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IN THE FAIR WORK COMMISSION

Fair Work Act 2009

Clause 95, Schedule 1 – FWC to vary certain modern awards

(AM2024/6)

Variation of modern awards to include a delegates' rights term

**SUBMISSION OF THE
CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION
(MANUFACTURING DIVISION)**

**In response to the
Statement of the Full Bench (16 April 2024) [2024] FWCFB 212**

(17 April 2024)

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Fair Work Act 2009
Clause 95, Schedule 1 – FWC to vary certain modern awards

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

**SUBMISSION OF THE CFMEU-MANUFACTURING DIVISION
IN RESPONSE TO THE STATEMENT OF THE FULL BENCH (16 April 2024) [2024] FWCFB 21**

1. On 16 April 2024 the Full Bench issued a Statement [2024] FWCFB 212 (**April 2024 Statement**)¹ arising from the series of Consultations undertaken with parties on 10, 11 and 12 April 2024.
2. In these proceedings, CFMEU-Manufacturing Division (**CFMEU-MD**) has an interest in the following modern awards:
 - *Dry Cleaning and Laundry Industry Award 2020* [MA000096] (**DC&LI Award**)
 - *Joinery and Building Trades Award 2020* [MA00029] (**Joinery Award**)
 - *Manufacturing and Associated Industries and Occupations Award 2020* [MA000010] (**Manufacturing Award**)
 - *Storage Services and Wholesale Award 2020* [MA000084] (**Storage Award**)
 - *Textile Clothing and Footwear Industry Award 2020* [MA000017] (**TCF Award**)
 - *Timber Industry Award 2020* [MA000071] (**Timber Award**)
3. To date, the CFMEU-MD has filed written submissions on **5 March 2024**, Reply Submissions on **2 April 2024** and a document in support on **15 April 2024**. The CFMEU also provided oral submissions in support of its position at the consultation held on **12 April 2024** before the full bench convened in this matter.
4. At paragraph [5] of the April 2024 Statement, the full bench provides “an opportunity to comment on the following matters:
 - (1) In a workplace where the workforce is comprised of employees of different employers including employees of labour hire providers, how does the definition of an “enterprise” in s.12 interact with the provisions in s350C?

¹ (AM2024/6) Variation of modern awards to include a delegates' right term; Statement [2024] FWCFB 212

- (2) How does the meaning of an “enterprise” in s.12 interact with the rights of a workplace delegate in ss.350C(2), 350C(3)(b)(i) and 350C(3)(b)(ii).²

SUBMISSIONS OF THE ACTU AND CFMEU C&G

5. The CFMEU is an affiliate of the Australian Council of Trade Unions (**ACTU**). The CFMEU-MD has had an opportunity to review the draft submissions of the ACTU prepared in response to the 2 questions raised in the April 2024 Statement. The CFMEU-MD supports and adopts by way of general application the submissions of the ACTU.
6. We have also reviewed the submissions of the CFMEU Construction & General Division (CFMEU-C&G) and support and adopt them with respect to the Joinery Award.

ADDITIONAL COMMENTS

7. In the limited time available, we provide the following additional comments with respect to the 2 questions raised in the April 2024 Statement, drawing on our understanding and experience of the variety of business operations and enterprises in the industries and sectors in which the CFMEU-MD has coverage.

Question 1 - In a workplace where the workforce is comprised of employees of different employers including employees of labour hire providers, how does the definition of an “enterprise” in s.12 interact with the provisions in s350C?

Question 2 - How does the meaning of an “enterprise” in s.12 interact with the rights of a workplace delegate in ss.350C(2), 350C(3)(b)(i) and 350C(3)(b)(ii)

8. The term “enterprise” is defined in section 12 of the Fair Work Act 2009 (FW Act) to mean “a business, activity, project or undertaking”. It is evident on the face of the words used that the term “enterprise” is broadly framed and its reach is intended to include circumstances and activities beyond those undertaken by a single enterprise employer on a single physical worksite. We consider this construction should be uncontroversial on a plain reading of the words themselves.
9. Sections 350C(1) and (2) makes clear that the definition of a “workplace delegate” extends to the right to represent members, or those eligible to be members, “who work in a particular enterprise”. The substantive, positive rights which attach to a workplace delegate, are not limited to representing such

² Ibid; at [5]

persons who work for a single employer, or in a single workplace, but are more expansive and include all workers (for which the workplace delegate's union has coverage) in a particular enterprise as broadly defined in s12.

