TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BINET
COMMISSIONER LIM

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

cl.95, Schedule 1 - FWC to vary certain modern awards

(AM2024/6)

Sydney

1.30 PM, WEDNESDAY, 10 APRIL 2024

PN1

VICE PRESIDENT ASBURY: Thank you. I think we've got an order of appearance. I think we are starting with Mr Harris, who has a commitment whereby he has to depart.

PN2

MR S HARRIS: Yes, thank you, Vice President. Harris, S, from COSBOA. I'm not going to be tabling much of a submission at this one because I've asked to be excused from here, but will leave it up to my colleagues from the Australian Chamber and from the Australian Industry Group, who will cover off on most points.

PN3

The main one from COSBOA's point of view is if the Bench would give remembrance when they are going to be drafting these award terms that there are small business operators out there who need to see it as a simple and non-complex way of managing it and ensuring that rights of the employees and employers are not impacted on dramatically from there.

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I will leave it at that, Vice President.

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VICE PRESIDENT ASBURY: Thank you. I think we will just do the appearances as we go on the basis of the order. So ACTU is next.

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MR B MOXHAM: Ben Moxham from the ACTU, and I'm joined by my colleague, Sunil Kemppi, who is online as well.

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VICE PRESIDENT ASBURY: Thank you.

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MR MOXHAM: I was just going to make a few brief opening remarks and then any questions from the Bench.

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I will just cover very briefly why the task before this Full Bench is an exciting one in our view, touch on some of the major controversies that are overarching in terms of the views of the parties, our approach to the model clause, and then pull out a couple of highlights in the model clause for the attention of the Full Bench.

PN10

Firstly, why are we excited? Delegates, properly supported, can make an absolutely tremendous contribution to building supportive, respectful and productive workplaces, and they do that by giving workers in their workplaces a voice to identify that, address concerns, improving outcomes in a wide range of areas, be it health and safety, gender equality, pay and conditions, worker wellbeing, and they do this both through a collective function and a democratic

function, workers working together to advance their interests, drawing on their delegates.

PN11

It is incredibly easy for an employer to undermine the work of a workplace delegate. I speak from experience. I remember once a meeting of delegates at a conference where a woman got up and said, 'What is unspoken is that being a delegate is cutting off your chances of promotion in the workplace; it is sticking your neck out there', and there were sombre nods from around the whole - I remember thinking this is an unfair cost these people are taking for a tremendous amount of work they are doing.

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Parliament has recognised these concerns and these limitations, and that's very clear in the Explanatory Memorandum to the Bill introducing these new provisions, and we think it's very exciting that they have introduced positive rights for delegates and an important set of additional protections.

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I won't take too long, but I just wanted to skip forward to what we see as four major controversies between the union parties to this matter and some of the employer organisations.

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Firstly, whether or not we include a definition of industrial interests and, indeed, what industrial interests means. Section 350C of the new provisions provides that a workplace delegate is entitled to represent the industrial interests of a member. ACCI and the Ai Group, my colleagues to my left, have given it a very, very narrow definition, which we say is not consistent with the case law, the language in the Explanatory Memorandum, nor Australia's international obligations, and as the High Court made very clear in Teoh, administrative decision-makers need to take that on board.

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I will just give one example, and that is where we have put forward the hardly radical idea that a workplace delegate should be entitled to talk to a potential member and sign them up in the workplace, and that has been opposed. Nothing is more fundamental to representing an employee's industrial interests than being able to ask them to be a member. I notice that the ILO's supervisory bodies on seven separate occasions have come down with recommendations affirming exactly that.

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The ACTU has decided not to offer a definition in our model clause. We think it has an ordinary meaning that is broad, and any attempt to try and define it in an award would be out of place and potentially inconsistent with that case law, and also the decision of parliament not to further define it. If the Full Bench did go down this path, our submissions provide extensive detail about what we mean by 'industrial interests'.

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I think the second controversy is the scope of delegates' rights terms in an award, and I won't take long on this, other than we know that the task here is that the rights of workplace delegates - and this is a note to the definition in section 12 - the rights of workplace delegates are set out in section 350, and a delegates' rights term must provide for at least the exercise of those rights. 'At least' is the key phrase here. It should cover the content in section 350C, but there are other facilitative provisions' details that really give that life and animate it, which we think the Full Bench should also have regard to.

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For example, the right to reasonable communication in section 350C, we say, should also be accompanied by common-sense provisions in the award term around the confidentiality of that communication, which comes up in section 350A around ensuring that the employer does not impinge or hinder the exercise of these rights, so to take a slightly broader view in what the content of the term should provide.

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Thirdly, I think there was some discussion amongst the parties around the application of the modern awards objective and what that might mean for these proceedings. On a very technical point, arguably, the modern award objectives do not apply to this exercise because the new provisions are actually in the general protections part of the Act, which has its own objects, but we think, as a practical matter, to the extent the Full Bench wants to consider them, then we are willing to entertain that.

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We would direct your attention to looking at those objects in section 336 of the general protections when completing the task, in particular, the objects around protecting freedom of association and other areas.

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The ACCI and Ai Group have pointed out that section 138, in terms of applying modern award objectives, should only apply to the extent necessary to achieve those objectives. Some have interpreted that as meaning, well, the model term in the award should simply be a cut and paste of the Act, with it, a bunch of restrictions very much in favour of employers. We, unsurprisingly, strongly disagree with that.

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I think what is necessary to achieve those objectives has changed in substantial ways. We have a brand new right that is exciting, which I have already mentioned twice already. The effective realisation of that right will make a substantial contribution towards most of those modern award objectives.

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If you look at the need to encourage collective bargaining, the need to achieve gender equality, which is not going to happen in a hurry, and a range of other objectives, and some of the evidence we have led, in particular from Professor Peetz, shows that there is a very positive benefit to productivity, in

particular where there is, you know, mature workplace relations between management and the workforce.

PN24

I think I will leave it there and just then talk about the ACTU model clause. We have developed this in consultation with our 36 affiliated unions. They all have extensive industrial practice in appointing, electing, supporting and resourcing delegates, and we have drawn on that extensive history in coming up with the model clause we have put before you, and it is a model in that affiliates to this consultation - some of whom are online, many of whom have made submissions - have either supported the clause, supported it with some minor variations for their own industry's specific circumstances, or, in a couple of cases, come up with a different clause because of the very, very different nature of their industry.

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Very, very quickly on our clause, the structure is a statement of high level principle that is very, very similar to what's in the Act, but then a very practical and non-limiting set of examples as to how that particular principle would operate, and we think that this is a sensible approach and provides guidance to the parties, but we are not seeking to displace, for example, the ordinary meaning of industrial interests. Then, underneath that, we have got a series of facilitative provisions which we say are essential for the effective implementation of that right. It is that further detail that the Explanatory Memorandum was talking to.

