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)

Melbourne

10.00 AM, FRIDAY, 12 APRIL 2024

Continued from 11/04/2024

PN809

VICE PRESIDENT ASBURY: Let's just do appearances first. It might be easier. So we have got Ms Pugsley up first.

PN810

MS PUGSLEY: Thank you very much, Your Honour. Would you like me to stand while I am speaking to you?

PN811

VICE PRESIDENT ASBURY: Whatever is comfortable for you. Thank you.

PN812

MS PUGSLEY: We thank the Commission very much for the opportunity to participate in this process and we rely on the submissions that we filed on 1 March and 28 March. As the Bench will note, our submissions are very brief and we really only deal with principle.

PN813

And we have not as clear from our submissions formed a concluded view about exactly what the common clause for all awards would look like. We do note the slightly differing positions between the Peak employer bodies. We didn't attend to listen in on Wednesday, I think it was, so we are not sure of exactly where the difference we are at – at this point, whether there's been a change in where the parties have landed. However, we do note that there's a considerable gap between the peak bodies position and the ACTU proposal and that the Full Bench will be giving consideration to this between now and 6 May and that we will have an opportunity to comment on the draft or terms to be published.

PN814

We note that the NTEU's reply submissions at paragraphs 3 and 28 support the inclusion of the ACTU clause in the Higher Education Awards. And to the extent that the NTEU reply submissions take issue with our position of what we call a minimalist clause, that's paragraph 16 to 24 of these submissions, they are really emphasizing support for specific elements of the ACTU proposal in very clear and detailed submissions in respect of that. And at paragraphs 3 to 37, the NTEU is replying to the Ai Group submissions rather than to our submissions. So unless there's any questions for me from the Bench, we reiterate that we look forward to the opportunity to comment on the draftable terms in due course.

PN815

VICE PRESIDENT ASBURY: Thank you, Ms Pugsley. Yes, sorry, Ms Pugsley, I am just – I am just reminded that we did ask the parties yesterday and we indicated that we would publish a general, I guess, question to give parties an opportunity to respond about their views with respect to what's an enterprise, for the purposes of this provision. Because – and I am not sure if it affects the Higher Education industry but there are some work places where there are multiple employers so there might be a labour hire company or a subcontractor on the premises and we are all on a project or an undertaking and whether each of those entities is an enterprise for the purposes of having a delegate. So we will publish a question in relation to that and give parties an opportunity to respond, because

the Act definition is already a definition in the Act of what is an enterprise and I am just not sure it's particularly illuminating for the – for this exercise stuff. That's an issue that may affect your organisation. You will have an opportunity to comment on that as well.

PN816

MS PUGSLEY: Thank you very much. We look forward to that opportunity, if the Commission pleases.

PN817

VICE PRESIDENT ASBURY: Thank you. Thank you. Okay. And so then we have the National Tertiary Education Union. Mr Smith?

PN818

MR SMITH: Thank you, Your Honour.

PN819

VICE PRESIDENT ASBURY: Thanks.

PN820

MR SMITH: Smith, initial C for the NTEU. If it please the Commission, NTEU is grateful for this opportunity to participate in this important process to include the delegates from (indistinct) in – into modern awards. As we have outlined in our written submissions, our position is that the ACTU model clause should be inserted into the awards in which NTEU has an interest. And we rely on those written submissions provided in this process so far. Our submissions today deal with three matters and noting my colleague, Ms Pugsley's comment about us replying to the AiG submissions in our written submissions we do that on the basis that we understand in their written submissions here as noted with general agreement, the Ai Group submissions. And so we say that it is relevant. The question before you in relation to the Higher Education Awards as well.

PN821

So our submissions today will deal with three matters first. We replied to some of the employer submissions about the task before the Commission. Second, make submissions about the scope of representing industrial interests and communicating with the person in relation to their industrial interests, under section 350C and third, we make some brief submissions about reasonable access to employer facilities for the purposes of communicating with persons in relation to their industrial interests in the context of the Higher Education Sector. And address the Privacy Act concerns raised by some of the employer groups. We also support the submissions that the ACTU made at the 10 April hearing.

PN822

So turning to the task of the Commission in the current process, it's found under Clause 95 of section 1 of the Fair Work Act:

PN823

And a number of the employer bodies have submitted that given the timeframe, within which the Commission is required to determine the content of a

delegates rights term, it is not possible to give consideration to separate clauses in different awards.

PN824

And we say that's not correct and significant. That Clause 95 does not say the Commission must create a model delegates rights term to a modern award. It merely says that a delegates rights term must be inserted into a modern award that is made for 1 July 2024 and each of the awards that apply to the Higher Education sector are such awards.

PN825

And it is – and they will be in operation on that day which is the test in Clause 95. We further note the President's statement of 3 January 2024 which outlined the timetable with respect to this award review stream. And note that the draft award terms are due to be published the week beginning 6 May 2024 upon those terms due by 17 May. We consider this period presents good opportunity for parties to provide specific submissions through their feedback on why particular provisions are or are not appropriate for any awards in which that party may have an interest and it's both appropriate and respectfully necessary for the Full Bench to have regard to those comments in relation to the industry in which their made.

PN826

We say that better meets the task demanded by Clause 95 of Schedule 1, recognising the difference in the way that work is performed across different sectors. For example, in the Higher Education sector, access to electronic facilities would be more relevant to the delegates having regard to how work is performed than it may be for other industries, where the work is by its nature, required to be performed on one physical site and much the communication between those workers can be in person.

PN827

Further, some of the employer groups' advanced submissions that the ACTU model clause goes further. It's contemplated by section 350C, and it's in the nature of a wish list. We say not so. The ACTU model clause goes no further than giving detail to the rights and obligations of employers and workplace delegates under section 350C. It was on that basis that it would support its inclusion into the Higher Education Awards.

PN828

Before moving on, we have one brief point in response to the ACCI submission, that an award clause can and should limit the amount of delegates that can be appointed, having regard to the size of the employer's undertaking. That submission appears in Principle 1.4 of paragraph 41 of their written submissions.

PN829

Section 350C(1) states that:

PN830

A delegate is a person appointed or elected in accordance with the Union's rules to be a delegate or representative how so described.

PN831

It's clear that the number of delegates appointed is a matter for the Union acting under the authority of its own laws with respect to our colleagues at ACCI it's not possible for a clause to limit how many delegates could be appointed at any particular enterprise and such a submission finds no support in the text of the legislation.

PN832

Turning now to the right to reasonable communication in relation to a person's industrial interests, we note that at paragraph 29 of that reply submissions, the Ai Group say they have a right to communicate with members or potential members about their industrial interests, could not include recruitment and this submissions been picked up by some of the other employers in their oral submissions.

PN833

We say this is an unduly narrow understanding of the concept of industrial interests and ignores the phrase, 'in relation to'. Section 350C provides that:

PN834

Workplace delegates are entitled to reasonable communication with members and potential members in relation to their industrial interests.

PN835

And having regard to the judicial interpretation of the phrase 'in relation to', talking to members or potential members about joining the union would clearly fall within the meaning of communicating with those persons in relation to their industrial interests. That phrase is a common one in legislative drafting. In O'Grady v Northern Queensland Company, High Court considered the meaning of it. Justices Toohey and Gaudron held that it requires no more than a relationship whether direct or indirect between two subject matters.

PN836

And Justice McHugh held that it was a phrase of broad import. The phrase also appears in section 437 of the Fair Work Act which relates to the making of protected action-valid orders. And the High Court's interpretation of that phrase has been endorsed by a number of decisions of this Commission regarding subsection (2A) and one example of that is the Maritime Union of Australia, The v Maersk [2016] FWCFB 1894 and a number of subsequent cases that refer – that (indistinct) with approval.

PN837

Therefore, in order to fall within the scope of the workplace right in section 350C, a delegates' communication with a person need only have a direct or indirect relationship with that person's industrial interests. While industrial interests is not defined, we submit that regard should be had to section 347(a) and (b) and the meaning of engages in industrial activity, as well as section 341 and the meaning of a workplace right. And that is the case because if a delegate was talking to a person about any of the matters that fall within – the scope of engaging industrial activity or those rights, they must be talking to them about matters which bear a direct or indirect relationship to that person's industrial interests.

PN838

VICE PRESIDENT ASBURY: So your submission is essentially while not – you are not seeking that the Full Bench define what the discussions need to relate to, but simply that we say that as a minimum, it must at least be these matters?

PN839

MR SMITH: Well, we wouldn't necessarily say that it needs to speak to it at all, Vice President. Only if that – to narrow it in the way that some of the employer groups have chose to do would be inconsistent with the rights in 350C.

PN840

VICE PRESIDENT ASBURY: Yes, I understand.

PN841

MR SMITH: Thank you. So we say a delegate would be communicating to a member of – member in relation to their industrial interests, that they are communicating about becoming an officer or member of the Union, promoting the lawful activity of the union such as participating in a campaign relating to enterprise bargaining or protect industrial action, or encouraging participation on lawful activity promoted by union representing or advancing the interests of a union or seeking to be represented by a union. They would also be communicating that a person in relation to their industrial relations if in the lead up to an election campaign they were talking to the worker about a parties' industrial platform and what it would mean for that person's workplace rights if it was enacted. In relation to the recruitment point, unions are organisations that are formed for the purpose of joining together to increase the – their bargaining power with their employers. The reasons outlined above the phrase, 'in relation to' a persons' industrial interests' encompasses a very broad range of subject matters and then requiring a direct or indirect relationship between the subject matter of the conversation. And that persons' industrial interests. Conversation about joining the union has a direct relationship to that person's industrial interests. Therefore, such conversation is clearly within the scope of the protection afforded by section 350C and cannot be carved out of any award (indistinct) in on the delegates' rights. So for those reasons we say the employer's submissions about the scope of the right to communicate in relation to a person's industrial interests should be rejected.

PN842

Turning now to the right to reasonable access to facilities. In the Higher Education Sector, similarly to many white collar industries where work is performed across many physical work places including many workers working from home, much of the communication between workers is performed by digital means. This is particularly the case since the COVID-19 pandemic.

PN843

As already discussed section 350C(3) provides that a workplace delegate is entitled to a reasonable communication with members and potential members in relation to their industrial interests and for the purposes of representing those interests, reasonable access to the workplace and workplace facilities.

PN844

In the context of the way the work is performed in Higher Education, this must improve reasonable access to emails including email lists of employees in the delegates' work area, as well as access to other digital communication media such as Teams, Zoom and any internet system used by the employer.

PN845

At paragraph 77 of their initial submissions in 95 of their reply submissions, Ai Group say that such communication where it occurs by digital means should be compliant with an employer's IT policies. In the reply submissions it's qualified by saying it's only the employer's reasonable IT policies with which such communication should be compliant. This finds expression in sub-clause 16 of Ai Group's draft model clause.

