

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

17 APRIL 2024

**BUSINESS  
NSW**

 **AUSTRALIAN  
BUSINESS  
INDUSTRIAL**

## **NSW BUSINESS CHAMBER AND AUSTRALIAN BUSINESS INDUSTRIAL**

The New South Wales Business Chamber Ltd (**BNSW**) is New South Wales' peak business organisation with nearly 100,000 members, spanning most industry sectors and sizes. BNSW is a registered state industrial organisation under the *Industrial Relations Act 1996 (NSW)*, as well as federally registered under the *Fair Work (Registered Organisations) Act 2009 (Cth)*.

Australia Business Industrial (**ABI**) is the industrial relations affiliate of BNSW. ABI is federally registered under the *Fair Work (Registered Organisations) Act 2009 (Cth)* and engages in policy advocacy on behalf of its membership as well as engaging in industrial advocacy in State tribunals and the Federal tribunal

1. This submission is made in response to the statement issued by the Full Bench of the Fair Work Commission (Commission) on 16 April 2024 providing interested parties with an opportunity to comments 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)?

*The use of the term “enterprise”*

2. When the legislature introduced the new section 350C provisions into the Fair Work Act (FW Act) through the passing of the Fair Work Amendment (Closing Loopholes) Bill 2023 they were aware that the FW Act already defined the term “enterprise” in section 12 of the FW Act.
3. With this knowledge, the legislature nonetheless determined to use the term “enterprise” in section 350C without prescribing it a new or different meaning in section 350C to that already contained in the FW Act.
4. As the High Court has previously made clear, the canon of statutory interpretation requires that a consistent meaning be given to a particular term wherever it appears in a suite a statutory provisions.<sup>1</sup>
5. It should therefore be presumed by the Commission that the legislature intended for the term ‘enterprise’ in section 350C to have the same meaning as that which arises by virtue of its definition in section 12 of the FW Act.
6. Such a conclusion is further supported by the lack of any evidence to the contrary supporting an alternative interpretation, there is no alternative definition in section 350C and nothing to suggest an alternative approach in the amended explanatory memorandum to the Fair Work Amendment (Closing the loopholes) Bill 2023.<sup>2</sup>
7. Accordingly in the settled principles of statutory interpretation compel the Commission to accept the statutory definition already assigned to the term “enterprise” in section 12 of the FW Act, to do otherwise would be an error in law.
8. As such “enterprise” should be interpreted as referring to ‘a business, activity, project or undertaking’ as defined in section 12 of the FW Act.

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<sup>1</sup> *Tabcorp Holdings Limited v Victoria* (2016) 328 ALR 375 at [65];

<sup>2</sup> *IMM v The Queen* [2016] HCA at [143].

### Meaning of the term “enterprise”

9. As set out above, the meaning of the term ‘enterprise’ as it appears in section 350C(1) should be construed according to the meaning already afforded to the term in section 12 of the FW Act.
10. This definition is an exhaustive one that does not require the Commission to consider the ordinary meaning of the term ‘enterprise’.
11. In considering this, it is also worth noting the familiarity of the term “enterprise” in many other sections of the FW Act, including most notably in sections 172(2) and 172(3) which deal with the new for a ‘genuine new enterprise’ in the context of greenfield agreement approval.
12. In interpreting the word ‘enterprise’, the Full Federal Court in *Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd* (No 2) [2022] FCAFC 5 held that the term is to be defined in accordance with its definition in section 12 of the FW Act.<sup>3</sup>
13. The likelihood of this being a live issue is limited as any such contest will likely only arise in the context of reasonableness which will be factually contextual within the proper meaning of the definition. The practical likelihood of such a contest is also low given the low level of union membership in Australia and that unionised workplaces more likely than not deal with these issues already by convention or through enterprise agreement provisions.

### “Enterprise” in section 350C

14. A workplace where the workforce is comprised of some employees who work for different employers is by no means an unusual one. It is not a circumstance that warrants a deviation from or alternative meaning from the definition of ‘enterprise’ in section 12.
15. Just as the converse should also be true, for workplaces that may have multiple delegates, potentially from multiple different unions present in a particular enterprise.
16. No matter the context, there is no need for the Commission to explain or qualify the term ‘enterprise’ beyond its statutory definition, as its relevance and limitations will be enlivened by what is ‘reasonable’ at the time in the enterprise concerned.
17. What is ‘reasonable’ in the context of the rights afforded to delegates in the workplace will by its very nature differ and be context specific, accordingly to the practical reality of the circumstances.

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<sup>3</sup> At [4]-[5] per Bromberg J; [63]-[76] per Snaden J.

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