PN26

Just quickly going through, we have the general right to represent. One particular controversy here is, when a delegate is exercising their rights in the workplace, on whose time is that? We think common sense should prevail here, and there are tests of reasonableness. If a delegate is sending messages here and there or they are attending a disciplinary hearing, then absolutely, of course, this is on work time. I point the Full Bench's attention to, you know, a couple of ILO instruments that talk about the need for representatives to be able to perform their functions promptly and efficiently, which is absolutely work time, and then an ILO worker representative recommendation, which says:

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> *Worker representatives in the undertaking should be afforded the necessary time off work without loss of pay or social and fringe benefits for carrying out their representative functions in the undertaking.*

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Moving on to the right to pay training leave, we think absolute clarity around a clear and fair quantum would aid all parties. It would avoid disputation. To the extent that there is any kind of discretion around tests of reasonableness in terms of access to paid training leave, we think that should be confined to questions around where a delegate, with their union, had given notice that they want to attend training, that, you know, the employer has got some sort of chance to say, 'Look, there's an unjustifiable hardship which means we need to (indistinct) the date of the training to keep that confined.'

PN29

On the right to communications, our clause has a couple of important points here. One is that we need those communications to be confidential or for the employer not to monitor or surveil. That is absolutely vital for the effective implementation of the communications, and an employer veto over any sort of content is, in our view, completely unworkable.

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Very, very finally, just on the right to access and to use facilities, for us, this is absolute common sense. What is the standard in the workplace around facilities for the workforce? Can the delegate be afforded those in carrying out their duties rather than receiving less favourable treatment than they otherwise would in their role as an employee?

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I will leave it there. Sunil and I are happy to take questions from the Bench.

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VICE PRESIDENT ASBURY: Thank you very much for that, Mr Moxham. The submissions were very comprehensive and I don't think any members of the Bench have got any questions for the ACTU. Thank you.

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MR MOXHAM: May it please.

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VICE PRESIDENT ASBURY: On the list next we have Ms McKeown from the ASU. Thanks, Ms McKeown.

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MS M McKEOWN: McKeown, M. I am here today on behalf of the Australian Services Union. We are obviously an affiliate of the ACTU and we support their submissions that have been made already.

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I just wanted to use this time to make a short submission that gives voice to the experiences of delegates themselves and to put those experiences before the Commission. Look, obviously, a delegates' rights clause will need to contemplate what the legislation says, what case law says, what parliament's intention is. All of those matters will clearly be, you know, a key driver of what the clause actually says, but we would add that it should also contemplate current practice and custom.

PN37

The ASU has thousands of delegates across the country. There are other unions that would have more than that. In totality, we are talking, you know, probably about tens of thousands of delegates. I'm not aware of a definitive number on how many delegates there are currently in Australian workplaces, but it's really significant.

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In working for trade unions, I have spoken to many delegates. I've acted on behalf of delegates in general protections claims where their rights have been infringed upon or they have suffered adverse action because they have exercised those rights, and one thing that is really obvious to me in doing all of that work, both, you know, professionally and also as a delegate myself - I was a delegate at the Fair Work Ombudsman when I worked there on the advice line - and I know that, you know, my experience of performing those duties in that kind of environment, because it is essentially a call centre, is that it can be really hard for delegates to know what the parameters of their job is and whether or not the employer has a shared understanding of those parameters. Certainly I think that this clause is very welcome and will help to provide certainty for both employers and employees.

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The thing about that experience day-to-day in the workplace is that, you know, there are some common understandings that have developed over a long period of time of what it means to be a delegate, and some of those understandings have become universal in how they operate in the workplace. There are obviously some differences here and there; the universality, though, I think the point that we wanted to make today is that it stems from the simple fact that delegates who possess a delegation from their union, so they are delegated certain powers or a certain role by their union to represent the interests of employees in the workplace and, from that, we can deduce what the scope of their work is within the workplace.

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I think it would be not a good outcome for the system to operate in another way because delegates aren't acting as individuals, they are not acting as, you know, people who determine what the rights and interests of employees are on a whim or, you know, as they might decide from time to time in different places. There is actually a process by which that has become established, and that process is that they are possessing that delegation from their union.

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I don't have too much more to say, other than that we submit that the proper conclusion to draw from all of that is that there are clearly certain things that can be included in a model clause, and one of the most obvious is communicating with employees about the value of joining their union because we submit that that is in their industrial interest. That is the fundamental point of a trade union, is that it is a collective of people who advance the interests of workers in the workplace, and so, of course, it is going to be in the interests of those employees to become a member, so it doesn't make logical sense to not include that in a model clause.

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That's really all I have to say. I'll leave it there.

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VICE PRESIDENT ASBURY: Thanks, Ms McKeown. I don't think I have any questions. I'm just pleased to note that the Fair Work Ombudsman didn't engage in any adverse action while you were a delegate in its call centre.

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MS McKEOWN: I'm not going to make any submissions about that today.

PN45

VICE PRESIDENT ASBURY: Thank you, Ms McKeown. Sorry, just a thought - Mr Moxham, your submission included a witness statement of Mr Peetz. We put in a requirement for anyone who wanted to cross-examine to advise by a certain point, so I am taking it that there's no objection to that statement being received from anyone here?

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MR B FERGUSON: No objection to the statement being received, and no desire to cross-examine, obviously.

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VICE PRESIDENT ASBURY: Yes.

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MR FERGUSON: I just note, for convenience, we have made some submissions in our written material about the weight, given the nature of the proceedings.

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VICE PRESIDENT ASBURY: Yes, understood, and it's a bit difficult to ask if there's objections when not everybody is here at the same time, but I'm taking it that, when parties didn't indicate they wanted to cross-examine, there wasn't any objection from anyone about that statement going in. Thank you. Thanks, Ms McKeown.

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I think next in the batting order we have Ms Harrison from the United Workers Union.

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MS L HARRISON: Thank you, Vice President. Firstly, can I start by just saying that we rely - sorry, if it please the Commission, Harrison, initial L, on behalf of the United Workers Union.

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VICE PRESIDENT ASBURY: Thank you.

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MS HARRISON: Firstly, if I can start by saying that we rely on our submissions that we filed on 1 March 2024, and I note that we filed four witness statements, which we would also seek to be tendered. That was the statement of Christopher Murphy, a union delegate at Woolworths in Dandenong, South Victoria; Andrew Grant, a Crown Perth delegate; Kathy Adams, an aviation screening officer at Sydney Airport, and Rebecca Stiles, a United Workers' union delegate at Hillbank Community Children's Centre in South Australia.

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VICE PRESIDENT ASBURY: Yes. Likewise, there was no indication that any party wanted to cross-examine any of those witnesses, so we are content to receive the statements as well as the submission, thank you.

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MS HARRISON: Thank you. We also filed reply submissions as well on 2 April 2024.

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VICE PRESIDENT ASBURY: Yes.

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MS HARRISON: My oral submissions are in addition to those submissions that we have already filed, and also noting that the United Workers Union is an affiliate to the ACTU. I note that we support the ACTU's submissions and the model clause that's been put forward. In that respect, the United Workers Union doesn't seek specific industry-based variations from the standard clause that the ACTU put forward.

