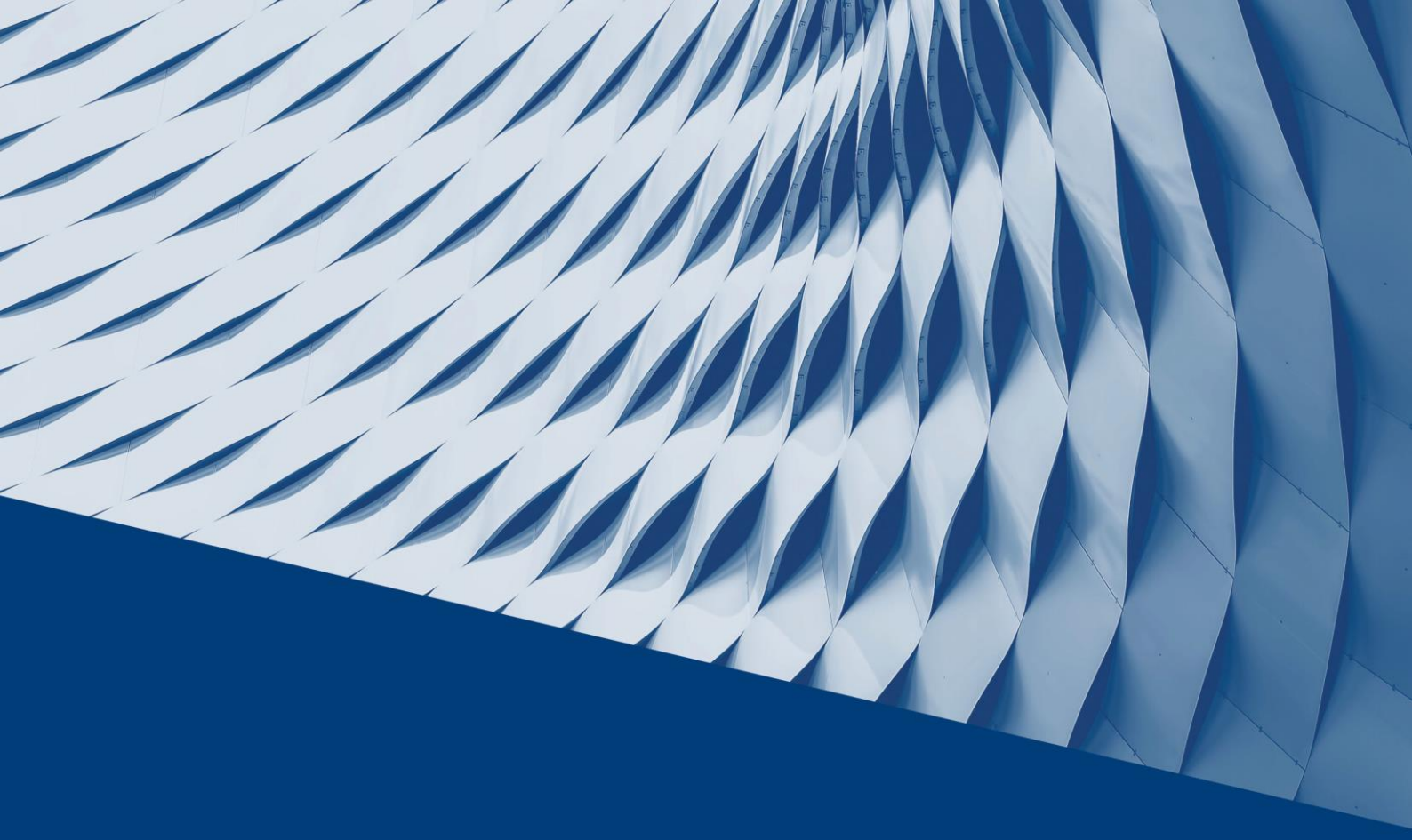

ACTU Submission – Further Reply Delegates' Rights

ACTU Submission, 19 April 2024
ACTU D. No 29/2024

ACTU
australian council of trade unions

Contents

Further submission in reply

1. The FWC issued a Statement of 16 April 2024 seeking comments from interested parties on two questions concerning the interaction of the word "enterprise" with s.350C of the *Fair Work Act 2009* (FW Act), in matter of Variation of modern awards to include a delegate's rights term (AM2024/06).
2. The FWC further invited responses to those comments from interested parties by today, Friday 19 April 2024.
3. The ACTU provides responses in turn to comments made in submissions by the Coal Mining Industry Employer Group (CMIEG), the Mining and Energy Union (MEU) and the Construction and General Division of the Construction, Forestry and Maritime Employees Union (CFMEU C&G).

