



ACTU Reply Submission - Delegates' Rights

Further reply in response to FWC Statement of 16 April 2024.

ACTU Submission, 17 April 2024
ACTU D. No 27/2024

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Submission

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 16 April 2024 inviting comments from interested parties on two questions. On those questions the ACTU makes the following submissions.

Question 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. "Enterprise" is defined in broad terms in the *Fair Work Act 2009* (FW Act) at s.12 as "a business, activity, project or undertaking".
3. As the term relates to "employers", the ACTU submits that "enterprise" can include:
 - (a) Workplaces or worksites which involve multiple employers, such as infrastructure joint ventures¹;
 - (b) A single business, and
 - (c) Part of a single business, e.g. a particular worksite of an employer (for example "the Melbourne office").²
4. While the definition of "enterprise" encompasses the pre-FW Act concept of enterprise agreements relating to a single business or part of a business³, the term is broader than just its application to such agreements.
5. The notion of a "single enterprise" remains in the FW Act in the provisions regulating the making and coverage of modern enterprise awards. These provisions relevantly provide, for non-public sector entities, as follows:
 - (3) A **single enterprise** is:
 - (a) a business, project or undertaking that is carried on by an employer; or

¹ For example [2023] FWCA 3071, AG2023/2848 at clause 3

² See also FW Act section 168A(6)

³ See the commentary in *Creighton and Stewart's Labour Law* (6th Edition), Federation Press at 14.21.

- (4) For the purposes of subsection (3), if 2 or more employers carry on a business, project or undertaking as a joint venture or common enterprise, the employers are taken to be one employer.
 - (5) For the purposes of subsection (3), if 2 or more related bodies corporate each carry on a single enterprise:
 - (a) the bodies corporate are taken to be one employer; and
 - (b) the single enterprises are taken to be one single enterprise.
 6. The legacy notion of a single enterprise has largely been replicated in the amended provisions of section 172(5A) concerning “related” employers, save for the inclusion of franchising arrangements in the latter.
 7. The statutory provisions envisage not only that an enterprise may involve more than one employer, but also that an employer may be engaged in more than one enterprise.⁴
 8. The word “enterprise” appears in subsection s.350C(1), “meaning of workplace delegate”, as follows:

“A workplace delegate is a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisations who work in **a particular enterprise.**”
 9. Further, a workplace delegate (at s.350C(2)) 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.”
 10. Reading these provisions together, the ACTU submits that the use of phrase “particular enterprise” in s.350C(1), in combination with s.350C(2), makes clear that a delegate can represent the industrial interests of members, or any other person eligible to be a member, beyond the particular employer that employs the delegate, to relevant persons on a particular worksite or in a particular workplace. This would include the industrial interests of labour hire workers who were engaged to perform work in the enterprise.
 11. Read in this context, the use of the word “enterprise” in the context of s.350C practically supports the realisation of these rights. For example:
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⁴ *Aldi Foods v. SDA* [2017] HCA 53 at [21]-[24].

- a) There may be several scaffolding contractors on a building site that all employ or engage workers that are members of a particular union, or are capable of being members. To effectively represent their industrial interests, workplace delegates would seek to understand, develop and advance their interests collectively, rather than have their representative efforts constrained by the boundaries of any one legal entity on that worksite.
 - b) Cabin crew on a particular flight all have common industrial interests, despite them being employed through many different entities.
 - c) A private hospital may be staffed by workers from numerous employers (for example those providing diagnostic imaging services, pathology collection services, catering services, cleaning services, agency nursing), and a particular union may have coverage of and appoint a delegate to represent workers across more than one class of work performed there.
 - d) In a medium-sized laundry, there may be directly engaged employees of the main employer as well as contracting entities who operate particular lines or machines and employ their own workers.
12. There is nothing novel or controversial about representative structures operating in this fashion. Indeed, many employers would be familiar with designated work groups operating under Work Health and Safety Law extending beyond workers engaged by a single entity with a health and safety representative having rights with respect to that work group (and each employer carrying obligations) accordingly.⁵
13. The draft model term filed with our submissions of 1 March ('Initial Submissions') is consistent with workplace delegates exercising workplace delegate rights as set out in section 350C in respect of the industrial interests of relevant persons, including:
- a) representing⁶ and communicating with members⁷ and persons eligible to be members who work in the same enterprise as the workplace delegate but who are not employed by the workplace delegate's employer; and
 - b) having reasonable access to facilities that are not the property of the workplace delegate's employer.⁸

⁵ See for example *Occupational Health and Safety Act 2004* (VIC) at s. 47, 58, 71.

⁶ At clause 2.

⁷ At clause 4.

⁸ At clause 5.

14. To be clear, a member or person eligible to be a member may have an “industrial interest” that extends beyond the boundaries of an enterprise. For example, an early childhood educator has an industrial interest in ensuring that her sector has adequate funding. Similarly, an employee may have an industrial interest in wanting to see improvements to a work health and safety law that would have provide for a safer workplace. As we put forward in our Reply Submission of 28 March 2024 at paragraph 19, the common law meaning of industrial interests can stretch beyond the workplace or employer and across an industry.
15. In developing delegates rights terms for modern awards, the FWC should ensure that those rights are able to be exercised to the fullest extent within an enterprise, as contemplated. In our view, this should include complementary recognition of workplace delegates in enterprises where more than one modern award applies. This is permissible having regard to sections 149E and 142, and we refer to paragraphs 45-47 of our Initial Submission in this respect.

Question 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 350(3)(b)(ii)?

16. On the second question put in the FWC’s Statement of 16 April 2024, the ACTU submits that the word “employer” is used in various places to attach specific legal obligations on the employer whereas the word “enterprise” is instead used to define the scope of the persons the workplace delegate may represent and the workplace where they are located.
17. In terms of the specific references in question 2, section 350C(2) operates on the premise provided in section 350C(1) that a workplace delegate is authorised to represent the industrial interests of persons “who work in particular enterprise”, irrespective of the identity of the represented person’s employer. The phrase “including in disputes with their employer”, as used in s.350C(2) in elaborating on the right to represent, is an example of a type of matter in which a workplace delegate may represent the industrial interests of a member or person eligible to become a member. It is not an exhaustive list of matters relevant to industrial interests, nor does it create any inconsistencies within the new provisions. It should be noted that even in this non exhaustive expression of a particular representative right, the legislature chose to refer to representation of the relevant person “...in disputes with *their* employer” rather than “in disputes with *the* employer”. That is, a workplace delegate in an enterprise conducted by “Employer A” and “Employer B” would have, subject to any particularities of their election or appointment, a right to represent an

employee of Employer A in a dispute with Employer A, even if the delegate themselves was employed by Employer B.

18. The reference at s.350C(3)(b)(i) to “reasonable access to the workplace and workplace facilities where the enterprise is being carried out”, makes clear that it is the “workplace” of the enterprise that defines the scope of these particular rights, rather than the workplace of the employer. This is a helpful formulation where a workplace may have multiple employers as per paragraph 4(a) above. It is also a formulation which does not encompass access to facilities of an employer which are located at a place where the employer carries on a different enterprise.
19. At 350(3)(b)(ii), the reference is: “...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.”. This 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 organisation who work in a particular enterprise, and another other persons eligible to be such members.

In summary

20. The ACTU submits that the use of the words “enterprise” and “employer” within s.350C are clear, and complementary. A delegates’ rights term in modern awards should not disturb this clarity.
21. There may be industry-specific cases where providing further clarity would be of assistance, consistent with the analysis here. The ACTU’s affiliates may advance such positions.

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