PN58

In these oral submissions, I don't intend to repeat all of our previously filed submissions, and I wanted to focus on sort of two areas of controversy between the parties - I apologise for any overlap with the ACTU's submissions on these points - but in relation to what, to us, appear to be the most contentious areas between the unions and various employer groups, that being the extent to which the model term should define industrial interests and what limitations there should be put on the extent of delegate leave.

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As we indicated in our written submissions, any proposal that suggests that the award terms should be confined or should fetter the rights that might arise under section 350C we would respectfully say should not be accepted. Section 350C(2) states:

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> *The workplace delegate 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.*

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Subsection 350C(3) then describes some of those duties and says that a workplace delegate is entitled to reasonable communication; and for the purpose of representing those interests, reasonable access to the workplace, and the like, which is then said to have been complied with - only subsection (3) of that clause is said to be complied with if the employer complies with an industrial instrument that contains a delegates' rights term.

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So in a circumstance if the Fair Work Commission were to put in a clause that sought to confine or limit what we say is a right that's contained in section 350C(2), it would respectfully fall into error in circumstances where there

would be a right associated with section 350C(2), which could only be fettered in the context of subsection (3).

PN63

In that respect, we also highlight the submissions of the ACTU at paragraph 47, where they discuss the Explanatory Memorandum, which did talk about a clear intention for a delegates' rights term in modern awards to be more detailed and to provide at least the standard that is set out in the statutory rights.

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Indeed, we would say it goes further than that. By virtue of section 149E, which is the obligation on this Commission to insert a delegates' rights term into modern awards, we would say it becomes defined. It says a delegates' rights term in section 149E is defined by section 12. Section 12, of course, is the definitions section of the Fair Work Act. It states that a workplace delegate is entitled - sorry, I've just realised I've pasted the wrong term there - but it importantly has in it a provision that defines a delegates' rights term and included a notation that says that a delegates' rights term must include at least those that are contained within the statute, and thus, I guess, reaffirming our respectful submission that any model clause needs to be the floor of delegates' rights as opposed to a ceiling.

PN65

That brings me to the topic of industrial interests. Section 350C provides workplace delegates are entitled to represent the interests of members and persons eligible to become members and have reasonable communications with such persons. We would say that goes, for the purpose of representing those interests, to have reasonable access to the workplace, workplace facilities, paid time, and for the purpose of related training.

PN66

As mentioned in our submissions, some employer group submissions propose the model clause include definitional subclauses that, in effect, limit what those industrial interests are. I think it's defined as 'guidance' on occasions, but, importantly, the Fair Work Act does not define what industrial interests are. The term is used throughout the Act. It's the subject of considerable judicial consideration in a range of contexts. *Regional Express Holdings Ltd v Australian Federation of Air Pilots*, a High Court case in 2017, is one such example, and we would say that there is no basis in the Act or in the authorities to confine the limits of those activities. On its plain meaning, 'industrial interests' is a broad term and has broad compass.

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In that respect, we would urge the Fair Work Commission to sway away from any form of definitional approach that limits the industrial interests, so it's in that context that we support the ACTU clause, which provides some - for lack of a better word - guidance in relation to the industrial interests, but is, importantly, not a limitation term.

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In this respect, one of the parts that I did wish to highlight was one of the areas of whether or not something is engaging the activities of industrial interests is, you

know, a question about an activity the workplace delegate might actually be involved in. Some of the employer group submissions gave examples of things that might fall outside of the scope of exercising industrial interests, which might be things like being involved in some level of political activity or political engagement. We would say that the term itself shouldn't fetter that particular right.

PN69

In this regard, I wanted to take a moment to highlight Rebecca Stiles' - a UWU member - witness statement. She is an early educator and care professional who works at Hillbank Community Centre in South Australia. Her statement was filed with our initial submissions. Ms Stiles is an instrumental delegate who has been incredibly heavily involved in the first multi-employer bargaining agreement.

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In the course of those activities, she is a member of our Big Steps campaign team. She has been doing a huge amount of lobbying on behalf of United Workers Union members that work in the educational care community; she has travelled to Canberra to meet federal members of parliament and to make statements to parliament to try and secure funding in respect of that supported bargain; she has hosted politicians in her workplace; she has organised meetings for groups of educators at local politicians' offices; she has spoken at and organised press conferences to discuss issues in the sector; she has appeared on radio and television in the media, and she is a fierce advocate on social media, both in relation to the issues at large, but also in relation to other educators across the sector, across South Australia and across the country.

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It is in this context that we say that advocating for the industrial interests of a particular industry or sector should not be confined by the terms. It is obviously all sort of within that framework of what's reasonable, but there is a direct correlation between the activities of Ms Stiles and bettering the conditions of her fellow workers that work within the education and care sector.

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It is in that context that matters such as improved wages or employment conditions are plainly associated with the industrial interests of union members or persons that are eligible to be union members.

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It goes beyond sectors that are funded by government. Mr Grant gives evidence in relation to being a casino delegate. There's obviously an array of legislative functions that come with working at a casino. Mr Grant has performed sort of similar activities, but obviously in a very different context.

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Thus we would support the model clause that has been put forward by the ACTU in relation to the industrial interests, it being a broad definition that doesn't seek to define the term 'industrial interests' in a narrow or limited manner.

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The second topic that I wanted to address was a question about whether or not there should be a proposed limitation on training. In this respect, and I note this is not uniform by employer groups, but it certainly appears in the ACCI submissions, the Ai Group submissions and the MCA submissions, in relation to whether or not there should be a number put on the number of days of leave. We say that, in that context, it's not appropriate, but also that we could end up in a situation where delegates are not able to obtain training leave if the limitations are done in the certain manner as proposed, and that's because the way in which the Act is framed is a question about whether or not the request for training is reasonable, and that 'reasonable', we would say, is an entitlement that should be limited - sorry, it's an entitlement that's limited to what is reasonable, but it plainly confers upon each person who meets the definition of being a workplace delegate to have a right to training.

PN76

In our written submissions, we touch upon this matter and we talk about the ACCI example where they proposed a four-person cap in relation to workplace delegate training. At the Crown Casino in Melbourne, we have a workplace of about 5000 employees, we have a hundred delegates. By virtue of that proposal, which doesn't really give weighting to the size or the complexity of that particular workplace, we could end up in a situation where we have 96 delegates that would not be eligible to training.

PN77

If you think about other employers within the sector - it goes beyond the private sector. If you thought about federal government employing entities - the Department of Human Services is an example - that limitation would become even more fraught, and so we say it would be - in that context, there is a reasonableness limitation, but whatever provision is determined in relation to training needs to contemplate the fact that every workplace delegate should have a right to access that training.

PN78

Thus, we would support the ACTU's proposed model clause, and I didn't have anything further to add, unless there was any questions from the Bench.

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VICE PRESIDENT ASBURY: When you say a right to access training, in your view, could that reasonably be subject to any limitations, for example, some kind of cap?