PN846

In our reply submission we outline a number of examples of university IT policies which would unreasonably restrict a delegate's communication with members and potential members and those examples are at paragraphs 34 to 36 of our reply submission. We say that such qualification is unnecessary in any award clause dealing with delegates' rights. And that's the case because a communication from a delegate that does not comply with a reasonable IT policy may not be reasonable communication within the meaning of sub-section (3) but of course this will come down to the specific facts of any particular case and we see it as possible that a breach of a reasonable IT policy, the exercise of a right under that section, could fall within the scope of the right provided by it.

PN847

Conversely, if an employer tried to discipline an employee on the basis of a breach of a policy that unreasonably restricted a delegate's right to communicate with workers in relation to their industrial interests, they will have committed an adverse action in breach of the general protections.

PN848

In our submission a clause beside an IT policy better meets the award objective of creating simple and easy to understand awards for that reason. It would then be on the employer to read down or revise any policy that did not allow for reasonable communication by delegates, rather than putting the onus on a delegate to determine whether a policy is reasonable before deciding to breach it in exercising their right to communicate.

PN849

We understand there have been some concerns in relation to enclosed obligations in relation to the Privacy Act and reference was made yesterday. Unfortunately, I was unable to make it, but I understand from the materials that were provided to the Full Bench that reference was made to QF and others in Spotless Group, the decision of the Australian Information and Privacy Commissioner.

PN850

VICE PRESIDENT ASBURY: Yes.

PN851

MR SMITH: Thank you. We have two brief submissions on that matter. First, we say the decision can be readily distinguished on its facts. In that case, the Information Commissioner made no findings about whether the provision of employee details to a union pertained to the employment relationship for the purpose of the employer records exemption. The actual finding in that matter was only that the random provision of names unconnected from the actual arrangement that had been struck between the parties did not have a sufficient connection to the employment relationship. That reasoning would clearly not apply where the provision of information was required by an award term and the information has been provided because a delegate wished to communicate with an employee in relation to their industrial interests in the workplace.

PN852

So we say that this decision clearly does not apply to the task before the Commissioner in this process and the provision of contact information to a delegate is also an employee of the organisation in compliance with an award term and applying to the person's information by reason of their employment with the employer would clearly meet the test of being directly related to the employment relationship for the purposes of the employee records exemption.

PN853

Second, and this is, we say a stronger point, clause 6 of the Australian Privacy Principles deal with the use of disclosure of personal information and they're the corollary to the predecessor National Privacy Principles which were under consideration in that Spotless decision. The clause 6.1 of the Australian Privacy Principles provided that an entity must not disclose personal information for the purpose other than that for which it was corrected unless that disclosure was consented to, or clauses 6.2 or 6.3 of the privacy principles apply.

PN854

So clause 6.2(b) provides that that sub-section applies, whether use or disclosure of information is required or authorised under an Australian law or court of tribunal order. Section 45 of the Fair Work Act is such an Australian law and provides that a person must not contravene a term of modern award. And section 50 is a – a similar provision in relation to enterprise agreements.

PN855

Therefore, if a delegates' rights term were compelled – if a delegates' rights term compelled provision of employee contact details to a delegate, privacy principles prohibition on that conduct would not apply. So rather than creating some sort of legal liability for an employer, arising from their obligations under the Privacy Act, such an award term would instead create a cover for them in relation to any allegation that they had breached – that they had dealt improperly with the employee personal information.

PN856

Even if we are wrong about this, which we say we're not, there's an easy alternative solution. In the Higher Education sector, it's common for employers to communicate with workers in specific areas by use of generated email lists such as library staff or faculty (indistinct) staff and very similar lists that can be created that have any number of different slices of workers in them. In our submission

access to such lists would clearly fall within reasonable access to workplace facilities for the purposes of communicating with workers about their industrial interests and no privacy issues can arise.

PN857

If it please the Commission, that concludes our submissions for today.

PN858

VICE PRESIDENT ASBURY: Thank you. Any questions? Thank you very much.

PN859

MR SMITH: Thank you.

PN860

VICE PRESIDENT ASBURY: So we now have the Coal Mining Industry Employers - Employer Group, Mr Gunzburg.

PN861

MR GUNZBURG: Thank you, Deputy President. Gunzburg, David appearing on behalf of the Coal Mining Industry Employer Group.

PN862

Your Honour, my submissions will be brief. They're in two parts. Firstly, is a submission about how we should proceed and second is a brief response to the MEU's submissions that were made yesterday. I should say if I am successful in the first part, I may not need to make the submissions in the second part. So if you want to stop me halfway through at any stage, I'd be happy for you to do so. But I will cover both topics anyway.

PN863

VICE PRESIDENT ASBURY: Okay.

PN864

MR GUNZBURG: So as our starting proposition, we say that the Commission should in these hearings seek to determine a model clause that would apply in most modern awards and then hold separate and later hearings of where that clause might need to be departed from in a particular award or circumstance. In respect to that base or model clause, we rely on our written submissions and support the submissions of the other employer groups.

PN865

Mr Patrick yesterday said that he believed the MEU's submissions and evidence were sufficient to have all these matters determined together with respect, we disagree with that proposition. Mr Patrick did give some clarification yesterday about some of the matters in the proposed MEU clause which he said were based on special circumstances of some type.

PN866

But what we have got before us in that respect is an entire clause which is quite different in some ways from the proposals from the ACTU for instance and what

we struggled with and we respectfully submit the Commission must struggle with as well, is it's hard to tell which of the differences between the two clauses are based on what rationale.

PN867

So firstly, we'd say there are some instances where we think the MEU agrees with the ACTU but has drafted their clause just differently for no particular reason. Secondly, there will be circumstances where the MEU relies on the same arguments or principles as the ACTU but believes there should be a different outcome to the one the ACTU proposes. And thirdly, and finally, there are some matters which are based on specific circumstances that they believe exist in the Black Coal Mining Industry. And what we struggle with is we're not sure which is which.

PN868

So for instance, if I take you to clause 2 in the ACTU proposal and clause 2.2 in the MEU proposal and you don't need to look at them right now, all I would say is that if you look at those two clauses they appear to cover much the same thing but they are different. They're subtly different in some respects and largely different in others and we don't know which of those differences are meant to be based on special circumstances and which are based on drafting issues or the same issues that the ACTU has raised but with a different outcome sought.

PN869

And our submission is that it's only those areas where there is a specific circumstance or reason why there should be a departure from whatever model clause the Commission determines exists. It's only those areas where the clause in the Black Coal Mining Industry Awards should be different from what's used elsewhere. We say that once a model clause is determined by the Commission, and we all understand the Commission's reasoning for the clause you come up with up, then it may be that some of the issues which the MEU raises will simply disappear or they won't be pursued or perhaps we won't resist them. But we don't know yet.

PN870

And also, it might be almost trite to say it. But it will be certainly a much simpler process and more expandable for all of us when trying to tell if the model clause should be departed from, that we all know what the model clause is. And we don't know what that is at this stage. We have got submissions from various parties but we don't know of course what the Commission's decision will be.

PN871

We agree with the MEU that there are a number of contracted companies which work from time to time or with part of their workforce located at a mine site. That happens. And I simply say that differing delegate rights provisions under different modern awards could give rise to some very interesting questions in those circumstances.

PN872

Thinking about it yesterday the circumstance which came to mind was that if there's a contractor based in a major town, who has part of their workforce

working in a mine site, their delegate based in the major town working under, say, the manufacturing award is called to represent some employees working at a mine site and there are differing delegates' rights provisions under those two model awards. I would struggle to know which one of those would apply to the work, the delegate, under those circumstances. Would it be the ones applying to where they are located or where the employees are located.

PN873

Now, I don't expect to answer that question at the moment.

PN874

VICE PRESIDENT ASBURY: Would it be determined by the coverage of the modern award, wouldn't it?

PN875

MR GUNZBURG: Well, but which – is the delegate operating under delegate rights applying to themselves or to the people that they are representing? I don't know.

PN876

VICE PRESIDENT ASBURY: I think in the explanatory memorandum, there's a line which says that the right is attached to the delegate.

PN877

MR GUNZBURG: You may be correct. I was struggling to - - -

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VICE PRESIDENT ASBURY: But it does – yes, it does – for a lay person it would be properly – problematic - - -

PN879

MR GUNZBURG: Yes.

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VICE PRESIDENT ASBURY: - - - if you have got an agreement which applies and you go to the mine site, you have got a different set of rules, you get different leave entitlements for example.

PN881

MR GUNZBURG: All those sorts of things. Now, the only reason I raise it at the moment is I think it adds another note of caution as to creating different clauses in different model awards because it just increases the possibility of that sort of confusion and difficulty. So for these reasons, we say that the bear course of action for the Commission would be to determine a model clause out of these proceedings. Then parties including the MEU would be able to set out the basis including appropriate evidence for any reason to depart from that model clause in a particular circumstance and then ourselves and other parties, be able to respond to that.

PN882

But I recognise we may not be successful in that submission. So we would like to address a few specific matters that were raised yesterday. Firstly, could I turn to the evidence of Mr Weece? Or Weise. I am sorry if I pronounce that incorrectly. We accept that he holds the views that he sets out in his evidence. But we don't think it's particularly useful or determinative that the person in charge of delegate training for the MEU thinks that delegates are a good thing and should have more powers and more training.

PN883

As we said, some of the MEU's submissions rest on what they say are special circumstances. And in respect to special circumstances, I would make the general observation that from inside an industry, all you can see is what is special about yourself in your own industry. From outside, all you can see is that most industries are actually very similar in respect to their base of tenants and purposes.

PN884

Every industry thinks it's special but in fact, we have more similarities between industries than they think. For instance, the MEU proposed or said that they thought it was unusual or special in the Black Coal Mining Industry to have a broad range of contractors working alongside the employees of the main employer in the location.

PN885

Respectfully, it's just not that special. It happens in many places. From my own personal experience which was – includes some time in the health industry, if you look at the example of the major hospital complex, the employers in that hospital complex, there's outsourced pharmacies, outsourced catering and laundry services, private hospital wings, doctors surgeries, outsourced pathology, labour hire for nurses. All sorts of things. So it's just not a special circumstance in our industry.

PN886

I was going to go on and speak briefly about the question of where the enterprise starts and finishes, but given that the Commissioner's posed a special question about that, we will probably hold ourselves and respond to that later.

PN887

VICE PRESIDENT ASBURY: Yes, well, it's particularly relevant for your membership, it would seem, Mr Gunzburg.

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MR GUNZBURG: I am sorry?

PN889

VICE PRESIDENT ASBURY: The question of what an enterprise is would be particularly relevant for your industry.

PN890

MR GUNZBURG: Well, it is to some extent, but not particularly so, I would say. So for instance if I went back to the example of a major hospital, where does the enterprise start and finish for a hospital complex? Is the enterprise include the

private hospital wing or the research wing which is in the building right next door to the Alfred's main hospital for instance? So I think it's a general question.