Coal Mining Industry Employer Group

4. The CMIEG submits that the phrase "particular enterprise" in s.350C(1) should be construed narrowly to mean "the enterprise of a particular employer carried out at a particular location" (at 8).
5. This interpretation unjustifiably narrows the definition of "*enterprise*" in the Act at s.12 and the work it does in s.350C.
6. The CMIEG further submit that if the Commission did not accept this proposition, then a "number of complicating matters arise" (at 15) if a delegate is able to represent the industrial interests of a member at a particular enterprise but working for a different employer, which the Commission should address. This includes the election of delegates (at 16), which delegate's rights provisions apply (at 17), and a delegate's ability to represent employees of another employer during work time (at 18). We submit that the new provisions already give the Bench clear guidance on these issues in the present matter, and that guidance should not be disturbed by the CMIEG's suggestions.

Mining and Energy Union

7. The MEU notes in its reply submission of 17 April 2024 (at 11) that the Commission asked several parties during the consultations of 11 and 12 April 2024 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.
8. The ACTU supports the MEU's submission on this point. Related training is highly likely to be conducted during regular business hours. Requiring an employee to work a shift adjacent to training would practically prevent them from undergoing such training, or risk

serious fatigue from completing work and training back-to-back. Similarly, if the delegate did not work that shift to avoid such fatigue, and were not paid leave, that would have the effect of financially punishing her for seeking to exercise her rights as a delegate under the new provisions.

Construction, Forestry, and Maritime Employees Union – Construction and General Division

9. Finally, the CFMEU C&G notes in its reply submission of 17 April 2024, that it was asked a question by Vice President Asbury during the consultation on 11 April 2024 as to whether s.350C(b)(ii) precluded the Commission including paid training leave for employees of a small business under an award. Given the broad implications this issue raises, the ACTU also seeks the indulgence of the Bench in offering its views.
10. We agree with the position of the CFMEU C&G for the reasons it puts and add the following.

The small business exemption and the power of the FWC

11. Prior to the enactment of s 350C some modern awards made by the FWC contained[1] provisions concerning dispute resolution training leave. Those modern award provisions did not contain an exemption limiting their application to small businesses. The power to make a modern award containing a dispute resolution training leave provision is contained in ss 139 (1) (j)[2] (supported by s 142). Those powers do not contain a small business exemption.
12. The issue is: does the enactment of s 350C limit the powers of the FWC under s 139 to make a modern award provision concerning dispute resolution training leave where that provision does not contain a small business exemption? That is, does the enactment of s 350C mean that the FWC does not have the power to retain the dispute resolution training leave provisions in their current form? The ACTU contends that the answer to both of these questions is no for the reasons below.

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[1] See cl 41 of the Textile, Clothing, Footwear and Associated Industries Award 2020, cl 40 Graphic Arts, Printing and Publishing Award 2020.
[2] And arguably also by s.139(1)(h).

13. The ACTU contention is that the small business exemption in s 350C (3) (b) (ii) limits what may be included in a delegates' rights term under s 149E. It does not limit the powers of the FWC under s 139 and in particular the small business exemption in s 350C (3) (b) (ii) does not limit the power of the FWC to include in a modern award a dispute resolution training leave without including a small business exemption. As discussed below, the ACTU's contention accords with the text of the provisions, the context provided by other provisions in the Act, the terms of the Explanatory Memorandum, the history of the regulation in this field of which the Legislature was aware, and the purpose of the exemption.

Reasons supporting the ACTU contention

14. Section 149E creates a duty. The terms of s 149E do not expressly limit the powers under s 139. There is nothing express in s 139 that suggests that the provision is now limited by s 349E or s 350C. The text of the provisions does not support the limits identified in s 350C (2) (b) (ii) being engrafted onto the terms of s 139 (1)(j).
15. The notion that there should be an implied limit on the powers in s 139 as a consequence of the enactment of s 350C is flawed. There is no inconsistency between ss 139 and 149E. The enactment of ss 149E and 350C did not impliedly repeal the broad powers in ss 139 (1) (j) that previously supported, and continue to support, the making of dispute resolution training leave provisions covering small businesses. The Legislature did not intend for s 350C to be an exhaustive code governing the matters mentioned in it.
16. Various contextual factors support the ACTU's contention that there is no inconsistency between ss 139 and 149E. The subject matter of both is different:
    a. Section 139 identifies matters that may be included in a modern award. It concerns a power to be exercised at the FWC's discretion. It is contained in Subdivision B of Division 3 of Part 2-3 governing 'terms that may be included in modern awards'. Section 149E imposes a duty on the FWC. It identifies what must be done. It is contained in Subdivision C governing terms that 'must be included in modern awards'. One is a discretionary power, the other is a mandatory duty. There is no suggestion that the mandatory duty was meant to oust or limit the discretionary power.
    b. Section 139 (1) (j) concerns 'procedures'. Subsection 350C (3) is not so limited. The latter grants substantive rights, not just procedural rights.
    c. Subsection 350C (3) is limited to the rights of workplace delegates, being certain people elected or appointed under rules of employee organisations. Section 139 (1) (j) can govern the rights of people who are not elected or appointed under rules of employee organisations. A construction of s 139 (1)(j) that prevents

employees choosing to be represented by unelected representatives (such as a co-worker informally appointed or deputed by an ununionized group) limits the rights of employees to freedom of association.[3]

d. The two provisions can be both given full effect. Section 149E enables the making of a modern award term about rights of delegates to paid training leave, but not in small businesses. Section 139 enables the making of a modern award term about rights of employees (whether delegates or not) to training leave (whether paid or not) about representation or dispute settlement whether in small businesses or not. There is no suggestion that a duty about one subject matter was meant to displace the discretionary power about a related but different topic.