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MS HARRISON: Vice President, I think in relation to that, I think there's a reasonableness in terms of it might be the number of totality in terms of days, and it might be - but I think in terms of an actual individual accessing that right, it becomes a problem, and it's obviously balanced up with you've got workplaces in which you've got multiple unions and multiple delegates as well, so it becomes difficult, I think, in a situation where you put a cap that's not limited to - that's not specific to a particular delegate themselves.

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VICE PRESIDENT ASBURY: Yes, I understand. Thank you.

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MS HARRISON: Thank you.

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VICE PRESIDENT ASBURY: Mr Ferguson, you are next.

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MR FERGUSON: Thank you, Vice President. Look, the Australian Industry Group has obviously filed detailed submissions and detailed submissions in reply. They include a comprehensive proposal, which we say is carefully targeted towards the purpose of the task before the Commission. I will just note that a final form of that proposal is in our reply submissions at the very end, and I will come to it in a minute, but it sets out what we say is the complete answer to these proceedings, subject to one issue, perhaps, about that cap, which I might return to.

PN85

I am not going to go through all of that, you will be relieved to know. I just want to, essentially, deal with four things: firstly, answer any questions that the Bench might have during the course of the proceedings; then I want to touch on the nature of the task, briefly, that the Commission has before it; then I want to take the Bench through some of the key elements of our proposal and the reasons for the approach that we have taken in broad terms, and then just deal with some of what has been put by the unions today or in their material.

PN86

Starting with the proceedings, I think we have dealt with this carefully in both our reply and original submissions, so if I can give you the short form proposition. This is not a broad-ranging review into what entitlements or rights of delegates should be given through awards. The task before the Commission is narrow. It is specifically to create a delegates' rights clause as contemplated under the new legislation, and that is a defined thing. It is defined under section 12, and essentially it means a term in a Fair Work instrument that provides for the exercise of the rights of workplace delegates.

PN87

Then, to be clear, the rights in contemplation in that definition are the rights contemplated by section 350C, and that is clear from the wording of the section, but any doubt is removed when you look at the note, which expressly provides that. So it is only those rights that the clause should provide, not further or additional rights, and I will come back to that point as well.

PN88

Now, in terms of what those rights are, and my friends have already taken you through it, there is, of course, the entitlement to represent the industrial interests of relevant members and persons who are eligible members. There then, as well, is an entitlement to reasonable communications with those members, and eligible members, in relation to their industrial interests. So it's not all communications, and it's certainly not communications with a union, or somebody else, it's about

eligible members. Then it's reasonable access to the workplace and workplace facilities where the enterprise is actually being carried out.

PN89

Then, of course, except in the context of small business employees, it's reasonable access to paid time during normal working hours. So that's not access, as we say, to being paid whenever you are on training; it's just access to paid time, so it's time when you would otherwise be working, and we will come back to what is reasonable in that respect. Well, we have dealt with that in our submissions.

PN90

I think it's a convenient point to say now there's a controversy over the scope in terms of what is industrial interests that can be dealt with through this sort of provision.

PN91

We had taken the approach of trying to put, or suggest, there should be some obvious examples that should be ruled out, which are matters that we say are clearly not related to the relevant industrial interests. That is a controversial proposition as well. We don't accept the interpretation advanced by the unions as to the scope of such matters, including, for example, membership drives or recruitment activities.

PN92

The course we would propose should be adopted is, ultimately, a safer course of action is not to seek to elaborate on the meaning of what constitutes industrial interests, or to sort of definitively necessarily set out examples; we think a safer course of action is to adopt the wording of the legislation, in essence.

PN93

The other point I would make in relation to the scope of the entitlements that can be created through the term, it is not that the legislation creates a floor, or a ceiling, as was suggested. What the term must do is actually create the entitlements that the legislation talks about. I think when you look at the scheme of the legislation and Explanatory Memorandum, it becomes clear that what it has established is an underlying set of principles, or, to put it simply, a sort of default entitlements that operate, but the award terms that deliver such an entitlement need to mirror those, in the sense that they need to create them, they need to give them life. They can provide additional detail of how they operate, but they must be in the same nature of the underlying entitlements.

PN94

What you cannot do through these proceedings is create complementary or ancillary rights. You can't build on the entitlements that the legislation created; you can only deal with the entitlements that are contemplated in the legislation, and that, equally, we accept, means that you can't demur from establishing those entitlements.

PN95

We say the way this scheme works is clear from the operation of section 350C(4), which provides a limited capacity, in effect, to depart from what the legislation

says in the sense that the award term can create a reasonable entitlement, and then, if the employer complies with that term, they are taken to have, in effect, provided the entitlements contemplated by the legislation. So it clearly contemplates that the legislation will interact with the term.

PN96

The other broad submission that we have tried to develop in our submissions is that it is appropriate, as a matter of merit, for the Full Bench to take a cautious approach to the development of these entitlements.

PN97

The first reason we say that is the nature of these proceedings. The reality is that, understandably, there is a truncated timetable and process compared to what is the typical process for dealing with these sorts of award variation cases. That has meant that you don't have before you fulsome evidence about all of the relevant factual issues that might be pertinent to your considerations, and we say that, as a result, you should take a cautious approach that delivers upon the obligations that you need to under the statute but that doesn't seek to deal with a whole range of variables.

PN98

We say the justification for that is reinforced by the fact that there has never been a test case standard dealing with matters related to delegates' rights, and the approach of the Commission, or its predecessors, has been to deal with it on an industry-wide industry basis. Where there are unique provisions, like training provisions, in awards at the moment, it is because they, essentially, have reflected an historical standard. Again we say that you should, instead, try to develop a standard provision that could safely be applied across the entire system, and be modest in the determination of what that says.

PN99

I might take you briefly, if the Bench pleases, to our proposed clause. Do the members of the Bench have our reply submissions to hand? So I take you to page 37.

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COMMISSIONER LIM: That was page 37, was it?

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MR FERGUSON: I apologise, yes, in my submissions, page 37.

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COMMISSIONER LIM: Yes.

PN103

MR FERGUSON: Now we set out there - on the next two pages following is our clause. I won't take you through all of it. We include, initially, a definition of a workplace delegate. We then, at clause 2, have a provision providing, effectively, that the obligations that arise from this clause only apply if a delegate has actually advised an employer that they are a delegate, and there is an obligation on the delegate to tell the employer if they have ceased operating as a delegate.

PN104

I think the practical point we want to see dealt with in the clause is there needs to be some sort of mechanism for requiring, effectively, the delegate - that they actually advise the employer that they have been appointed. Otherwise, how could an employer possibly know the commitments they need to meet?

PN105

Without taking you through every clause, we then, at clauses 3 and 4, create those entitlements that you are required to provide for under the delegates' rights term, and we do so in terms that largely follow the statutory provisions.