PN891

VICE PRESIDENT ASBURY: I mean, I think for – I guess your submission, Mr Gunzburg, it seems particularly relevant to me and perhaps if I can say by way of example, my understanding is that some of the Black Coal Mining sites you may have various subcontractors, and they may have varying degrees of integration with the principal's workforce. They may be reporting directly to the principle, they may be provided the supervision for various purposes but say if you contrast that to say Sydney Airport, which could be an enterprise but then so could all of the various airlines which operated there.

PN892

MR GUNZBURG: Yes.

PN893

VICE PRESIDENT ASBURY: Different context there, but the reason why I think it would be helpful for you to provide, perhaps comment on it at a later date is that as I understand from your submission, you're seeking or you're proposing that there should be a cap on the number of delegates.

PN894

MR GUNZBURG: Yes.

PN895

VICE PRESIDENT ASBURY: That would be recognised and given that the definition of workplace delegate is tied to enterprise, those seem to be - - -

PN896

MR GUNZBURG: Yes. Now, that's absolutely correct and we will respond. I should clarify though, we don't seek to put a cap on the number of delegates. We seek to put a cap on the number of delegates who receive the benefits of the delegates' rights provisions.

PN897

VICE PRESIDENT ASBURY: Okay. yes. Thank you for clarifying because I think they're quite different propositions.

PN898

MR GUNZBURG: Yes. So I will leave that matter for separate response. The MEU's proposed in their draft clause that the scope of the industrial issue should be somewhat broader than was proposed by anyone else. In listening to Mr Patrick yesterday when he was speaking about that, I do not think that any special circumstance in the Black Coal Mining Industry was advanced to support that proposition that it was based on general rationale as to what the extent of industrial matters should be. And on that basis, and we make no special submission about that matter, we rely on the general submissions of employers on that issue.

PN899

There was some discussion held yesterday with Mr Patrick about delegates having the right to call mass meetings and those sorts of things. Again, if the MEU's submissions in that respect were intended to rest on some special circumstance, in the Black Coal Mining Industry, I didn't hear it or understand it. We say that any different provision on that matter applying in our award would have to rely on much clearer and better support and submissions in evidence than have been given so far.

PN900

The MEU submitted that some operations covered by the Black Coal Mining Industry Award take place in remote areas. Now, that's true, but it's not true for all cases. Some mines were fly in fly out, some are drive in, drive out. Some are a mixture, some are located near large regional centres. Some have union offices located very close nearby. Some don't and all those circumstances can change over time. We say that the only sensible way to deal with such complex and myriad set of hospital circumstances, is to have a basic award provision which allows matters that are relevant to a particular enterprise or location to be dealt with during the enterprise bargaining process.

PN901

And in this respect, we adopt the words of the MEU in their opening submission at paragraph 16D, they say,

PN902

It is understood that the Fair Work Act's preferred method for settling employees terms and conditions of employment is collective bargaining.

PN903

And that's true. And we need to make sure we leave room for that to occur. The MEU also submitted that the layout and operation of mines and various mining locations can vary significantly. They say also, correctly, that mine sites are very strictly governed by safety of regulations and operating protocols which govern movement and communications within operations. Again, we agree to some extent. But mines are very different from one to the other and there was a good reason for all these regulations and protocols which apply for working in them, because they're inherently unsafe locations.

PN904

We suggest the Commission should not seek to override these regulations and should be careful not to inadvertently create a conflict between a delegates' rights provision for instance which is highly descriptive or prescriptive and what might be an equally detailed safety or operational procedure at a mine site. We don't know what all those regulations are. We know they exist and there's many of them. It would be extremely unfortunate if we ended up with a situation where there was confliction between the two.

PN905

So we don't think it's possible for the Commission to develop a detailed or prescriptive delegates' rights clause which can properly provide for all those variations and conditions that will occur at individual enterprises. And arrangements which sensibly and safely allow delegates to represent union

members, should be established via a basic award provision which covers the essential rights and which is then able to be expanded upon through the enterprise bargaining process.

PN906

The MEU made some brief submission. I think in response to a question that additional training was required for delegates because the industry is male dominated. And that this may lead to an increased support being required of delegates who may have to deal with the issue of sexual harassment. With respect, I think that's somewhat of a red herring. No evidence was led as to how much time, how it – delegates actually spend on this issue at the moment.

PN907

No evidence was led to suggest that the additional days of training that would be spent, would actually be spent on that issue. And I have to say the claim also disregards the extensive efforts already being expended by employers in this industry on employees including delegates being trained and educated in this area.

PN908

Finally, the MEU has referred to some previous awards or decisions of previous bodies such as the Coal Industry Tribunal which dealt with provisions relating to delegates' rights. In response to that, we say that those awards and decisions came from a very different era. And the awards in particular at that stage, contained a whole range and extent of provisions which these days are not included in modern awards and are instead left for the enterprise bargaining field.

PN909

If the Commission, decides that previous award provisions are somehow relevant in this matter we would simply say that that's not a particular circumstances of the Black Coal Mining Industry either. And finally, I'd say that even if we accepted all of the MEU's arguments on that, the old clauses certainly didn't go as far as the ones they are seeking at the moment.

PN910

Unless there are some questions of myself, may it please the Commission.

PN911

VICE PRESIDENT ASBURY: Okay. Mr Gunzburg, so I am looking at paragraph 4 of your submission about the limitation on affording rights to delegates, effectively. It doesn't seem to me that a concrete proposal has put – using to canvas a few different options. Have I read that correctly?

PN912

MR GUNZBURG: I think it's fairest to say that in the absence of a model clause being determined, it's hard to know exactly what to say about that restriction. What we would say is that there should be some limit because otherwise it's open for gain by unions who wish to appoint for instance all their members as delegates or all their members in a particularly critical part of the operation or whatever.

PN913

I recognise that the questions which have been raised about the extent of the enterprise may have some bearing on our original proposal which was that there should be a limit on the number of delegates based on distinct operational and geographic areas. That seems to overlap a little with the enterprise questions. But may need to be varied on that basis.

PN914

But essentially, that was the best idea we could come up with.

PN915

VICE PRESIDENT ASBURY: Yes. I mean, one of the – and I think you have heard some of the submissions from some of the other parties, Mr Gunzburg. But certainly some of the submissions we have received is that the limiter on the recognition of the various rights, various reasonableness.

PN916

MR GUNZBURG: That's one way of dealing with the matter. I suppose what we were saying is that if we were looking at reasonable, we'd look at whether a delegate could effectively represent the rights of a group of employees and we'd say that that's largely driven by whether that group of employees is operationally or geographically separate from another group. You know, in various mindsights and various locations, its handled at different ways and again, I would suggest that it's probably one of those things which as far as possible has left for enterprise bargaining because to try and find a specific solution which is going to meet all those different circumstances, I wouldn't know where to start. Our suggestion which is in our submissions as we thought the reasonable place to start.

PN917

VICE PRESIDENT ASBURY: Yes.

PN918

MR GUNZBURG: There will be an exception to every possible – every possible solution to that.

PN919

VICE PRESIDENT ASBURY: Yes, and do I take it that this limiter that you're proposing which you have clarified is around the recognition of the right not necessarily the election of delegates.

PN920

MR GUNZBURG: Yes.

PN921

VICE PRESIDENT ASBURY: Do you say that that should be applied to all, of the rights? It seems to me that some of the submissions from the employ groups, they seem to focus more on the entitlement to pay training leave but not so much on say, the reasonable communication with members.

PN922

MR GUNZBURG: No, I think we'd say it applied to both. Certainly, the amount of – the training – the training leave is one issue, but we'd also say that there

should be some limit on the number of people who the employer should have to make allowance for to be able to conduct this – these duties.

PN923

Again, it's almost trite to say it but these people are employees. They're meant to be doing work and some of them are doing work which is essential to the on-going operation of a part of the work site. We should resist the temptation to create thousands of mini-union officials who are paid for by employers. This – the rights of delegates to represent employees are important but they should not be unfettered. There should be some reasonable and sensible limit on it.

PN924

VICE PRESIDENT ASBURY: I understand your submission. Yes. Thank you.

PN925

THE COMMISSIONER LIM: It seems though, and again, you can agree or disagree with this, Mr Gunzburg, but the reasonableness provisions relate to the communication, the reasonable access to workplace facilities, those sorts of things and not to the numbers that can be elected as delegates. Got the – yes, it seems that the Act is establishing some things as rights, so the right to appoint or elect a person in accordance with the rules of the employee organisation and then the reasonableness is found in the provision of access to facilities and those sorts of areas, rather than the Commission saying well, for every, I don't know, 50 employees, it's reasonable to have X number of delegates. There doesn't seem to be any capacity or any indication in the statute that that's what the Commission could do. And it may in fact limit a right.

PN926

MR GUNZBURG: I agree. I don't think there's any bar that on the Commission, for instance – this is just an example, not a submission, saying for instance that each operational area at any one time there can only be one person who is the recognised delegate for the purposes of having access to all these communications, transport, whatever it might be. Otherwise, looking at it from the employer's perspective, if they have got four people who say we have been elected as delegates, and any one of them at any one time or all four of them might say we all want to go there, we all want to be part of that representation. We all want to whatever. And it's difficult for me to talk very clearly about this, because until to be honest, we see the model clause, it's hard to tell how it would apply in practice. It's just a bit of a chicken and the egg situation.

PN927

THE COMMISSIONER LIM: But will those things really sort themselves out? I mean, realistically, on a coal mine site, you have got rosters and some – and some of the shift panels never meet.

PN928

MR GUNZBURG: Yes.

PN929

VICE PRESIDENT ASBURY: They have no interaction at all, so the proposition that a delegate could be the delegate for the entirety of – and they might all plot-seat change and they never meet.

PN930

MR GUNZBURG: Yes.

PN931

VICE PRESIDENT ASBURY: So the proposition that one delegate for that hit or that drag line or that whatever, it could be – could properly represent, is probably fairly minimal and he might think you know, that it would sort itself out and that each shift panel would elect a delegate or - - -

PN932

MR GUNZBURG: Possibly.

PN933

VICE PRESIDENT ASBURY: Whatever have we.

PN934

MR GUNZBURG: There are many operations, Your Honour, where there is a delegate for the – a head delegate sort of arrangement. What I'd say is the basic award provision which is inserted, whatever it is, shouldn't try and deal with all those myriad of possibilities. It should be simple, have some limits around it and then allow the parties to bargain.

PN935

And it's not as if there's some terrible objection to delegates in our industry. It's not like we don't accept that they have a role to play and that they should play at, et cetera, but how it's best organised at a mine site in Hunter Valley underground, compared to an open cut mine in Queensland, I wouldn't even like to start to guess.

PN936

VICE PRESIDENT ASBURY: I understand. So your point is, it needs to be – needs to have some limitations but it also needs to provide for flexibility and the ability for the employers to still operate their businesses?

PN937

MR GUNZBURG: Yes, and for them and the unions to reach agreements on how it should operate over a particular mine site during the enterprise bargaining process. It's a valid issue to discuss and bargain on.

