW Act is as follows:

   enterprise means a business, activity, project or undertaking.

6. The meaning of "employer" is set out in each Part of the FW Act (see the definition of employee in s.12 of the FW Act). For the purposes of s.350C, which is found in Part 3-1 – General Protections, the meaning of "employer" is set out in s.335 which provides as follows:

   335 Meanings of "employee" and "employer"

   In this Part, **employee** and **employer** have their ordinary meanings

7. Section 15 of the FW Act deals with the ordinary meanings of employee and employer, which states the following:

   15 Ordinary meanings of *employee* and *employer*

   (1) A reference in this Act to an employee with its ordinary meaning:

   (a) includes a reference to a person who is usually such an employee; and

   (b) does not include a person on a vocational placement.

   Note: Subsections 30E(1) and 30P(1) extend the meaning of ***employee*** in relation to a referring State.

   (2) A reference in this Act to an employer with its ordinary meaning includes a reference to a person who is usually such an employer.

[1] 2024 FWCFB 212, at paragraph [2]
[2] Ibid., at paragraph [5]
[3] Ibid., at paragraph [6]

Note: Subsections 30E(2) and 30P(2) extend the meaning of ***employer*** in relation to a referring State.

8. The wording in s.350C refers in some parts to "the enterprise" (see s.350C(1), s.350C(3)(b)(i) and s.350C(5)(a) and (b)) and in other parts to "the employer" (see s.350C(2), s.350C(3)(b)(ii) and s.350C(5)(b)). There is nothing in s.350C or Part 3-1 of the FW Act that requires the use of different definitions to those of "enterprise" in s.12 of the FW Act and "employer" in s.335 and s.15.

9. Enterprise should therefore be given its full meaning. This would be consistent with the Full Bench in *Helensburgh Coal Pty Ltd v Neil Bartley and Ors* ([2021] FWCFB 2871), who said the following in considering the term "enterprise" in the context of unfair dismissals:

"Consideration

[45] "Enterprise" is defined in s.12 of the FW Act as follows:

enterprise means a business, activity, project or undertaking

[46] Section 389 of the FW Act uses the term "enterprise" in two contexts. Firstly, in s.389(1) in relation to the requirements of the enterprise and then s.389(2) of the FW Act in relation to redeployment. We agree that the meaning of "enterprise" should be consistent over both subsections.

[47] The Explanatory Memorandum to the Far Work Bill 2009 in relation to what is now s.389 of the FW Act states (underlining added):

> 1546. This clause sets out what will and will not constitute a genuine redundancy. If a dismissal is a genuine redundancy it will not be an unfair dismissal.
>
> 1547. Paragraph 389(1)(a) provides that a person's dismissal will be a case of genuine redundancy if his or her job was no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise. Enterprise is defined in clause 12 to mean a business, activity, project or undertaking. …
>
> 1549. It is intended that a dismissal will be a case of genuine redundancy even if the changes in the employer's operational requirements relate only to a part of the employer's enterprise, as this will still constitute a change to the employer's enterprise.
>
> 1551. Subclause 389(2) provides that a dismissal is not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within the employer's enterprise, or within the enterprise of an associated entity of the employer (as defined in clause 12)."

[48] That is, the meaning of "enterprise" as used in s.389 of the FW Act is given effect through the definition in s.12 of the FW Act. This suggests that no other limitation should be placed on the word "enterprise" than the meaning given to it in s.12.

[49] Further, and in particular given the Explanatory Memorandum, we do not consider there is anything to be gained in considering the term as used in the context of enterprise agreements made pursuant to Part 2-4 of the FW Act. Section 172 of the FW Act (in

Part 2-4) sets out the types of enterprise agreement that may be made and the scope of such agreement with the scope being limited by the employer and not by the definition of enterprise in s.12 of the FW Act. Section 172(2) of the FW Act states, for example that "An employer…may make an enterprise agreement". The enterprise does not make the enterprise agreement but rather the employer. There is no suggestion that an employer and an enterprise are necessarily synonymous. To seek to limit the term "enterprise" as used in s.389 of the FW Act (which is in Part 3-2) by a limitation on the scope of an enterprise agreement that is permitted by s.172(2) of the FW Act is therefore rejected.

[50] We would also observe that the consideration within s.389(2) is to whether there may be redeployment within "the employer's enterprise" or "the enterprise of an associated entity of the employer". The consideration is not to whether there may be redeployment by "the employer" or associated entity.""

10. It should also be noted that during the four yearly review of modern awards a Full Bench varied the Horticultural Award to include the following definition:

    1. By inserting the following definition of 'enterprise' in clause 3.1 in alphabetical order:

       Enterprise means a business, activity, project or undertaking, and includes:

       - An employer that is engaged with others in a joint venture or common enterprise; or
       - Employers that are related bodies corporate within the meaning of s.50 of the Corporations Act 2001 (Cth) or associated entities within the meaning of s.50AAA of the Corporations Act 2001 (Cth).'[4]

11. The CFMEU therefore submits that the word enterprise should be given the same meaning as provided in s.12 wherever it is mentioned in s.350C.

Interaction of the Meaning of an "enterprise" in s. 12 With the Rights of a Workplace Delegate in ss. 350C(2), 350C(3)(b)(i) and 350C(3)(b)(ii)

12. In the context of the building and construction industry, where the well-established practice on sites is to have a head contractor (which could be a joint venture) with its own employees on site, who then engages many contractors with their own employees (who perform specific tasks such as concreting, steelfixing, crane operations, formwork, scaffolding, tile laying, painting, plastering, etc) the meaning of enterprise is significant for the operation of the rights of workplace delegates to be included in a delegates' rights term in the applicable modern awards.