PN106

In clause 5, we deal with payment in relation to training. Of course, the statute, consistent with my submissions that it only provides a level of principle, just indicates that there is to be access to paid time, but it doesn't say at what rate, and we say, having regard to the nature of modern awards as a safety net mechanism, that the appropriate rate would be the minimum award rate, the minimum classification rate for that particular employee's classification, so not the lowest rate in the award, but the lowest applicable award rate, and we say that particularly in a context where you don't have any evidence about over award arrangements before you, or what the cost of doing something more might be, or the practicalities of some sort of other approach. In that context, we say that this is the only approach that you could be satisfied is necessary to meet the modern award's objective and the requirements of the legislation. I wasn't going to go to clause 6 but I will because it responds to an issue by the ACTU.

PN107

We say clause 6, that the provision should expressly provide that delegates not required to be paid any amount pursuant to the award for any activities other than those undertaken in relation to clause 4. Basically, what we're saying is the only activities that this clause should provide payment for is those related to access to the relevant training. Now it is important to note that the entitlements created under section 350C do not create an entitlement more broadly to payment, they don't, and we say that beyond the context of the delegate's right term to deal with or create payment obligations more broadly or outside of training arrangements.

PN108

And as a matter of merit we say it is – it could not be accepted that the safety net would require employers to pay for other activities that a delegate may be left to undertake except that they're going to be given entitlements to undertake other activities, but it is a different thing to determine that it's fair and appropriate to require that they be paid. Ordinarily, they're not at work, they would not be paid.

PN109

Of course, arrangements can be worked out at the workplace through enterprise bargaining and that the awards should encourage them to be dealt – those issues to be dealt with through bargaining. They shouldn't provide payment. To use the example I think it was the UWU witness, now clearly in the – Ms Stiles. Clearly the submissions indicated that there were all sorts of activities undertaken by Ms Stiles. It would not be relevant and fair for the employer to have to pay for those sorts of activities if they fell within the scope of the clause.

PN110

We then make clear that the clause should revert to the requirements in the Act to have regard to certain specific factors in determining what's reasonable. But in relation to paid training time versus the other entitlements, we adopt an approach of – putting simply in relation to paid training time, suggesting that there be certain factors that have to be identified as matters that should be considered when determining whether a particular proposal or a particular attempt to access training time is reasonable in specific circumstances and to be determined on a case by case basis but they're all relevant considerations.

PN111

They would go to whether or not the leave should be accessed but also the amount of loading and so forth. On top of that though, we say that there should be some specific criteria that will always be relevant to be satisfied. We do say that there should be a cap specifically. We say that an individual should not be able to access more than two days of leave per calendar year. So that doesn't mean they get two days.

PN112

Whether they get the two days will depend on whether it's relevant in the particular circumstances, whole range of factors we've identified there would be considered, but they wouldn't be able to access more than two days. Noting, of course, the paid leave is a significant entitlement and noting in the context when we've advanced this we haven't put a specific cap on the number of delegates and so forth that would actually be able to access this.

PN113

We also think there should be clear requirements for notice in advance, should be able to provide or required to provide details around what the nature of the training is, what its content will be and its proposed duration. Obviously employers need to know when an employee is going to be absent. Now in terms of the notice, we would like a provision that creates a catalyst for providing as much notice as reasonably practical and that's why how much notice has been given should go to the reasonableness of granting the leave but we say at an absolute minimum eight weeks notice should be provided to an employer.

PN114

Ultimately, we will say that evidence should also be provided of actual attendance at the training as well. In relation to the broader entitlements to reasonable communication and access to workplaces and workplace facilities and so forth, we leave that largely up to the consideration of what's relevant in particular circumstances but we do set out some specific requirements. We do say that there should be a compulsion on delegates as far as reasonably practical to undertake the relevant activities outside of working hours and without disrupting an employer's operations.

PN115

I think that is obvious industrial merit. We do propose that there should be an express prohibition, and this is at clause 12, on delegates holding meetings during working hours with other employees without the authorisation of the employer as well. I won't take you through all of them but when – one I think that is worth

calling out which has been the attention of some controversary in the submissions, is that we do say a delegate should only be able to exercise the rights under clauses 3 and 4 of our proposal in the manner that's consistent with the reasonable requirements or policies of the employer that have been communicated to that delegate.

PN116

Now to be clear, there is a caveat there that they be reasonable and we give the specific examples of reasonable policies in relation to workplace health and safety also in relation to information technology. Now it may be put that people should be able to access, for example, workplace computers. I think it is entirely appropriate that – and only reasonable that that only be exercised if done in accordance with policies say relating to the undertaking in cybersecurity training.

PN117

We think that those sorts of protections should be afforded to employers. That's all I was going to say in relation to those issues. Just in relation to the controversaries that were raised by the ACTU. Without accepting the veracity of what they say about the relevance of the modern award's objective, the point I would make is that it should be uncontroversial that pursuant to the operation of section 138 of the Fair Work Act, awards can only include terms to the extent necessary to achieve the modern award's objective.

PN118

So you can only include terms that would be in the nature of a safety net provision and that is an overarching complication that still needs to be met through these proceedings and makes the modern award's objective relevant. Look I won't – I think I – the only other final observation I make in relation to the ACTU proposal and those advanced from the unions is we've dealt with them in detail.

PN119

I think in broad terms clearly some of the proposals advanced is an overreach in the sense that they extend well beyond what could be contemplated by section 12 as being part of a delegate's rights term and in broad terms reflect almost a union wish list of provisions that they would like to see inserted into awards around delegate's rights and we say that those sorts of issues are better dealt with through bargaining and at the workplace level.

PN120

They're not in the nature of claims that could be accepted as part of the safety net. Those are the submissions I was going to advance unless there were any specific questions?

PN121

COMMISSIONER LIM: Mr Ferguson, I just have a question about your proposed X5.

PN122

MR FERGUSON: Yes.

PN123

COMMISSIONER LIM: Which is about the wage employee would be entitled if they take the training and you've identified that as the minimum rate of pay for their classification under this award.

PN124

MR FERGUSON: Yes.

PN125

COMMISSIONER LIM: How does that apply where this clause is taken to be a term of an enterprise agreement?

PN126

MR FERGUSON: It would call up the award term for the minimum rate of pay under the award, so it wouldn't be that the entitlement suddenly morphs into providing the minimum rate of pay under the relevant agreement classification. It would be the minimum rate of pay that is contained in the award that would effectively be caught by that obligation once it was incorporated effectively or taken to be a part of the agreement.

PN127

COMMISSIONER LIM: Okay, so you say that applies even if the relevant enterprise agreement provides for more beneficial rates of pay compared to the award?

PN128

MR FERGUSON: Yes, though obviously that – if the agreement provided more than a beneficial rate that might be a relevant consideration to which term was more favourable but, yes, the term in its totality of the award would be a term that is taken to be a part of the agreement so that the term would be an entitlement, a term requiring payment at the relevant award rate. It wouldn't suddenly change in nature to require payment at the agreement rate.

PN129

COMMISSIONER LIM: Thank you for that clarification.

PN130

VICE PRESIDENT ASBURY: Thank you. Thanks, Mr Ferguson.

PN131

MR FERGUSON: Thank you.

PN132

VICE PRESIDENT ASBURY: Ms Tinsley.