PN938

VICE PRESIDENT ASBURY: Well, you, I guess, all say if you agree or disagree with this, but it seems to me that it might have the opposite effect so that if you have a very minimal awards provision, you're going to get bargaining that says, every time one delegate goes to the Commission, the whole lot of them have to come and they all – which happens, let's face it, in your industry.

PN939

MR GUNZBURG: On behalf of my members, I'd have to say they better stand up in negotiations when it comes to that.

PN940

VICE PRESIDENT ASBURY: Okay. I understand your submission. Thank you.

PN941

MR GUNZBURG: Thank you.

PN942

VICE PRESIDENT ASBURY: Thank you. Okay, well, I think that pulls us up for the morning session and we have got the afternoon session starting at 2 o'clock. So on that basis we will adjourn. Thank you.

LUNCHEON ADJOURNMENT [11.00 AM]

RESUMED [2.05 PM]

PN943

VICE PRESIDENT ASBURY: Thank you. We'll just do appearances as we go. So I think we've got Ms Byrne from the Housing Industry Association first?

PN944

MS BYRNE: Thank you, Your Honour, and thank you for the opportunity to make a brief oral submission this afternoon. Obviously we continue to rely on our written submissions which were dated 28 March. So what I intend to do this afternoon is address some matters that I understand were discussed and raised yesterday, we thought might be of more assistance to the Bench than going over what we've already submitted. So the two matters that I understand were discussed yesterday was one around the definition or interpretation of what an enterprise is for the purposes of section 356(c), noting the definition in the Fair Work Act at section 12.

PN945

Then I understand there was also some discussion around model terms versus industry-specific terms so I'll come to that item in a moment. But I thought just to deal with what I understand was the view of some that a broad interpretation should be taken to the definition of an enterprise: that from our perspective in the residential building industry's perspective, that would lead to a very difficult situation where there would be potential or multiple workplace delegates to exercise these rights they're entitled to.

PN946

As you might be aware, about 80 per cent of the workforce in the residential building industry are independent contractors, so these small businesses work across various sites and for various builders and at any one time on a residential building site, there can be up to around 25 different contractors operating. So you could understand how broad the interpretation of what an enterprise is might impose some impracticalities on those sites.

PN947

VICE PRESIDENT ASBURY: Ms Byrne, sorry to interrupt you but when you say they're independent contractors, do you mean they're one person operations as an independent contractor?

PN948

MS BYRNE: Potentially.

PN949

VICE PRESIDENT ASBURY: Well, then the award wouldn't cover them, would it?

PN950

MS BYRNE: Well, it's about the access to site, so if they've got employees, if those independent contractors so have an employee then the award will apply. So there's just – I guess there's various arrangements that operate on residential building sites. So it's notwithstanding that union membership across our sector is not high and I guess the second point to note is that when you're talking about inserting a term into the award of the nature proposed by the CFMMEU, which is quite lengthy, it wouldn't apply to a lot of our sector. So you're sort of making the award longer and potentially more complex in circumstances where those businesses are still trying to understand and interpret the instrument.

PN951

So that was – I guess that was the first point. And then along the lines of what I just mentioned in terms of the terms to be included in the award our strong preference is that a model term be adopted across all the modern awards and as outlined in other submissions of the employer groups if particular parties wish to make those more industry specific there are provisions in the Act to facilitate that process. But at this stage, our strong preference is that a model term be included. They were the two matters that, as I said, I understood were raised yesterday that I wanted to just briefly touch on.

PN952

VICE PRESIDENT ASBURY: Okay, so that's your oral submission? Is there anything else you wanted to add?

PN953

MS BYRNE: Apologies, I can't hear you.

PN954

VICE PRESIDENT ASBURY: Sorry – is there anything else you wanted to add?

PN955

MS BYRNE: I'm sorry, I didn't catch all of that.

PN956

VICE PRESIDENT ASBURY: Is there anything else you'd like to add?

PN957

MS BYRNE: No, they were all the submissions I intended to make, thank you.

PN958

VICE PRESIDENT ASBURY: Thank you. Any questions? Thank you very much, Ms Byrne. So next we have the ANMF. Thank you.

PN959

MR YIALLOUROS: Thank you, Vice President. Just a second. So firstly I thank the Commission for the opportunity to appear in these proceedings on behalf of the ANMF. Sorry, I should start: Yiallouros, P, from the ANMF. These submissions should be taken to be in addition to the written submissions that we've already provided and the submissions in reply that were filed at a later date. I can't remember exactly what date it was. The ANMF also supports the ACTU's claim for a model clause to apply across awards with slight variations, specific to certain industries and occupations. I can go into more of that later but I did tune in for the conference on Wednesday and watch the proceedings remotely.

PN960

The ANMF shares the ACTU's enthusiasm for the prospect of a delegates' rights clause being inserted into all modern awards, including into the Nurses' Award or hopefully soon to be the Nurses' and Midwives' award if our work value case succeeds. But that's another matter. If I could just step back and examine what the broad purpose of these proceedings are, is to look at the role of the delegate in the workplace as it ought to apply to the award system given that it's now a requirement that modern awards include a delegates' rights term.

PN961

Delegates are chosen because of their leadership skills and attributes in their workplaces with the recognition that they have capacity to represent the best interests of their colleagues. They are the lifeblood of the union movement but what they represent within their workplace is a triparted relationship within the workplace. They act as an intermediary between workers, be they members or not, and the employer. They conduct themselves diplomatically to resolve workplace issues. We think that the parliament's decision to legislate the delegates' rights term into – delegates' rights generally – into the Fair Work Act but also specifically into modern awards is a good thing. It's a good thing for workers and it's a good thing for employers.

PN962

The over-riding purpose, though, is to allow delegates to perform their role outside of the shadows, which historically they have done in many professions and industries because of the way in which they can be targeted and undermined. To discuss the submissions of various parties in these proceedings, and make specific reference at times to clauses. But I'll start with something that seems to have up in a number of employer submissions: some handwringing about identifying who the delegate is. We did touch on this in our submissions in reply. The concern, in a nutshell, was if an employer doesn't know who the delegate is, how can they be sure to afford them the rights that they've now been given under the Act and also soon to be under the award system and eventually under enterprise agreements. We say that it should be, in most instances, plainly obvious who the delegate is because they will have been identified or they will identify themselves at some point, particularly at key points where they might

need to access certain entitlements. An employee walks up to their employer and says, 'I'd like to access training for my role as delegate'. That disclosure in and of itself identifies the delegate. If it was previously unknown who the delegate was it's no longer a mystery.

PN963

Prior to that point the employer could not have been required to grant them any rights so it's not necessary to afford them particular rights prior to that point. Our submission in reply notes that under no other area of the general protections provisions where a certain attribute is protected does there need to be active – an action by an employee to the employer about a certain status that they hold as a precondition to accessing the right knowledge of that attribute is sufficient and what I would say is that an employee who is a delegate or workers who for whatever reason decide or fail to identify the delegate, may not get the rights they would otherwise be entitled to under the Act and perhaps that's the logical way in which this legislation operates, that if for whatever reason a group of workers decide that they want to have union meetings offsite and in so doing the employer never knows who is a member, who is the delegate, the delegate never approaches the employer to ask for access for training, the employer may not even be aware that they have a unionised workforce.

PN964

Well, if that is the case then it's probably not possible for the employer to take adverse action against a delegate where the fact that a delegate exists is a mystery. So I'm really not sure where the – like I said – anxiety comes from about identifying the delegate as a precondition to accessing those rights because it will only become relevant at the point where those rights need to be exercised. An employer who didn't know that a delegate exists and took adverse action against a delegate for another reason, would be well within their rights to say, well, I didn't take adverse action against you because you're a delegate, because I've only just found out at a point after that.

PN965

If I could move on to the discussion in – that's been addressed by multiple submissions around what is an industrial interest and this is specifically with reference to section 350C(2) of the Act. It talks about the rights of a workplace delegate, being entitled to represent the industrial interests of union members and those eligible to be members, including in disputes with the employer. The language of that particular subsection is quite broad and I note specifically that the word, 'including', and then – sorry, I'll repeat that – that the words, 'including in disputes with the employer', is not designed to be limiting. 'Disputes', is the starting point; 'including', suggests that there are other rights that ought to extend beyond mere disputes. It's expansive language. When I tuned into the proceedings on Wednesday I note Ms Harrison from the United Workers Union provided a pretty good summary of the breadth of the role that a delegate performs. I wouldn't add too much to that other than noting that on occasions delegates do participate in discussions and public inquiries of importance.

PN966

For example, if a royal commission were to be held and it happened to address a particular industry and a union were invited to make submissions or provide

evidence to a royal commission, the go-to person is usually an articulate workplace delegate. To suggest that the role of the delegate should be narrowly constructed, I think misconstrues the way this subsection is designed to operate and I'll make specific reference to the Australian Chamber of Commerce and Industry's submissions, specifically paragraph 27 of their submission, and I'll paraphrase a bit here.

PN967

They say that when we talk about representing the industrial interests of workers, be it members or potential members, the list should be constructed narrowly and ideally limited to four particular points: disputes under industrial law, consultation about workplace change, enterprise bargaining and disciplinary and/or performance matters. Now, delegates do all these things. But they do much more. To limit the rights of a delegate to represent the industrial interests of workers to those four particular points would be to deny delegates adequate protections under the Act for the breadth of the role that they perform.

PN968

I note that the Australian Industry Group at paragraph 53, rather than identifying the limited number of areas that ought to be covered by the meaning of, 'Industrial activities', they seek to exclude certain activities and they refer to industrial campaigns or industrial action, rallies, community activism, attending conferences including union conferences. I won't sort of delve into each and every one of those; perhaps specifically refer to their view that industrial action should not be included in among the industrial interests of workers. Taking protected industrial action is a protected right under the Fair Work Act. It's taken by union members and the delegate usually plays a key role in this. To suggest that that is not an industrial activity when it's clearly contemplated by the Fair Work Act that industrial action should be permitted in certain circumstances is to deny a legitimate way in which workers may seek to exercise their rights. It's framed in the Act notionally as being the price that we pay for industrial peace in the workplace at allotted times. A delegate should be able to take the leading role in the taking of industrial action as a legitimate way of them to exercise their right to represent the industrial interests of workers.

PN969

Now, if I could provide a specific example to contrast with ACCI's claim that industrial interests should be narrowed to four particular points: I think I've got an example that illustrates why the narrow construction is somewhat illogical. Late last year when the Federal Parliament was debating and tabling the closing loopholes amendments to the Fair Work Act, rather than passing the legislation at the time a decision was made to refer the legislation to a senate inquiry conducted by the education and employment legislation committee of the Australian Senate. The purpose of it was to examine the impacts of the proposed legislation and parties including unions were invited to make submissions to a public inquiry about the impact of the legislation.

PN970

During that process, the ANMF made the decision to provide submissions specifically about the delegates' rights provisions as proposed in the closing loopholes amendment. We attended the senate inquiry hearing on 10 October last

year. When I say we I mean myself, our federal assistant secretary Lori-Anne Sharp and two union delegates. Those delegates spoke about the importance of having a delegates' rights protections in the Fair Work Act and what that would mean in practical terms about the industrial interests of the people that they represented, the workers, the midwives, the nurses in their particular workplaces.