13. Under s.350C(1) a union could appoint or elect a workplace delegate for its members who work in a particular business, activity, project or undertaking, e.g. a union could appoint one delegate to cover all of its members who work on a project, and/or appoint or elect delegates for members employed by each business or employer engaged on the project. In practice this can occur and the division of responsibilities is usually where the site delegate (usually an employee of the head contractor) would represent members in site wide issues such as amenities on site, operating hours, etc, and a company delegate would represent members on

[4] PR599008

issues directly under the control of their employer. This is consistent with the right to represent the industrial interest of members under s.350C(2).

14. The right to communicate with members under s.350C(3)(a) would apply to both project or site delegates elected or appointed to represent members who work on a particular project or site, and to workplace delegates elected or appointed to represent members employed by their employer.

15. The right to reasonable access to the workplace and workplace facilities where the enterprise is being carried out under s.350C(3)(a) would apply to both project or site delegates elected or appointed to represent members who work on a project or site, and to workplace delegates elected or appointed to represent members employed by their employer. This does not necessarily mean that each delegate on a project would have their own area private lockable area and a suitable workplace location to conduct confidential discussions with table, chairs and a filing cabinet. In practice this is only provided to the site delegate by the head contractor. The workplace delegates representing members who work for their own employer would however be entitled to a telephone, iPad or similar electronic device, and access to stationery, etc., to be provided to them by their employer as set out in the CFMEU C&G's Union Delegate Facilities clause. This is consistent with what is reasonable under s.350C(a) and (c) which refer to the enterprise, and s.350C(5)(b) which refers to the employer.

16. As for the entitlement to paid time during normal working hours for the purposes of related training, under s.350C(b)(ii), this would only be provided by the employer of the workplace delegate.

17. In regard to s.350C(b)(ii), the CFMEU C&G was asked a question by Vice President Asbury during the consultation on 11th April 2024 as to whether this provision precluded the Commission including paid training leave for employees of a small business under an award. The CFMEU C&G would seek the indulgence of the Full Bench for the union to provide the following more considered response.

18. The CFMEU C&G submits that the exclusion in s.350C(b)(ii) would apply where there is no industrial instrument applying to the workplace delegate.

19. If a workplace delegate is covered by an industrial instrument however, s.350C(4) provides that "*The employer of the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate*."

20. As the CFMEU C&G noted in its oral submissions on 11th April 2024, Paragraph 829 of the Revised Explanatory Memorandum deals with the issue of the exemption for small business and states the following:

> *"829. Further, an exemption for small business employers would be provided by new subparagraph 350C(3)(b)(ii). Small business employers would be exempt from the obligation to provide workplace delegates paid time for the purpose of undertaking training for their role as a workplace delegate due to the amendments. This exemption would alleviate the cost burden of the amendments on small businesses.* ***Small businesses could still elect to provide workplace delegates with paid time for training, or may otherwise have obligations to do so, for example under an enterprise agreement.*** *For the purposes of this provision, small business has the meaning given by existing section 23 of the FW Act*." (Emphasis added)

21. This paragraph makes it clear that there is no blanket exemption for small business under the legislation and that small businesses may otherwise have obligations to do so, for example under an enterprise agreement. Accordingly, there is no legislative impediment for the commission to include a paid training leave provision for workplace delegates in an award that applies to all businesses, large and small, covered by an award.

22. The CFMEU submits that where an award already contains a provision providing for up to 5 days paid training leave for workplace delegates, which does not contain a small business exemption, as contained in clause 39.10 of the Building and Construction General On-site Award 2020, such entitlement should not be removed by a delegates' rights term which does contain such an exemption. This would result in the perverse outcome where a shop steward or delegate employed by a small business would not be entitled to dispute resolution training leave but other "employee representatives" would have an entitlement. We would further add that the existing entitlement is part of the modern award that is consistent with the modern awards objective.

23. The interpretation of the legislation as suggested by the CFMEU C&G is consistent with the approach that the AIRC Full Bench took when maintaining small business redundancy provisions in modern awards. In the Award Modernisation Decision ([2008] AIRCFB 1000, the Full Bench stated:

> **[60]** Seen in the context of the history we have set out, the terms of the NES indicate an intention to adopt the Commission's 1984 decision in relation to small business—that employees of employers of fewer than 15 employees should not be entitled to redundancy pay. We are obliged by the terms of the NES to observe the small business exemption. We therefore conclude that the draft provision would exclude a term of the NES contrary to the terms of s.30. We also find that it is not necessary to include the provision in modern awards generally to ensure the maintenance of the safety net. <u>As a general rule, therefore, the small business exemption will be maintained. We shall make an exception for federal awards and industries in which there was no small business exemption prior to the Redundancy Case 2004.</u> Among the priority modern awards the only award in this category is the Textile industry award. The terms of the Textile industry award will include the small business redundancy pay provisions previously in the Clothing Trades Award 1999.20 The provision will only apply to the clothing industry." (Underlining added)

24. The CFMEU C&G therefore submits that the provision in s.350C(b)(ii)) does not prevent the Commission from inserting a delegates' rights term in modern awards that provides for paid training leave for all workplace delegates covered by an award, including workplace delegates employed by small business.