PN133

MS TINSLEY: If it pleases the Commission. It seems to be that – brevity seems to be the key word this afternoon so I will put aside my longer spiel and try and keep it brief. In terms of – I'll start off with some high level remarks about the task that the Bench is looking at and then briefly go through our proposed provision and just highlight some key points keeping in mind some of the submissions that we've read and also heard from today noting, of course, that our

proposed provision at paragraph 41 of our initial submission is more just a guide for drafting as opposed to a proposed draft.

PN134

So in terms of the task ahead, what ACCI's tried to do in its submissions is really getting this balance right between making sure that we're not creating a modern award term that confers additional obligations on employers or gives additional rights to delegates that was not the intent within the legislation as a whole and here I'm thinking of the ACTU's submission which similar to – as Mr Ferguson's just set out, we too believe is an ambit claim, a bit of a wish list so would go too far in that way.

PN135

On the other hand as well, we're also mindful of the explanatory memorandum specifically saying that the point of this process was to try and provide more detail and to the extent possible a more fulsome list, so to speak, or a summary of what the employer's obligations or the rights that the delegate may have. So here we're trying to find areas where it may be possible to provide more detail to explain what those obligations or rights do without introducing those new obligations that I just said.

PN136

So I think some of the submissions perhaps go – especially from some of the other employer groups, may go a little bit too far the other way, so ACCI is trying to do in our submissions is trying to get that balance right between summarising the obligations but in a way that doesn't confer new obligations or rights. So with that, what I might do is refer here again to paragraph 41 being our proposed provision and then pretty much step through this quite briefly.

PN137

In terms of representation generally, there's much been discussed in today around our proposal to introduce a definition of industrial interest and that really is going back to my first point. What we're trying to do there, we're trying to provide a little bit more certainty in the best possible way of what exactly a delegate may be entitled to represent in terms of their members of prospective members.

PN138

Here we're talking – in terms of our definition which is sort of subparagraph 1.5, apologies for the messy numbering here, we're talking about we think quite a fair list of activities around disputes, around consultation. Here strictly limited to major workplace change or changes around rosters and here we're thinking in terms of making sure that this clause would be consistent with the usual representation rights that exist in our system, bargaining being another obvious point and also matters relating to discipline and performance.

PN139

Here I would just like to briefly refer to the expert evidence that the ACTU put forward from Mr D Peetz at paragraph 19 of the ACTU's initial submission and here they've provided a neat summary – sorry, the expert has provided a neat summary of what he considers to be the day to day job of a delegate, so here handling grievances, dealing with queries about award provisions, participating in

the consultative processes, negotiating wages, physical working conditions and work practices and negotiating enterprise agreements.

PN140

We'd make the point there that that fits squarely with our proposed definition of industrial interest. An alternative view, noting that there doesn't seem to be much love across the board for our proposal to have a definition of industrial interest, so we would be satisfied in any sort of additional guidance that could be provided perhaps we could include some – a list here that is – that may include - would be something that as an alternative well ACCI may be minded to support but really the key here is that this is a practical list.

PN141

It's a clear list and in our view it shouldn't be particularly contentious although it's proven to be so maybe that was silly of me to assume. In terms of the - moving now to the concept of – well I guess we could look at subsection – so we've got 350C(3). So similarly to what Mr Ferguson set out, we would agree that this provides essentially an exhaustive list of the obligations, the rights on a – that a delegate has. In some ways the provision could be construed as saying that subsection (2) says:

PN142

The workplace delegate is entitled to represent the industrial interests of those members.

PN143

And it goes on. Whereas subsection (3) in a way could be construed as essentially providing – it's facilitative in a way so I can't see a situation that doesn't – that a delegate would need to be able to efficiently represent industrial interests that's outside things like communication, outside needing reasonable access to the workplace and workplace facilities and receiving training so that they're well qualified to undertake that work, so I think looking at the provision as a whole there's an argument to say that this is meant to be a complete list of those rights and I think that works quite practically as well.

PN144

With that, I might take – the reasonable communication, reasonable access to the workplace and workplace facilities although they are different, I think taking them together is useful and certainly how we would like to see a provision work. Here, noting that it will be difficult and nigh an impossible task for the Bench to set out a list of the types of communication or when something might be reasonable, when it might be – what reasonable access is, what we've tried to is set out a mechanism that can apply across all enterprises essentially.

PN145

Here – and I think we've got a lot of agreement here with AI Group in terms of a path forward with only a slight difference. We're both in agreement that where possible that communication, the access to the workplace and workplace facilities, it needs to occur outside – needs to work outside the usual ordinary hours of work but noting that practically that's not always going to be possible there is, of course,

going to be times where a delegate will need to undertake their work during their usual working hours.

PN146

With that, to the extent that that is needed and work is needed outside of rest breaks, for instance, then the delegate should be obtaining the agreement of the employer, so this is consistent, in my understanding, with the AI Group's submission but here we've sort of fleshed out this concept of well what next. If an employer refuses that, we note here that the employer cannot unreasonably refuse a consent for this to occur during – outside of a rest break.

PN147

With that, I'd point to 350C(5) which already has a list of some factors that should be used – that would be determining the reasonableness, so:

PN148

(a) the size and nature of the enterprise;

PN149

(b) the resources of the employer of the workplace delegate; and

PN150

(c) the facilities available at the enterprise.

PN151

And we kind of build on this by way of guidance in terms of some additional points around the impact on the employer's output, keeping in mind that the delegate – that the work being undertaken might distract from the employee's usual duties noting, of course, that a workplace delegate has the full-time role with the employer. Any sort of cost pressures on the employer, the ease within which facilities can be provided, et cetera.

PN152

So we think there that really what the draft – or what the provision can do is provide a mechanism and it's really steeped in this concept of reasonableness but we understand that reasonableness is often vague and when an employer is trying to understand what that might be, we've tried to sort of flesh out this concept of reasonableness a little bit more as a pathway forward. We'd agree generally with AI Group as well about of course it would be useful to have a requirement there that employees would have policies.

PN153

I think that will be particularly relevant around say things like usual use of emails, et cetera, as well and I point you to – in terms of any sort of privacy requirements here as well, so importantly we believe that the – while employers must always retain their rights to communication they still need to have the right to monitor employee communication as they would usually in any sort of relationship. Here if this policy exists, perhaps a provision might require the employer to notify the delegate that their correspondence being monitored in the usual way.

PN154

I might turn briefly to – actually I think I might turn very briefly, sorry, to the ACTU's proposed provision in 22 and 23, et cetera, of their initial submission and just note some of the differences here as well, very briefly, around things like reasonable access to the workplace, of course, is fine but just by way of example of what I meant earlier in terms of construing obligations or rights that don't exist, so reasonable access to management, we'd contend that that isn't read into the – there's nothing in the provision that would support that.

PN155

To provide information, we don't – well we submit that that wouldn't be relevant. Participation in any dispute, again, while disputation is something that's included in our definition of industrial interest we don't think that the term 'any dispute' is relevant here and needs to be applied more narrowly and there's more examples of that but I won't go through that because we've mostly dealt with that in our reply submissions so I'll just briefly touch on reasonable access to paid time off for training.