PN971

It cannot be said that by those delegates attending that particular inquiry that they were not representing the industrial interests of their colleagues. They were seeking to expand the rights of delegates, so as to benefit the industrial interests of their colleagues. If taken to its logical conclusion – and ACCI's claims are to be accepted that the industrial interests of workers would be narrowed to those four particular points – those delegates would not have been protected, would not be protected, in appearing before that senate inquiry. It would be, if nothing else, deeply ironical if that were not a protected activity and not considered a legitimate form of representing the industrial interests of workers. Delegates must be able to advocate in their workplaces and sometimes publicly for the expansion of rights as they relate to the industrial interests of the workers they represent. That is the whole point of having that particular subclause there. I'm going to stick with examining the ACCI claim, which is that the industrial interests of members should be narrowly constructed to refer to those four particular dot points, being the ability to represent members in disputes, consultation about workplace change, bargaining and disciplinary matters.

PN972

Starting with the first dot point, the right to represent workers in disputes: that previously hasn't been a part of the Fair Work Act. It's now part of the Fair Work Act in that it is expressly stated under subsection (2) that the industrial interests of members include disputes with the employer. The second dot point, which is about workplace change, is something that already exists for workers. If I could – and may I hand something up to the bench?

PN973

VICE PRESIDENT ASBURY: Certainly.

PN974

MR YIALLOUROS: So I've just handed up an extract from the nurses' award, two clauses: clauses 29 and 30, both of which deal with consultation about major workplace change and consultation about changes to rosters or hours of work. This is already provided for not only in modern awards but consultation clauses are required in modern awards under the Fair Work Act. If you look at the wording of those two clauses in the nurses' award, the obligation to consult employees affected by workplace change, changes to rosters or hours of work, is mentioned, I think, seven times. There is clearly already an obligation to consult with workers and representatives and the language in the awards typically say representatives, if any, meaning that where there is a workplace delegate that is the go-to person when it comes to consultation.

PN975

I'm not familiar with absolutely every single award in the modern award system but of the awards that I've read, the terms are pretty consistent and generally

they're of this particular structure. I'm not aware of any award that does not frame consultation in this particular way. What ACCI is really saying is that there is to be no change as a result of the delegates' rights clause being implemented, apart from disputes. That's already been articulated in that particular subsection.

PN976

VICE PRESIDENT ASBURY: Except that disputes have a provision – dispute settlement procedures also have a provision that people can choose to be represented in any part of the process, don't they?

PN977

MR YIALLOUROS: That is correct. You could even go so far as to say that the way that ACCI have used that particular clause is that there is to be no effect whatsoever, no change to the status quo. Similarly with bargaining, the Fair Work Act, Part 4, Division 3 of the Act, makes the union a default bargaining representative and otherwise allows employees to be nominated as bargaining representatives by their colleagues. A delegate could find themselves at the bargaining table already either by participating as a part of a union contingency through the bargaining process or nominated by their colleagues to be a separate bargaining representative.

PN978

Either way, they have an automatic right to participate in bargaining at the bargaining table. Similarly, section 387(d) of the Fair Work Act, which deals with unfair dismissals, makes it unreasonable for an employer to refuse to allow a support person to assist in any discussions relating to dismissal. That support person could naturally and often would naturally be the delegate. But that is it. That's all that ACCI say the delegates' rights clause as it relates to representing industrial instruments interests a worker should do is to mirror what already exists.

PN979

If we go back to the wording of the legislation, the wording of the Act says: 'Including in disputes with the employer'. If their intention had been to just say, 'Represent the industrial interests of members', in ways that are already provided in the Fair Work Act and the awards system therefore no change is required, it really does beg the question as to why the parliament would even bother to bring a new right into the Fair Work Act if there was no expansion on existing rights as already featured in various parts of the Fair Work Act. Clearly the parliament identified a shortfall in the way the legislation currently operated. That's why this particular subclause is there.

PN980

That's why the ACCI submission is so misguided in saying that delegates should only operate in this very sort of narrow little box and not expand beyond those particular activities when it comes to representing and advancing the industrial interests of their workers. To ignore the word, 'including', when it says, 'including in disputes', would be to render the word meaningless. What ACCI is basically saying is only disputes; represent the industrial interests of workers only in disputes and things that already exist in legislation.

PN981

It's because of that that I think the Fair Work Commission should avoid taking a restrictive approach and narrowing the definition of industrial interests in the way that ACCI proposes. Now, if I could move on to the next subsections of the legislation, I'll make a comment generally around the way they are framed and I'm aware that other parties have drawn on this point as well, is that unlike the right to represent industrial interests of members which is largely unconstrained, comparatively subsection (3) is at various points couched in terms of reasonableness. So when we speak about reasonableness generally, ACCI observe that paragraphs 31 to 34 of their submission, that reasonableness is based on individual circumstances and Australian Business Industrial similarly say at paragraph 6.2 that reasonableness is contextual.

PN982

We agree with that observation and that sentiment. But then oddly those employer submissions go on to completely disregard circumstance and context in a way that flies in the face of the intention of the legislation to consider questions of reasonableness as they come up in certain circumstances and in particular contexts. It may be the case that disputes around reasonableness would be better served by being explored through subsequent case law, rather than trying to in a prescriptive way narrow and identify reasonable versus unreasonable circumstances through the framing of a modern award term.

PN983

The first of the rights under subsection (3), specifically subsection (3)(a), is the right to reasonable communication with members and potential members about or in relation to their industrial interests. ACCI propose that clause 2.2 of their proposed model delegates' rights clause that delegates should only communicate with employees during breaks or alternatively, where agreement has been given by the employer. We disagree. We say that employees should be able to speak to the delegate at a suitable time. For example, if you've got in a hospital setting a delegate nurse looking one direction down a corridor and another nurse who happened to be a union member walking in the opposite direction. They see the delegate, they have something that they want to talk to them about. They should be able to have a quick chat. There is nothing unreasonable about that despite the fact that it hasn't occurred in a break or outside ordinary working hours.

PN984

It unfairly assumes that break times of various workers in any workplaces will align. They don't always. People have breaks at different times. If the delegate has a lunch break at a particular time but everyone else has – they might have done a night shift or an afternoon shift and their breaks just simply don't match, what you'll effectively be saying if you were to adopt his clause would be that some, indeed many employees may not have access to their delegate. The point of having the delegate there is that they are accessible by members so that they can raise and ventilate their industrial interests. Both delegates and workers recognise that there is a time and place for a conversation to be had. Contrast the hypothetical scenario of a delegate passing a member in a corridor and having a quick chat. Contrast that with a delegate who interrupts surgery with a clipboard, saying, 'I've got a petition to sign'. That would clearly be unreasonable, or at least

you'd be hard-pressed to defend that as a reasonable communication. And that delegate may well not be protected by the rights to reasonable communication in those circumstances.

PN985

I note that AIG say that the right to communicate with members and potential members should not be designed to – shouldn't be intended, rather, to disrupt or hinder the performance of work. In other words, no talking to employees while they are already working. And much emphasis has been placed by employer submissions that the delegate is an employee, first and foremost. Now, we don't disagree with that – delegates are employees – but they are employees who have additional obligations to workers that they represent, and those obligations need to be balanced with employment duties. With that, there should be an expectation or an understanding that there will be some level of disruption by the operation of this particular section the Act.

PN986

But given that the subsection refers to reasonableness, it is necessarily a question of reasonableness, about whether or not the disruption is inherently reasonable or unreasonable. A delegate passes a worker in a corridor and has a conversation. Is it a long conversation? Is it a short conversation? Is it a particularly busy day? Do they have other things they need to attend to? Is the location that they've chosen the best place to have the chat, or would it better for them to step into a closed-off staff area? Are there others nearby who might hear? Are there others involved in the conversation? Is the nature of the industrial matter being discussed individual or collective? I.e., is this member approaching the delegate wanting to alert the delegate to a bullying claim that they might have, or is it something more collective in nature, such as a discussion around bargaining that's currently afoot?

PN987

All of these things will set the circumstances about whether or not the conversation is reasonable, is it being had in a reasonable place, is it being mindful of the other obligations that both that delegate and that worker, or workers, the obligations they may have. Delegates are smart. They know when it's a good time to speak and when it's not. If the delegate who's passed by the worker in the corridor is approached and said, 'Do you have five minutes for a chat', and the delegate thinks to themselves, 'Actually, no. I'm doing my rounds and I need to finish this by a certain time', the delegate will be smart enough to say, 'Now is not a good time. I'm free from 2 pm onwards. Can we meet then'? And they will arrange their time so that they meet both their employment obligations and still provide their delegate duties.

PN988

But to suggest that that conversation or any subsequent conversation can't be had during work time is an absurdity. It would be effectively denying employees access to their delegate, through whom they exercise their rights and ventilate their concerns. ACCI also, at clause 2.5 of their proposed model clause for delegates' rights, makes reference to the monitoring of emails and phones in relation to communications between delegates and workers, be they members or potential members. And they say that this should be justifiable where a policy

exists to permit the monitoring of devices, and also consider the possibility that this should be reasonable where the employer has already notified of this intention.

PN989

I refer the Bench to the submissions of the ACTU, where they define confidential communications and articulate why confidential communications and how confidential communications ought to be kept just that; confidential, secret. No eyes of the employer ought see or hear what is being discussed. To allow an employer to monitor email and phone messages would offend the confidential nature of discussions that take place between delegates and employees, and would have a chilling effect of the voice of workers. It also encourages haphazard modes of organising of union members through their delegates, in that inefficient modes of communication are often adopted to, and when you consider workplaces where delegates and union activities occur in the shadows.

PN990

Personal email accounts are used rather than workplace ones. People don't check them as often. People miss memos, unaware of meetings that take place. Repeat meetings often have to be held. Scattered conversations are had. The messages that people need to receive are not received or understood clearly. It makes no sense to the efficient operation of a workplace for channels of communication to occur in this way. It is technologically possible to silo these discussions through the employer's existing communication networks, be they email or phone. It my view, it would be akin to the practice that law firms have in creating information barriers where conflicts of interest exist. It's feasibly possible. Employers shouldn't be reserving the right to be able to peer into and observe the conversations being had between workers and their delegates.

PN991

Employers currently can do that, and I'm aware, without going into particular details, of instances where this has occurred, in a manner that thwarts the efforts of the delegate. What this does is it erodes the confidence that employees have to speak candidly to the delegate, which is the entire reason that they are there, to be able to have discussions in confidence, knowing that the employer is not privy to those very discussions. And we draw the Commission's attention to section 350A(c) of the Act, which says that an employer must not unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under this Act.