10. In our submission there is no necessity or warrant for the term "enterprise" to be read down or narrowed, either generally under the FW Act, or specifically as the term applies to section 350C, or in the Commission's determination of delegates rights term(s) for modern awards as required under s149E.
11. In the wide range of sectors and industries in which the CFMEU-MD has coverage it is a daily reality that employees of labour hire companies work with a host employer alongside employees directly engaged by the main employer. For example, the use of labour hire employees (together with directly engaged employees) is common in the TCF, laundry, furnishing, timber and glass manufacturing industries.
12. The CFMEU-MD has also seen examples where the enterprise includes a combination of directly engaged employees of a single employer, employees of a labour company working with that host employer and other contractors (and their employees) working in the same enterprise. By way of example, the CFMEU-MD is aware of an employment model used by a commercial laundry in Melbourne which operated with (i) directly engaged employees; (ii) labour hire employees of another employer; and (iii) contractors who ran particular lines or laundry machines who employed their own employees.
13. All of the workers engaged in each of these cohorts in the commercial laundry in question performed work covered by the DC&LI Award. In this scenario, we submit the operation of s.12 in combination with s350C, would permit the workplace delegate to represent *all* of the workers undertaking work which come within the CFMEU-MD's industrial coverage, irrespective of which entity employs them.
14. It is also often the case that a particular employer's operations are undertaken across more than one site, which may be co-located next door to each other, or in a different building in another location. Commonly, this will include a manufacturing site in one location and associated warehouse and distribution operations in another location. We submit, these functions would all be covered by the definition of "enterprise" in s.12 and therefore attract the rights provided for in s.350C. In practical terms, a workplace delegate would have the rights in s350C to represent workers across all the sites within the enterprise as long as the work undertaken comes with the union's industrial coverage as provided by its registered rules.

15. In some circumstances (for example, such as timber harvesting in the forest), there may be no physical building where work is undertaken; however, the definition of “enterprise” is sufficiently broad to capture this work. With respect to interaction with the rights in s350C, there are any number of potential variations on this scenario, including; that the timber harvesting is undertaken by directly engaged employees of the primary employer operating the business, or undertaken by employees of a contractor or undertaken by persons who are themselves sole contractors. Subject to the union’s rules including the industrial coverage of both employees and contractors, a workplace delegate could represent each of these persons, if required, under s350C. This of course, may not be necessary as a timber harvesting contractor for example, may have its own workplace delegate appointed or elected for that particular group of workers.
16. The interaction between the meaning of an “enterprise” in s12 with the rights of a workplace delegate in **s.350C(2)** confirms that a workplace delegate is able to represent the industrial interests of members, or those eligible to be members, who work in a particular enterprise, “including disputes with their employer”. The use of the word “including” in s350C(2) indicates that the clause is not intended to be exhaustive, and further does not operate more generally to qualify the term “enterprise”.
17. For example, in practical terms, a workplace delegate has the overarching right to represent workers in the enterprise (as broadly defined in s.12) and this (as per s.350C(2) may include (in one scenario) the workplace delegate representing a labour hire employee in a dispute with their direct employer (for example, around the issue of number of shifts being offered, right to request to be made permanent). It could also potentially include representing the labour hire worker with respect to their industrial interests as they apply to the host employer (for example, around a health and safety dispute affecting all workers in the enterprise).
18. The interaction between the meaning of an “enterprise” in s.12 with the rights of a workplace delegate in **s.350C(3)(b)(i)** is directed to providing the workplace delegate with “reasonable access to the workplace and workplace facilities where the enterprise is carried on” for the purpose of representing the interests of those members, or persons eligible to be members. It is relevant, that s.350C(3)(b)(i) expressly refers to the “enterprise” as part of this ‘access’ right for the workplace delegate.
19. As outlined above the term “premises” is expansive. The only express qualification to the access right in s350C(3)(b)(i) is the test of reasonableness as applied to the exercise of the right. The CFMEU-MD has previously contended in its submissions, that there is no necessity for the full bench to seek to further define what ‘reasonable’ means in the context of delegates rights term(s) for modern awards.

20. In summary, the CFMEU-MD identifies no conflict between the terms of s12 and s350C(3)(b)(i) either on the plain words of the respective provisions or in their interaction.
21. The interaction between the meaning of an “enterprise” in s.12 with the rights of a workplace delegate in **s.350C(3)(b)(ii)** is directed to (unless the employer of a workplace delegate is a small business employer) reasonable access to paid time during paid time for the purposes of related training. We submit that logically, the obligation in s350C(3)(ii) only attaches to the *employer* of the workplace delegate. We consider that this construction naturally arises from the words of s350C(3) itself and from reading s350c(3)(ii) in context of s350C(4) and s350C(5)(b).
22. Similarly, as a matter of statutory construction, we see no conflict between the terms of s.12 and s.350C(3)(b)(ii).
23. With respect to the small business exemption contained in s350C(3)(b)(ii) the CFMEU-MD has previously outlined its position regarding the capacity (both on a jurisdictional and merits basis) of the full bench to determine one or more delegates right term(s) for modern awards which does not include such an exemption.³ We continue to rely on those submissions.

Submitted on behalf of the:

**Construction, Forestry and Maritime Employees Union
(Manufacturing Division)**

(17 April 2024)

³ See CFMEU-Manufacturing Division, Reply Submission (2 April 2024) at paragraphs [45] – [46] and oral submissions at the consultation held 12 April 2024.