PN156

Here our proposal is a maximum and, again, it's a maximum not a minimum or a set, of five days per delegate per year. Now this seems more generous, well it is more generous than some of the other employers' submissions but importantly the difference with our submission here is that our support for five days would be conditional on having a very – a quite a – a very tight cap on how many delegates a workplace can have.

PN157

I point you here to 4.2(j) where we've got a table setting out the max number of delegates that would be eligible to attend training per year, so it follows that if there was - it was five days – sorry, if there was no cap, then we would fall more in position with the position like AI Group's and call for something like two if it was uncapped and any delegate can really get training.

PN158

Now we've put forward this proposal again trying to relieve this tension between clearly that the provision contemplates the paid time off being reasonable but also trying to find a mechanism there that provides a little bit more certainty so to try and decrease disputation on this point. Similarly here I'll just point one last thing in terms of we were proposing almost identical set up with what AI Group has proposed in terms of providing information at the request of an employee – employer about training.

PN159

Where the ACTU has proposed four weeks, AI Group's proposed eight weeks so as an example I think we're quite I think somewhere in the middle there of about six weeks might be more appropriate but I might just leave it there. If there are any questions?

PN160

VICE PRESIDENT ASBURY: We've never been known to cut the baby in half, Ms Tinsley, so probably dangerous to say somewhere between there but in any

event, no, I don't have any questions. Any from the members of the Full Bench? Thank you.

PN161

MS TINSLEY: Thank you.

PN162

VICE PRESIDENT ASBURY: Mr Davies, I think you're next.

PN163

MR DAVIES: Yes, thank you. Davies, initial B for the Minerals Council of Australia. Can I confirm that people can hear me okay?

PN164

VICE PRESIDENT ASBURY: Yes, very clearly. Thank you.

PN165

MR DAVIES: All right. Thank you. This submission supplements the previous submission in reply of the Minerals Council of Australia and also responds to several of the issues raised in the Mining and Energy Union's submissions in reply. As stated in our written submission in reply, the MCA endorses the approach put forward in the submission of AiG, namely that the Commission ought to adopt a cautious approach in the limited time available to develop an initial award term and that any industry specific variations should then be undertaken on a case by case basis if need be.

PN166

I wish to set out three things in this presentation. The first is to make some further comments on the general principles that we submit should apply to the exercise of the Commission's power in this case. Second is to respond to some of the specific proposals in the Mining and Energy Union's proposed award term and finally to respond to some specific issues raised in the evidence put forward by the MEU which we submit does not sufficiently give the Commission the comfort we think it should have to adopt what the union is proposing.

PN167

In relation to general principles, other parties have outlined how the legislative amendments require the Commission to undertake this task, operate in the context of the modern award's objective in section 134 of the Act. Obviously we endorse the submission of AiG and others that these cannot be severed from the new provisions of section 350C. This objective requires that the Commission must approach this task in the same manner as its previous approach to award variations since the modern award's objective was first enacted in 2009.

PN168

Specifically, the objective limits the power to make and vary awards to terms in such a way that they provide for a fair and relevant minimum safety net of terms and conditions. The Act further constrains the Commission's jurisdiction to only include terms in awards only to the extent necessary to achieve the modern award's objective and that's the constraint in section 138.

PN169

The Commission's jurisdiction to make these changes to awards is constrained by these two guardrails so anything that goes beyond what is necessary to provide a minimum standard is therefore beyond its jurisdiction, we would respectfully submit. It is not necessarily to include award terms that may generate excitement for a party. It is only to provide what is necessary. On that point I would say given the hazardous nature of much of the mining industry and the amount of explosive materials, we always seek to avoid unnecessary excitement at all times.

PN170

The MCA's position is that much if not most of what is being sought by the MEU and the ACTU in its proposals goes well beyond the guardrails that I've outlined. They are, in effect, proposing that the Commission do something that we believe would substantially exceed its jurisdiction in this case. Other employer parties have dealt with the ACTU's proposal. These submissions will consider only the MEU's proposal and the reasons advanced in support of it in its submissions given its obvious relevance to our industry.

PN171

In response to the MEU's proposal, it appears to be based on a misconception about the extent of the Commission's role in this regard. This basic flaw flows through much of the detail of what it is proposing. The MEU's proposal, and in particular we say the arguments in its submissions in reply, are an assertion of what the union considers desirable in terms of its own interests but what one party considers desirable is, of course, very different to the statutory concept of what is necessary to achieve a minimum standard.

PN172

The MEU's approach is one that instead of pursuing minimum standards instead adopts what I would describe as a maximalist approach beyond the guardrails that the Commission must operate in. I'd like to illustrate this point by dealing with several of the specific proposals in the MEU's submission, each of which are characterised by this misconception. The first is the excessive minimum entitlement to paid leave. The MEU's submission proposed that relevant awards should have a minimum of five days paid leave per year for delegate training.

PN173

In its submission in reply it included a witness statement of Mr Michael Weise in support of its arguments. The witness statement of Mr Weise states that he is in charge of delegate training within the MEU. At paragraph 27 of his witness statement, Mr Weise indicates that the union currently provides three days of training for delegates. We can reasonably infer from this that this is what the union believes is sufficient, three days only.

PN174

However, the MEU's proposal would require every employer to give every delegate a minimum of five days paid leave per year. No explanation is provided for this disparity in the union's submissions. Something that is substantially beyond what the union currently considers sufficient cannot, we submit, be said to be a minimum standard that is appropriate for an award. The second issue is the unlimited number of union delegates under the union's proposal.

PN175

It proposes that the award should include no upper limit on the number of delegates who can access the range of minimum entitlements it seeks in awards. This is another example of what I would term a maximalist approach. I'd like to quote in detail one element of the submission because I believe it really encapsulates the point. At paragraph 30 of the submission in reply, the MEU argues that:

PN176

Section 350C(1) does not limit the number of workplace delegates who can access the benefit at a particular enterprise. If the term inserted into the award limits the number of delegates, an employer must recognise the award terms would be inconsistent with the statutory regime.

PN177

The argument is, we believe, misconceived. Section 350C(1) itself may not impose an upper limit but it does not need to do this work. This section must be read as subject to the other sections which constrain the content of modern awards, notably section 134. Section 350C does not do this work in terms of providing guardrails because it doesn't need to. This then raises the issue of what is reasonable and how reasonableness should be applied. Section 350C does include several uses of the term 'reasonable'. On this point, the MEU's submission at paragraph 31 argues that:

PN178

Given the rights attached to each delegate the assessment of what is reasonable should be undertaken by reference to what is reasonable for an individual delegate.

PN179

This is equally misconceived. It is clearly beyond the guardrails imposed by the modern award's objective. The objective, amongst other things, requires that the Commission must ensure that modern awards take account, for example, the factors in sub-subsection 134(1)(f):

PN180

The likely impact of any exercise of modern award powers on business including on productivity, employment costs and regulatory burden.