PN992

The right of the delegate include the ability to communicate. I can't think of anything more obstructive than an employer voyeuristically observing all communications between delegates and union members. And because of that, the Commissioner should be cautious about codifying the rights of union delegates to communicate with workers in a way that restricts the types of conversations that could be had. I'll make brief comment about section 350C(3)(b)(i), which relates to the reasonable access that a delegate has to the workplace and workplace facilities. Similar concepts around reasonableness apply here, looking at the circumstances and the context in which this occurs.

PN993

Returning to the earlier example; can a delegate use a corridor for a chat? Perhaps, depending on the circumstances. Are there other people around? Is it a conversation that should be had in private? Should the delegate be able to conduct an online meeting with other employees which management is not able to attend? Can they use a staff break area? If there's a meeting room free, and the delegate wants to hold a meeting with employees, is it reasonable to use that space? What if no meeting room exists? Again, it all comes down to the circumstances and the context. Notice boards, email bulletins, all the same principles apply. It will vary from circumstance to circumstance. So our view is that the Commission ought not take a restrictive approach, and rather allow for reasonableness to occur. And where there are disputes around the scope of reasonableness, it will be resolved in those particular instances. The last thing I'll discuss – and it is discussed in both our initial submission and submission in reply – is to do with reasonable access to paid time to participate in training for the delegate. We've said that five days per year represents the industry standard within the profession. It's the standard that's been negotiated into public sector enterprise agreements for nurses across the public health system, who are the largest cohort of workers in the sector.

PN994

The ANMF is comfortable with this forming the benchmark for not only the nurses' award, but potentially all other award. It is important that delegates have access to their training, because they need to be proficient in their role. It assists in the resolution of disputes. I note that employers, in saying earlier, that I referred to, (indistinct) for industrial action, lawful industrial action not to be included in the industrial interests of members. Another reason why that, and also the access to training is important is that it would likely limit the amount of industrial action that occurs in an unlawful manner, because it occurs outside of the embedded framework of the Fair Work Act. That's a counter to the AIG claim at paragraph 53.

PN995

ACCI have said, at clause 4.2 of their proposed delegates' rights clause, that the number of delegates should be capped. Now, we've already discussed this in our submissions in reply. I would add to that the rationale for doing that, which is – I take it to be a cost concern, an impact on the workplace concern – it takes an unnecessarily narrow focus around cost, without examining the broader impacts on how the workplace would operate. If what they say were to apply, and there were to be a capped number of delegates, it would restrict the ability for employees to access their delegate wherever they may be, particularly in large workplaces. If you consider a public hospital, for instance, a public hospital is a huge place. You need to have a few delegates there, because of the sheer size of the workplace and the number of issues that will come up.

PN996

If you limit the number of delegates who have access to training, you'll have a fewer number of delegates, who will then subsequently become overwhelmed with member issues that are raised. That then in turn means that a delegate would struggle to balance their duties as delegate with their employment

obligations. The more delegates you have, the easier it is to share the load, particularly in large and complex workplaces. Again, you need to consider the size and nature of an employer. I've described a hospital system, in which a nurse may work, but a nurse may equally work in an aged care facility. Having a smaller number of delegates there may be more logical, because of the nature of the enterprise.

PN997

It would be unreasonable for an employer to refuse access to training in circumstances where they have predetermined the number of delegates who have access to that training to begin with. It would also be unreasonable for an employer, in our view – and this is said at ACCI at clause 4.4 of their proposed model term – that they should be able to refuse access to training, because they may not consider training to be relevant to that workplace, or not fit for purpose. AIG make a similar argument at paragraphs 69 and 70 of their submissions, essentially allowing the employer to review the content of delegate training as a precondition to granting access to the training. The Commission should reject this suggestion. It's not for the employer to determine the industrial interests or strategies of the union, and to meddle in the union's affairs and the training that is provided to delegates.

PN998

In the same way, employers have suggested that industrial action should not be contained within the industrial interest of workers and the capacity of a delegate to represent employees in those matters. Employees shouldn't be able to determine the content of training, which may include the taking of industrial action. It would effectively allow an employer the right to decide, through their delegate, which rights union members and employers generally exercise, or whether or not they are even educated about those particular rights. That is why we say that employers should have no say in the content of delegate training. Now, that was it from me, unless anyone on the Bench has any questions.

PN999

VICE PRESIDENT ASBURY: And likewise, you would have heard that we are going to give parties an opportunity to provide some further commentary on the definition of an enterprise, if you want to partake in that.

PN1000

MR YIALLOUROS: No. Thank you, Vice President.

PN1001

VICE PRESIDENT ASBURY: All right. Thanks. Thank you. Ms Wiles. It's always good to be last, isn't it?

PN1002

MS WILES: I was going to say, I'm not sure it's always good to be bringing up the rear, but anyway, we'll see how we go. But thank you for the opportunity to the Full Bench. It's a very important matter obviously to industrial parties, but particularly, unions, their members, and their delegates. I do appear on behalf of the CFMEU Manufacturing Division. That's Wiles, initial V. Our union has to date filed two submissions in these proceedings. There was the initial submission

filed on 5 March 2024, and our reply submission filed on 2 April 2024. We continue to rely on those submissions, and we also support, by way of general application, the additional oral submissions made by the union parties in these consultations, including those of the ACTU and the CFMEU Construction and General Division on Wednesday.

PN1003

In particular, Mr Maxwell, for the CFMEU Construction and General Division – sorry, on Thursday – set out in considerable detail the important legislative underpinnings of the new delegates' rights provisions in the Act, as reflected in the revised explanatory memorandum, and also the significant international law convention relevant to the introduction, and we strongly support those submissions. The CFMEU Manufacturing Division has a direct interest in approximately seven modern awards in these proceedings, and we set those out in a list at paragraph 4 of our first submission. Our approach to what we submit should occur with respect to these awards is set out at paragraphs 17 to 20 of our submission.

PN1004

In summary, for the Joining and Building Trades Award 2020, we support the proposed delegates' rights clause advanced by the CFMEU Construction and General Division. For the Manufacturing and Associated Industries and Occupations Award 2020, we support the proposed ACTU clause, with the additional modifications as sought by the AMWU. And for the Dry Cleaning and Laundry Industry Awards 2020, the Storage Services and Wholesale Award 2020, the Textile, Clothing, Footwear and Associated Industries Award 2020, and the Timber Industry Award 2020, we support the ACTU's proposed model clause.

PN1005

In oral submissions today, my intention is to briefly address a number of the issues in contest between the union and employer parties, and how these are particularly relevant to the workers in the industries and sectors that my union represents. I apologise in advance; you've probably heard the substance of some of these submissions by other parties, but I think it's useful for me to put them on the record on behalf of my union as well.

PN1006

VICE PRESIDENT ASBURY: Absolutely, and don't constrain yourself at all, Ms Wiles.

PN1007

MS WILES: I'm sure you might have planes to catch.

PN1008

VICE PRESIDENT ASBURY: It's fine.

PN1009

MS WILES: So this is around the scope issue. The new section 149E requires that a modern award include delegates' rights term for workplace delegates covered by the award. The associated operative parts activating that requirement are found in combination in section 12, which provides a definition of delegates'

rights term, and in section 350C, which defines who is a workplace delegate and the rights of such workplace delegates. Critically, section 12 requires that delegates' rights term in award provide for the exercise of those rights. And a number of union parties have made this submission as well, but the use of the word 'exercise' is, we say, intentional. It is designed to support the insertion of new terms which animate and activate the new rights of workplace delegates.

PN1010

The note under section 12 is instructive, as it makes plain that the rights of workplace delegates are set out in section 350C, and that a delegates' right term must provide for a least the exercise of those rights. We say that section 350C represents the floor and not the ceiling of what terms can be in delegates' right term in awards. In this respect, we submit that the contentions of the employer parties should not be entertained. For example, ACCI, at paragraphs 27 to 32 of its reply submission, run a line of argument to the effect that delegates' terms in awards can contain greater detail, but no additional rights or obligations. Putting aside for a moment the inherent difficulties in untangling where an award term is simply greater detail, rather than a substantive operative provision, the substance of this contention is unsustainable.

PN1011

As outlined earlier, section 12 requires delegates' term to provide for the exercise of rights. The note underneath clarifies that a delegates' right term must provide at least for the exercise of those rights. In our submission, this clearly contemplates that an delegates' right term can provide for additional rights, not just additional detail. The second is the contested one, of industrial interests. And we know that a lot has already been said in these proceedings about what should constitute the parameters of industrial interests as referenced in section 350C. As we know, the term 'industrial interests' in not defined in section 350C or in the Fair Work Act itself, even though it is used in various other parts of the legislation.

PN1012

In our respectful submission, there is no necessity or warrant for this Full Bench in these proceedings to seek to include such a definition in a determination of delegate terms for modern awards. In fact, to do so could also seemingly have unknown and uncontemplated implications for the operation of other provisions in the Act where the same expression is used. Further, we contend that there's no express or implied requirement in section 350C that the term 'industrial interests' should be read down and constrained in the manner urged by a number of the peak employer organisations, including by the inclusion of lists of what a delegate can or can't do in their representative role.

PN1013

Such an approach, we say, would be contrary to the enabling purpose of the positive new delegates' rights provisions, consistent with Australia's international obligations. Another example of the employers' contentions. So ACCI, at paragraph 13 of its reply submission, asserts that this Full Bench, quote:

PN1014

Must constrict industrial interests to those matters which are directly relevant to the employees' employment

PN1015

– end of quote, which, in their view, only includes four matters, and Mr Yiallouros has made reference to these in his submissions this morning. It's unclear on what basis this submission is advanced by ACCI, as they simply refer to their submission as support for the proposition. On a plan reading of section 350C, it self-evidently does not qualify the expression 'industrial interests' in the manner contended by ACCI. The limitations sought to be imposed on what constitutes industrial interests are nothing more than a preference of ACCI. In another example, ACCI, at paragraph 57 of its reply submission, take umbrage at union proposed clauses which call for delegates to be able to ask workers to join the union.

PN1016

In contexts where delegates are both members and delegates of the union, this is quite an extraordinary submission to make. It is a fundamental function of a delegate's role, as provided under their union rules, to seek to encourage workers to join their union. In our view, this should be completely uncontroversial. The underpinning architecture of the new provisions is that positive rights afforded to workplace delegates who are either appointed or elected in accordance with the rules of an employee organisation – and that's found at section 350(1) – a workplace delegate is not acting in any individual capacity, but in a representative one on behalf of the union, in order to represent the industrial interests of members and those eligible to be members.

PN1017

So turning to the actual substance of the rights, so the right to represent in section 350C(2) and (3). Section 350C(2) provides an express right for a workplace delegate to represent the industrial interests of its members and those eligible to be members. In the workplaces in which the CFMEU Manufacturing Division has coverage, manufacturing and production employees will often be the significant percentage of a workforce of a particular enterprise. That is, commonly, the production and factory employee cohort or workforce is the largest part of the employees' operations, as compared to a smaller cohort of administrative and managerial staff, for example.

