



Australian Higher Education Industrial Association

Submission to
Fair Work Commission

AM2024/6

Variation of modern awards to include a delegates'
rights term

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AHEIA Submission

1 March 2024

Further to the statement of Justice Hatcher of 30 January 2024 in matter AM2024/6 please find the submission of the Australian Higher Education Industrial Association (AHEIA).

Proposed workplace delegate clause

1. AHEIA proposes the following as the workplace delegates' rights term for the higher education sectors two main awards – Higher Education Academic Staff Award 2020 and Higher Education General Staff Award 2020 (Higher Education Awards):

“Rights of Workplace Delegates

The rights of workplace delegates are set out in section 350C of the Fair Work Act 2009.”

Rationale for proposal

2. In making this proposal AHEIA notes that section 12 of the FW Act states:

“delegates' rights term means a term in a fair work instrument that provides for the exercise of the rights of workplace delegates.

Note: The rights of workplace delegates are set out in section 350C, and a delegates' rights term must provide at least for the exercise of those rights.

workplace delegate: see subsection 350C(1)” (emphasis added).

3. Section 138 of the FW Act states:

*‘A modern award may include terms that it is permitted to include, and must include terms that it is required to include, **only to the extent necessary to achieve the modern awards objective** and (to the extent applicable) the minimum wages objective.’ (emphasis added).*

4. The expression ‘*necessary to achieve the modern awards objective*’ in s.138 of the FW Act was considered in the case of *CFMEU v Anglo American Metallurgical Coal Pty Ltd*ⁱ

“The words “only to the extent necessary” in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4.”ⁱⁱ

5. The higher education sector industrial framework is unique, with nearly complete enterprise agreement coverage. As such, modern awards do not act as a source of employment conditions except for the better off overall test in bargaining.
6. Many sector Enterprise Agreements (EAs) provide terms that recognise the rights and role of workplace delegates. In many instances, the higher education sector EAs go beyond the matters set out in section

350C. These rights are set out in dedicated union representation clauses and/or referred to in other EA terms. For example, consultation over change, misconduct procedures and dispute resolution clauses terms. Sector EAs, while variable in content and specifics, broadly provide workplace delegates with rights to have reasonable access to facilities, information, and communications with members (and non-members), represent members in various EA procedures, be consulted and may provide rights of workplace delegates to periods of paid union training leave.

7. The Explanatory Memorandum (EM) makes it clear that it was the Government's intention that greater detail for particular industries and enterprises could also be negotiated into enterprise agreements. AHEIA notes Justice Hatcher in his statement of 18 January 2024:

*"The EM [Explanatory Memorandum] at [827] and [830] sets out an expectation that "...for most employees, modern awards and **enterprise agreements** would provide greater detail for particular industries, occupations and enterprises" and that s 350C(4) would ensure, where this is the case, that:*

*employers can rely on [the award or **agreement term**] as a complete statement of their obligations under new subsection 350C(3)ⁱⁱⁱ"*

8. AHEIA has observed that although the Higher Education sector has advanced business support structures, the rate of modification with respect to compliance with awards is challenging for small and medium-sized enterprises to keep up with and does not align with the purpose of the Act..

ⁱ *CFMEU v Anglo American Metallurgical Coal Pty Ltd [2017] FCAFC 123*

ⁱⁱ *Ibid at [23]*

ⁱⁱⁱ *Statement of Justice Hatcher, 18 January 2024, [2024] FWC 150 at [7]*