

IN THE FAIR WORK COMMISSION

Fair Work Act 2009 (cl.95, Schedule 1)

Matter Number: AM2024/6

Matter: Variation of modern awards to include a delegates' rights term

Mining and Energy Union's response to the 16 April 2024 Statement

1. This submission is made in reply to the Coal Mining Industry Employer Group's (CMIEG) submission (**Submission**) in response to the Commission's 16 April 2024 Statement.
2. At [4] and [9] of the Submission, CMIEG invited the Commission to consider the 'ordinary and normal meaning' of delegate, which they assert is a 'person elected by their fellow employees to represent them.' CMIEG's submission is unsupported by authority. Presumably, this is because the ordinary meaning of delegate is not so confined. For example, the Macquarie Dictionary defines delegate as 'a person delegated to act for or represent another or others'.¹ Nothing in the ordinary meaning of delegate suggests that representation would be confined to the representation of an individual engaged by the same employer as the delegate. Further, given *workplace delegate* is defined at 350C(1) of the *Fair Work Act 2009 (Cth)* (**FW Act**), the ordinary meaning of delegate is not relevant.
3. At [5] and [6] of the Submission, CMIEG submit that s. 350C(1)'s reference to 'particular' qualifies the word 'enterprise' and that 'particular' would be given the meaning 'used to single out an individual member of a specified group or class'. The MEU accepts that 'particular' qualifies the word 'enterprise' as it appears in s. 350C(1) of the FW Act. However, as submitted in our 17 April 2024 submission, enterprise would be understood as a business or activity or project or undertaking. Thus, a particular enterprise within the meaning of s. 350C(1) of the FW Act may be:
 - a. A business but not an activity, project, or undertaking; or
 - b. An activity but not a business, project, or undertaking; or
 - c. A project but not a business, activity, or undertaking; or
 - d. An undertaking but not a business, project, or activity.
4. Respectfully, as we submitted in our 17 April 2024 submission, it is for the relevant registered organisation to determine whether the workplace delegate they appoint or elect is appointed or elected with respect to a business, activity, project or

¹ *Macquarie Dictionary*, 8th edition, 2020, p 411, definition 1.

undertaking. Please see [6] – [7] of our 17 April 2024 submission for illustrative examples.

5. At [7] and [8] of the Submission, CMIEG states that it is open to the Commission that a particular enterprise is to be understood as an ‘enterprise of a particular employer carried out at a particular location’. We respectfully submit such an understanding is not supported by the legislature’s intention as communicated by the *Senate Revised Explanatory Memorandum of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (EM)*. Paragraph [820] of the EM states:

*...The definition of ‘workplace delegate’ would recognise the role of workplace delegates in representing the interests of **all workers, not just employees, who work at the relevant enterprise** and who are eligible to be a member of the relevant employee organisation...*

6. At [16] of the Submission, CMIEG submitted that it would be “*a remarkable and inappropriate outcome if a group of employees “who work in a particular enterprise” were not directly involved in the process which selects the delegate who is recognised by s. 350C as being able to represent them.*”
7. Section 350C(1) of the FW Act expressly provides that a workplace delegate may be appointed (as distinct from elected), further, s. 350C(2) of the FW Act allows workplace delegates to represent individuals who are not members of the relevant registered organisation. Plainly, s. 350C contemplates that not all individuals whom the delegate may represent must be involved in selecting the workplace delegate.
8. In any case, with respect to the MEU, CMIEG’s concern is unfounded. Largely, the MEU’s Lodges in the black coal mining industry are established with respect to a mine; any individual eligible to be a member of the MEU and who works at the mine can join the Lodge regardless of their employer.
9. At [17] of the Submission, CMIEG states that “*if a person can be the delegate for the employees of an employer other than their own, then it is possible that a different Modern Award or Enterprise Bargaining Agreement might apply to the delegate and the employees they represent. These Awards or Agreements may contain differing delegates’ rights provisions.*” CMIEG continues in [18] of the Submission by stating the “*Commission should clarify in such a circumstance whether the rights applying under the industrial instrument which covers the employment of the delegate, or the rights applying under the instrument which covers the rights of the employees being represented*”.
10. In our respectful submission, the Commission does not need to clarify which rights apply to the workplace delegate. As a matter of law, an industrial instrument may only

provide a right or entitlement to an individual if that industrial instrument applies to their employment.

11. With respect to modern awards section 46 of the FW Act provides:

(1) A modern award does not impose obligations on a person, and a person does not contravene a term of a modern award, unless the award applies to the person.

(2) A modern award does not give a person an entitlement unless the award applies to the person.

12. With respect to enterprise agreements section 51 of the FW Act provides:

(1) An enterprise agreement does not impose obligations on a person, and a person does not contravene a term of an enterprise agreement, unless the agreement applies to the person.

(2) An enterprise agreement does not give a person an entitlement unless the agreement applies to the person.

By virtue of s. 46 and 51 of the FW Act, an industrial instrument that does not apply to a workplace delegate cannot bestow a right on the delegate.

13. Given the emphatically clear statement at paragraph [820] of the EM that “(t)he definition of ‘workplace delegate’ would recognise the role of workplace delegates in representing the interests of all workers, not just employees”, the MEU respectfully submits that the delegates’ rights clause inserted into the modern awards would include an obligation on the employer to whom the industrial instrument applies to not prevent a workplace delegate from representing a member or potential member. Clause 2.6 of the MEU’s draft delegates’ rights clause is such a provision. For the purpose of clause 2.6, when inserted into each of the Awards, employer will mean national system employer within the meaning of the FW Act.

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