PN1018

This point is relevant because a workplace delegate in our sectors and industries is sometimes the only delegate for the production and factory workforce, and considerable demands are made on them in undertaking their role. These demands are exacerbated when the nature and characteristics of a particular workplace create further challenges for the delegate, for example, effectively imparting important information and representing workers where there is a wide diversity of language and cultural groups, without the availability of onsite interpreters or translators. As was submitted by the Mining and Energy Union yesterday, the role of a workplace is increasingly complex, in the context of the array of legislation which governs employment and industrial relations, including the Fair Work Act, anti-discrimination legislation, superannuation legislation, workers compensation, health and safety, and others.

PN1019

It's a lot for a workplace delegate to try and get their head around, even in a principal sense. Whilst a workplace delegate is not expected to be a workplace expert or be across all the detail of these laws, they must, as part of their role, deal with the consequences of the operation of these laws. There's an impact on members and potential members. In practice, workplace delegates are required to undertake their role with respect to a wide variety of disputes and grievances, both individual and collective, and other matters impacting on the rights and entitlements of workers. In our experience, there is often a reluctance by workers to take on the role of a workplace delegate.

PN1020

This reluctance is based on a combination of reasons, including the time required, in the context of what are typically very demanding physical jobs, and also a lack of confidence that they can undertake the role successfully. To amplify this point, in the TCF and laundry industries in particular, a large percentage of the workforce are women, many of whom have migrant or refugee backgrounds, and have English as a second or third language. While this is slowly changing, women generally continue to also have primary responsibilities for children, family and caring duties, and have limited discretionary time outside of work and family responsibilities.

PN1021

Of course, we acknowledge that many of these women are leaders in their families and communities, and sometimes, informally, in the workplace itself. However, taking on a representative workplace delegate's role is commonly a significant step in this context. Another feature of the industries in which the CFMEU Manufacturing Division has coverage is that many workers do not have university educations, and often do not even have high school qualifications. We have experienced that this can feed into a lack of confidence in workers to take on a leadership role in their workplace. We say that these factors speak to the critical importance of workplace delegates' training for workers in our sectors, and that such training rights practically encourage and facilitate workers to take on the role.

PN1022

Overarching all of these challenges is an often-expressed view my members that they would consider taking on a workplace delegate's role, but they are fearful that this would trigger unfair treatment or discrimination by their employer. Unfortunately, in our experience, this fear is commonly based in reality. The union has experienced many instances where workplace delegates have been unfairly treated or targeted by their employer. For example, suddenly the workplace delegate is not offered overtime or has their overtime reduced. The workplace delegate is subjected to hyper-management vigilance in undertaking their normal employment duties or the delegate is selected for redundancy even though they have a superior skillset to other employees not chosen.

PN1023

So moving to the rights to represent, as I said, the pillars of that representation can be summarised as the right to reasonable communication; the right to reasonable access to the workplace and workplace facilities; the right to reasonable access to

paid time during normal working hours for the purposes of related training. We acknowledge that these rights are qualified by the test of reasonableness and in relation to paid training leave by the small business exemption.

PN1024

The test of reasonableness is contained in section 350C(5) which sets out the matters which regard must be had to in determining reasonableness with respect to the rights in section 350C(3). In our submission, there is no necessity for this Full Bench in the formulation of relevant award delegates' rights terms - term or terms - to unpack what the test of reasonableness is outside of the factors of section 350C(5). Relevantly, the test of reasonableness does not actually apply to the substantive right to represent in section 350C(2).

PN1025

Moving to the right to reasonable communication. In our submission, the right to reasonable communication in section 350C(3)(a) must include the capacity for a workplace delegate to undertake their role in paid time, subject only to the reasonableness requirement. We say this is clearly contemplated by the legislature. To conclude otherwise would be to accept that the new delegates' rights provisions in the Act result in no material significant change from the status quo applied to their insertion.

PN1026

The parliament in enacting the new laws, consistent with international ILO obligations, have signalled a clear change in the status of workplace delegates and made provision for the exercise of workplace delegates' rights both in modem awards and enterprise agreements. So much is evident from the revised explanatory memorandum, which Mr Maxwell for the CFMEU Construction and General Division took you to yesterday.

PN1027

The employer parties variously contend that the role of a workplace delegate in undertaking their role should primarily occur in unpaid time. This contention should be rejected. What exactly is meant by 'unpaid time'? The employer parties make reference to unpaid meal breaks. In their respective submissions, this would practically restrict a workplace delegate's role to a maximum window of 30 minutes per day on shift.

PN1028

Such an outcome is clearly untenable given the multiple complexities involved in being an effective workplace delegate. As Mr Yiallouros submitted this morning, in many workplaces meal breaks are staggered - often two employees, then two employees, two employees - so the capacity of a workplace delegate to effectively represent members and potential members on a collective issue could be severely constrained, in our submission.

PN1029

The employer submissions also ignore the fact that in many manufacturing and production environments, and across different shift arrangements, there are no unpaid meal breaks. They are instead paid 20-minute crib breaks. In addition,

rest breaks under, I think, most modern awards, are commonly paid rest breaks of 10 minutes. They're actually not unpaid time.

PN1030

If the employer's contentions on this point are accepted, then in reality a workplace delegate would be forced to forego their own rest and recovery needs, including meals, in order to undertake their role. If delegates are restricted to undertaking their role in unpaid time, effectively unpaid meal breaks, the logistics of a delegate effectively communicating with workers for the purpose of representation across multiple meal or lunch areas, including sometimes across multiple physical factories and sometimes across multiple sites operated by the same employer, would be impossible.

PN1031

However, more fundamentally we say that the contentions by the employer parties fail to engage with the fundamental role of a workplace delegate in award-dependent workplaces. We're talking about award terms here. Our experience tells us that in the sectors in which we have coverage if delegates are unable to practically undertake their role in paid time, then many workers will simply choose not to become delegates as they do not have the capacity to effectively undertake the role in unpaid meal breaks or an unpaid time before or after their shift.

PN1032

As we outlined at paragraph 14 of our first submission, there is a gendered prism to the capacity of workers to firstly consider and, secondly, to accept becoming a workplace delegate in the first place. In 2024, we submit that it would be unacceptable for a term of an award to effectively disadvantage women workers, even in an indirect sense, from actively participating in the democratic operation of their workplace.

PN1033

The next point I wish to address the Bench on is reasonable access to the workplace and workplace facilities. There is a theme in the employer organisation's submissions that there should be minimal obligations on employers to provide reasonable access to workplace facilities to a delegate to perform their role. It is mooted in one of those submissions that a delegate could use their own mobile phone to communicate with members, persons eligible to be members in a union.

PN1034

A number of issues arise from this contention. In the experience of the CFMEU Manufacturing Division, many manufacturing and production enterprises have policies which expressly prohibit employees using their mobile phone during work hours. Secondly, it is not uncommon for our members to either not have their own phone, as it's shared with a partner or a family member, or have insufficient credit on their phones whilst they live week-to-week on minimum award wages.

PN1035

It is worth remembering that a significant number of workers dependent on modern awards are part-time and female. This has been consistently borne out in a number of annual wage review decisions issued by this Commission. That is, award-dependent workers are more likely than not to be women, part-time and low paid. This includes delegates in the sectors in which we have coverage.

PN1036

In terms of other facilities, by the nature of the work in a manufacturing factory or warehouse environment, production employees will rarely have access to their own private office or even a private meeting space to confidential or sensitive phone or one-on-one discussions with other employees. Typically production employees have access for meals and rest breaks to one or more lunch rooms and so-called smoko areas outside and that's about it. Workplace delegates in our sectors, similarly, have limited options outside of the ones I have just mentioned. These practical realities speak to the necessity of delegates have reasonable, practical access to workplace facilities in order to facilitate them effectively undertaking their representative role.

PN1037

The next issue I want to deal with is reasonable access to paid time during normal working hours for the purpose of related training and this entitlement, as you know, is found in section 350C(3)(b)(ii). We know that that section contains a small business exemption. As we outlined in our earlier oral submission, section 350C as a whole should operate as a floor and not a ceiling. We have referred you to the note under section 12 which contemplates and facilitates a delegates' rights term in an award to provide additional rights for delegates.

PN1038

We say this includes the capacity of a delegates' rights term in an award to include an entitlement to paid training leave in workplaces with less than 15 employees. We submit this construction is supported by the relevant revised explanatory memorandum.

PN1039

VICE PRESIDENT ASBURY: Sorry, can you just repeat that last point. The last point, yes.

PN1040

MS WILES: Maybe I will just repeat - - -

PN1041

VICE PRESIDENT ASBURY: That would be good.

PN1042

MS WILES: Yes. As we outlined in our earlier oral submissions, section 350C as a whole should operate as a floor and not a ceiling.

PN1043

VICE PRESIDENT ASBURY: Yes.

PN1044

MS WILES: It is evident from the note under section 12 that section 350C contemplates and facilitates a delegates' rights term in an award to provide additional rights for delegates. We say this includes the capacity of a delegates' rights term in an award to include an entitlement to paid training leave in workplaces with less than 15 employees.

PN1045

VICE PRESIDENT ASBURY: Is that if it's already there?

PN1046

MS WILES: I think it's open to the Bench to provide a term of that nature whether there is currently a term in an award or not.

PN1047

VICE PRESIDENT ASBURY: How would that operate though when there is an exception or an exclusion for small business employers because the exception is to the first part of (3), the entitlement to something.

PN1048

MS WILES: But what we say is that the combination of section 12 and section 350, that the Full Bench is not constrained to provide additional rights in an award term dealing with delegates' rights. So, yes, 350, subsection - - -

PN1049

DEPUTY PRESIDENT BINET: Do you think perhaps that could mean they mean things other than the ones that are listed as opposed to overriding an express exemption?

PN1050

MS WILES: Sorry - - -

PN1051

DEPUTY PRESIDENT BINET: Do you think the legislature meant when they said the Full Bench can provide for greater entitlements than in that section, that they meant you could provide greater entitlements other than the communication, the access, the items that they specify, rather than them meaning that we could override the express exemption that has been stated for small business?

PN1052

MS WILES: I think the Full Bench can. I think it can, because the way that I have read the revised explanatory memorandum and, you know, the plain words I think of section 12 and section 350C, is that this is the floor and that it is open to the Commission to provide a delegates' rights term in a modern award which provides greater rights than what is provided here.

PN1053

DEPUTY PRESIDENT BINET: Even if there is an express carve-out?

PN1054

MS WILES: Even if there is express carve-out, because this is the minimum, yes, so if the Bench determined to just provide the minimum which really mirrored

what was in section 350C, then obviously the small business exemption would be maintained, but we say that you're not so restricted if you choose not to be.

PN1055

I mean, we also note that currently dispute resolution training leave clauses in awards are not - you know, there is no exemption. I think in all awards there is no exemption - no small business exemption. So if the exemption was to be carried over to a particular award that already contained a term, effectively the result would be an anomaly in a way because we've got these new rights and yet delegates would be worse off than they are currently under some awards, and we don't think that was the intention of the parliament.

PN1056

DEPUTY PRESIDENT BINET: I understand the submission.