PN181

And sub-subsection (h):

PN182

The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

PN183

These are mandatory considerations that the Commission must take into account in varying any award. They must also therefore inform what is reasonable, so to overlook these mandatory factors in favour of one factor only, what is deemed desirable for an individual union delegate would, with respect in our view, be a

jurisdictional error if the Commission was to adopt such an approach. The third issue I'd like to look at is the issue raised in the MEU's submission of organising industrial action.

PN184

Paragraph 14(d) of its submission in reply gives some indication of how it intends to use its proposed award entitlements in practice. It states that its enhanced role for delegates will:

PN185

Empower them to navigate the Fair Work Act's complex rules concerning initiating and participating in bargaining, the forms bargaining may take and provide information on taking protected industrial action.

PN186

Such a proposition might be desirable, even exciting for the union but it should not be seen as a reliable guide to how the Commission should exercise its powers. The question that this statement of the union gives rise to is whether subsidising union delegates to pursue industrial tactics and increase the likelihood of protected industrial action is really the role of the modern award's objective let alone a requirement of the Commission to do only what is necessary to achieve a minimum standard.

PN187

It is, in my submission, a misunderstanding of the role of modern awards which characterises the union's submission more broadly. The purpose of awards is to only provide minimum standards. It is not to proactively service the advancement of any party's industrial ambitions and this, we submit, is not a legitimate basis on which to make particular award terms. On a similar note, the MEU's submission again states at paragraph 14(e) that:

PN188

Increasing union density, a broad delegate's rights term will increase union density by increasing the visibility and effectiveness in the workplace.

PN189

Again, the modern award's objective requires no more than that awards provide a minimum safety net of terms and conditions. Achieving a minimum level of union density is not one of the objectives. The Act, of course, is neutral on the question of whether employees do or do not join unions or participate in industrial activity and so we submit an award should not proactively be structured in a certain way to achieve an outcome in either respect in this regard. Another example is the MEU's submission at paragraph 14(f) saying that:

PN190

An unlimited number of union delegates taking paid leave for bargaining removes financial burden of bargaining for the employee bargaining team.

PN191

This raises the issue of how many delegates the MEU thinks is desirable to be in a bargaining team but the interest it's promoting here is not a minimum workplace

standard. It's really promoting a commercial interest of the union that employers should subsidise delegates engaging in what is really union core business. Finally I wish to make one comment on the question of industrial instruments - industrial interests, sorry, and how the award term should approach that issue.

PN192

There has been some discussion of if and how industrial instruments could be defined but I would make the point that under the MEU's proposed award term, clause 4(1), any definition of industrial instrument – industrial interest would be rendered moot because it says that the – it says without limitation that union delegates should have the right to have communications including discussions with any employee in relation to any matter or subject.

PN193

This right is not constrained by any guardrail around industrial interests and it once again illustrates the maximalist approach that has been adopted here. Finally, I wish to just turn to the evidence provided by the MEU in its submission. It includes the witness statement by Mr Weise who is an organiser of the union and at a fundamental level, both its submission and the witness statement are both afflicted by confusing between what the union views as desirable to achieve its industrial and commercial objectives and what the statute prescribes must be necessary to achieve the modern award's objective.

PN194

The MEU's submission in reply quotes on no less than seven occasions as authority for its argument paragraph 24 of Mr Weise's submission which states:

PN195

> *In my experience, work sites with higher union density and good union delegates have the best chance of negotiating an enterprise agreement and achieving the best outcomes during resultant bargaining.*

PN196

This is, with respect, a subjective statement of personal preference. It is, we submit, not what could be described as a rigorous evidence base, so there is a very large difference between what one party subjectively considers is desirable for its own objectives and what the Act requires is necessary. The award's – the modern award's objective, sorry, is quite prescriptive in this regard. It requires a minimalist approach in terms of setting minimum terms and conditions, it requires simplicity and it requires reasonableness where what is reasonable must be measured taking into account the regulatory burden on business and the impact on productivity.

PN197

These are the guardrails within which the Commission must operate under the Act and the MEU's proposals, based as they are on the ACTU's proposals, are clearly outside of these guardrails. In terms of what should be accepted, the MCA adopts the submissions of AiG and others and that in this case the Commission ought to adopt a cautious and incrementalist approach operating within the guidelines of only that which is necessary as prescribed by the statute.

PN198

VICE PRESIDENT ASBURY: Mr Davies, could I ask from the Mineral Council's perspective, what does – how does it see the term 'enterprise' operating with respect to its – the organisations that it represents? What would be an enterprise from your perspective?

PN199

MR DAVIES: Look, that's a good question. Like an enterprise could be a mining operation which is a single undertaking but there would be a number of contractors, separate employing entities within that enterprise. It can also be individual businesses that operate on a particular project, so depending on the context it could have different meanings.

PN200

VICE PRESIDENT ASBURY: How do you see that being balanced with the objective in this particular part of the legislation that a delegate, a workplace delegate – the definition is a person appointed or elected in accordance with the rules of an employee organisation to be a delegate or representative for members of the organisation who work in a particular enterprise if you've got an operation that could arguably have multiple enterprises operating together.

PN201

MR DAVIES: Yes, that would obviously be a significant issue for us. Obviously the issues around union coverage and demarcation have a long history which we don't – I hope no one would want to seek to disturb or revisit in any way. The issue here is that it's entirely open to the rules of the union to prescribe who should be a delegate and what the enterprise is and the legislation, the proposed award term, doesn't really put any constraints on what the union terms might be.

PN202

They could – the union, any union, could adapt its rules in a way that is quite ambitious and define enterprises in a way they like.

PN203

VICE PRESIDENT ASBURY: But enterprise has got a meaning in the Fair Work Act and also union rules usually apply to - apply in a particular way, so I'm more – when you say that you've got concerns about the numbers of delegates, I guess my question is how is that to be constrained in circumstances where the right is for a particular enterprise to have delegates representing its employees?

PN204

MR DAVIES: Yes. No, look, I think the main concern we have is that under the union proposal there is no constraint. There has to be a constraint. It's difficult to give a prescriptive answer at this stage of this proceeding to say exactly what the constraint should be but certainly having no constraint, we would submit, would be a flawed approach.

PN205

VICE PRESIDENT ASBURY: Is the constraint that you're concerned about on the number of delegates or is it the exercise of rights, for example, to paid leave?

PN206

MR DAVIES: Look, it's a combination of both because they really work in conjunction with each other. If you look at the requirements of the modern award objective to look at the impact on productivity and regulatory burden, obviously a small number of delegates with larger rights would have a different impact on the business to many, many delegates with a smaller range of rights.

PN207

VICE PRESIDENT ASBURY: Thank you. Thank you for your submissions, Mr Davies.

PN208

MR DAVIES: Thank you.

PN209

VICE PRESIDENT ASBURY: I think that brings us to a close for this afternoon. Thank you very much for your attendance and on that basis we'll adjourn.

ADJOURNED UNTIL THURSDAY, 11 APRIL 2024 [3.07 PM]