17. The structure of the Act, and the relationship between Subdivisions B and C, supports the contention that the identification of a term that must be included in Subdivision C does not limit the powers of the FWC about what terms may be included. The mandatory terms in s 147 (ordinary hours of work) and ss 149B-149D do not limit the powers of the FWC to make modern awards regulating hours and superannuation under s 139. Rather, they operate so the FWC must include certain terms (ss 147, 149B-149D and 149E) and may under s 139 include other terms on hours of work, superannuation and procedures for representation and dispute settlement.
18. Sections 148 and 149 are important in this context. They dictate that if a s 139 power is exercised about an identified topic, then the award must include a certain term. In contrast, s 149E does not state that 'if a modern award includes a term about dispute resolution training leave, then it must be a delegates' rights term'. Section 149E is not intended to be a code exhaustively governing the matters covered by it.
19. A parallel can be drawn with other NES provisions. Section 119 confers a right to redundancy pay, subject to the small business exemption in s 121 (1). Section 141 confers a power to include industry specific redundancy schemes in modern awards. Section 141 is not the subject of a small business exemption merely because s 119, on a similar topic, contains such an exception.

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[3] See s 3 (e), s 336 of the Act, *CFMMEU v ABCC (The Bay Street Appeal)* [2020] FCAFC 192; 282 FCR 1 at [13]-[18], [23]-[30], [66]-[67], *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14; 191 FCR 212 at [14], [22] (rev'd on other grounds).

20. The notion that s 149E impliedly repealed s 139, or that the exception in s 350C (3) results in a narrower construction of s 139, is contraindicated by the Revised EM. Paragraph 829 states:

> "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."

21. The emphasised words are important. They make it clear the small business exception only applies to paid leave 'due to the amendments'. The additional costs burden spoken of is a burden 'of the amendments'. Paid leave conferred by an award provision made under s 139 is not 'due to the amendments'. Further the EM contemplates small businesses 'may otherwise have obligations to' provide paid leave. One example is under an EA. Another example is under a s 139 term.
22. The Legislature can be presumed to know of the practice of the FWC of including provisions regulating dispute resolution training leave. If it intended to remove or limit the power of the FWC to continue in its previous practice it would have said so.
23. Provisions in the FW Act often represent a compromise by the Parliament between various competing interests. The exception in s 350C (3) (b) (ii) is an obvious reflection of that balance and compromise. In construing provisions involving such a compromise tribunals should hew closely to the legislative language. When construing such provisions reflecting compromises a tribunal should try '***as best it can to remain close to the language Parliament chose to use***, in the context it chose to use it, and applying the legislative purpose, objectively ascertained.'[4] This is best achieved in this context by

[4] Watts v Australian Postal Corporation (2014) 222 FCR 220 at [12]-[14], approved Mulligan v Virgin Australia Airlines Pty Ltd [2015] FCAFC 130; 234 FCR 207 at [137].

giving the exemption in s 350C (3) (b) its plain meaning, and not treating it as if it implicitly narrows the scope of the powers of the FWC under s 139.

24. Tribunals should not seek to extrapolate from the purpose of an exception in one provision containing a compromise a broader proposition about the purpose of a different provision: 'The competing interests and forces at work in achieving that compromise are well known. The question then is not: what was the purpose or object underlying the legislation? The question is: how far does the legislation go in pursuit of that purpose or object?'[5] Here the exemption is stated to limit s 350C (3). It is not a limit that applies more broadly. The purpose is to exempt small business from regulation arising from the exercise of power under s 149E. It is not permissible to infer that the purpose of s 350C (3) is to exempt small business from regulation arising from the exercise of other powers.
25. For the above reasons, the enactment of ss 149E and 350C do not result in the FWC losing its power to include make a modern award provision concerning dispute resolution training leave in small businesses.
26. Accordingly, the ACTU reinstates its position put in its Initial Submission, that those existing clauses that provide for paid leave for dispute resolution should be preserved in the present exercise.

[5] CFMEU v Mammoet Australia Pty Ltd [2013] HCA 36; (2013) 248 CLR 619 at [40]-[41]; Western Union Business Solutions (Australia) Pty Ltd v Robinson [2019] FCAFC 181; (2019) 272 FCR 547 at [160], Watts v Australian Postal Corporation (2014) 222 FCR 220 at [12]-[14], approved Mulligan v Virgin Australia Airlines Pty Ltd [2015] FCAFC 130; 234 FCR 207 at [137], Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32; (2012) 248 CLR 500 at [61].

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