PN1057

MS WILES: Just on that point by way of example, I mean, if the small business exemption was to be included in the model term for the Textile, Clothing and Footwear Award, for example, what that would result in is that a miniscule number of workplace delegates would be eligible to be paid delegate's leave across the entire sector. We way that would be an unfair outcome for workers in any industry which is highly award dependent and experiences high rates of award noncompliance.

PN1058

I should indicate - and I apologise because I failed to do this, and if I could just seek leave for a moment - in an award review matter in 2021 - this is the casual terms award review, AM2021/54, this was the award proceedings where the Commission had to review and then redetermine, I guess, casual award terms in modern awards after legislative reform amendments to the Fair Work Act. In those proceedings the CFMEU Manufacturing Division filed a number of submissions.

PN1059

One of them included a witness statement where we had one of our industrial officers do an analysis of some ABS data, labour force data, in relation to a number of things of relevance to the textile, clothing and footwear sector, so these are '20, '21 ABS data, but that analysis identifies that of the total number of businesses in the textile, clothing and footwear industry, the percentage of those employing businesses with one to 19 employees was approximately 90 per cent.

PN1060

So that is 1:19 and obviously the small business exemption is 15 or less, but it gives you an indicator of the serious impact on the TCF industry if the small business exemption was included in the model term, particularly for the Textile, Clothing, Footwear and Associated Industries Award. It would represent a reduction in current rights under the award.

PN1061

VICE PRESIDENT ASBURY: Current rights - so does that award provide for training already?

PN1062

MS WILES: Yes, it does. Sorry, it's clause 46.

PN1063

VICE PRESIDENT ASBURY: Clause 46?

PN1064

MS WILES: Yes, it's titled 'Dispute resolution training leave' - sorry, it's clause 41. I apologise.

PN1065

VICE PRESIDENT ASBURY: Clause 41. That's the Textile, Clothing and Footwear Award?

PN1066

MS WILES: Yes, yes. There has been a lot said by a number of the employer organisations about the impact on small business, but we note that the Council of Small Business Organisations Australia, as far as I could see, have not filed any submissions on their own behalf and made no substantive oral submissions on day one of this consultation process in relation to the impact of the removal of the small business exemption.

PN1067

The peak employer organisations have made no submissions - no effective submissions - or produced any evidence as to the purported detrimental impact of current award terms applying in workplaces with less than 15 employees. We say that their concerns are purely speculative and should not be accepted. Just on the paid training leave, we note that a number of the awards in which we have an interest, including the TCF Award, the Timber Award and the Manufacturing Award, have a minimum entitlement to five days' training leave in those awards and that there is - sorry, I withdraw that.

PN1068

VICE PRESIDENT ASBURY: What was the third award, sorry? You said the Timber - I've just got this air conditioning - - -

PN1069

MS WILES: Yes, the Timber Industry Award, the TCF - - -

PN1070

VICE PRESIDENT ASBURY: The Manufacturing Award.

PN1071

MS WILES: Yes, and the Manufacturing Award.

PN1072

VICE PRESIDENT ASBURY: Thank you.

PN1073

MS WILES: There has also been a line of argument about what delegates should be paid when they do access paid training leave, and in our view the principle should be that delegates should receive the same remuneration as they would

ordinarily receive if they were not on paid training leave. We say that in the context of low paid award-dependent workers if there is a prospect of people losing income, that will act as a disincentive for people to consider and then accept to become a delegate.

PN1074

DEPUTY PRESIDENT BINET: What if they are not rostered to work at the time of the training, so no loss of income, in effect?

PN1075

MS WILES: Look, I guess if they are not rostered to work - I mean, unless, you know, they were deliberately rostered so that the employer awarded training - sorry, payment for training - I do acknowledge that there are part-time delegates for whom, you know, the rostered training may not occur on their normal days of work. Lastly - I'm just aware of the time - there has been some submissions made about the modern awards objective and that, you know, the appropriate mechanism for inclusion of additional rights for a delegates' rights term should be done through enterprise bargaining.

PN1076

The point we would make there is that there are some sectors in the industries where due to the nature of the industry and the unequal bargaining power, enterprise bargaining is not the norm and for many of these workplaces it's not realistic that enterprise agreements will be entered into in the ordinary course of events. So we say that there is a limit to enterprise bargaining in many sectors including, for example, in the TCF industry and the laundry industry and some of the smaller timber workplaces; that this assumption that all will be solved with enterprise bargaining is erroneous. Unless there are any more questions from the Bench, they are the submissions of the CFMEU Manufacturing Division.

PN1077

DEPUTY PRESIDENT BINET: The provisions refer to paid time for training leave, but they don't refer to paid time for communication or access. What do you say is to be made of the choice of the legislature to pay in one aspect and not in the other two aspects if they intended that it was all done in paid time?

PN1078

MS WILES: I guess I'm surmising in a way that I guess there is already paid training leave terms in awards, so I guess I'm assuming that it builds - in terms of the training leave component, that it builds on existing provisions. You're correct in the sense that section 350 doesn't expressly provide that the rights occur in paid time, but, as I've set out in my submissions today, I think without them being able to be reasonably accessed in paid time, then they won't generally be accessed in any kind of effective way for the reasons I've outlined.

PN1079

Now, obviously we accept that the rights are qualified by the test of reasonableness and undoubtedly there will be cases once the term is - you know, the final term or terms are determined there will be cases about what that means, but I don't think it's - well, as I said in my earlier submissions, I don't think that

the concept of reasonableness needs to be enunciated any further than what is contained in section 350C(5).

PN1080

VICE PRESIDENT ASBURY: Just circling back on your point in relation to the small business exclusion, for the sake of the argument, you know, my provisional view at least is that wherever the statute doesn't define or limit something, we can't do that in an award. For example, if industrial interests is not defined in the Fair Work Act, then the award can't define it in a more limited way.

PN1081

So does the converse apply with respect to the provision that the parliament specifically intended to carve out small business employers from the obligation to provide reasonable access to training in paid time, that we can't then put in a provision that grants something that parliament specifically decided to exclude?

PN1082

MS WILES: I understand what you're saying, but I respectfully disagree, because section 350C is really the minimal amount that has to be contained in a delegates' rights term and that minimal amount does include the small business exemption.

PN1083

VICE PRESIDENT ASBURY: But if that's all it does, what work does the exemption do? If the Commission was intended to be completely unconstrained, then the parliament could have said reasonableness could include the number of employees, for example.

PN1084

MS WILES: I guess another way to put it is to say that the parliament has intended to constrain this minimal set of rights. The Full Bench could say, 'You know what, despite all these consultations and submissions, we're just going to put in a term which effectively mirrors the substance of section 350C', and the small business exemption then would obviously be contained in that, but that's not the end of the task. Well, it could be, but there is scope there for the Full Bench, in our respectful submission, to provide rights additional to what's contained in section 350C, because the rights attaches to the delegate.

PN1085

VICE PRESIDENT ASBURY: Yes.

PN1086

MS WILES: So, as I understand how this operates, the rights could be superior in a modern award term either in a model term or in particular awards should the Bench so determine.

PN1087

VICE PRESIDENT ASBURY: I accept unreservedly that the rights attach to the delegate and yet subsection (3)(ii) is specifically worded to say that 'unless the employer of the workplace delegate is a small business', so arguably the rights don't attach to a delegate who is an employee of the small business.

PN1088

MS WILES: If this was all that was going to be contained, I agree with you, but given the note under section 12, in my submission the Bench is not constrained in providing greater or additional rights in a modern award delegates' rights term.

PN1089

VICE PRESIDENT ASBURY: I understand your submission. Thank you.

PN1090

MS WILES: Yes. Thank you for your time.

PN1091

COMMISSIONER LIM: Ms Wiles, sorry, I do have one additional question.

PN1092

MS WILES: Sorry.

PN1093

COMMISSIONER LIM: I'm not entirely sure if your union wishes to comment on how 'enterprise' should be defined. It's something that has been canvassed with quite a few other parties, particularly with parties where they have members who work at workplaces where there may be multiple employers, at which point - you may or may not wish to take that one notice. I think we are providing the opportunity for parties to provide any additional comments on that and I think something is issuing to that effect, but it occurs to me that given your membership that may be a pertinent question.

PN1094

MS WILES: Thank you, Commissioner. If it's okay, I would probably prefer to take that on notice. I couldn't attend to it in the session this morning. I'm just unclear though, because there is a definition of 'enterprise - - -'

PN1095

COMMISSIONER LIM: Yes, and there is perhaps varying views about how useful that is in terms of the delegates' rights definition. The reason why it has come up is that through various submissions there are various contentions about how does that interact with perhaps proposed caps on delegates; whether that can or cannot be sustained. Perhaps more prudently or really perhaps more pressingly, it interacts with contentions around the recognition of the entitlements, particularly with paid training leave.

PN1096

MS WILES: I see. Okay.

PN1097

DEPUTY PRESIDENT BINET: You might have a mindsight where you have got a delegate that covers all the workers on that location regardless of who they're employed by, so you can have an argument is the enterprise by employer or is the employer by a physical location or is the enterprise by business structure, because then the rights attach to - - -

PN1098

VICE PRESIDENT ASBURY: And the definition is an 'or' definition.

PN1099

MS WILES: Yes. It's not particularly helpful - - -

PN1100

VICE PRESIDENT ASBURY: It's a business activity - well, not for this, but for other things it is. Yes, it's a definition that has been there for other purposes - - -

PN1101

MS WILES: Yes.

PN1102

VICE PRESIDENT ASBURY: - - - and it's still there, yes.

PN1103

MS WILES: It means a business activity, project or undertaking.

PN1104

VICE PRESIDENT ASBURY: Yes.

PN1105

MS WILES: Yes.

PN1106

COMMISSIONER LIM: And we have heard some submissions to say that it actually doesn't matter at all. The definition is what it is and will play out; the law of the jungle. We've had various submissions from both unions and employer what is - some saying the same thing, some saying varying of things.

PN1107

MS WILES: I can say that, you know, we - I wouldn't say commonly, but it's not uncommon that we have employers that operate more than one physical site and sometimes they are co-located, although in separate buildings - but sometimes they might be down the street, sometimes there is the warehouse down the street or - - -

PN1108

COMMISSIONER LIM: Yes.

PN1109

MS WILES: So I guess, thinking on my feet, that may be something to consider in terms of - - -

PN1110

VICE PRESIDENT ASBURY: That you would make some further comment on.

PN1111

MS WILES: Yes.

PN1112

VICE PRESIDENT ASBURY: Yes.

PN1113

MS WILES: We may do, yes.

PN1114

VICE PRESIDENT ASBURY: Okay.

PN1115

MS WILES: Let me just have a think about it. Thank you.

PN1116

VICE PRESIDENT ASBURY: All right. Thank you.

PN1117

MS WILES: Thank you for that opportunity.

PN1118

VICE PRESIDENT ASBURY: I thank you for your submissions and we will adjourn.

ADJOURNED INDEFINITELY **[3.35 PM]**