

# VARIATION OF MODERN AWARDS TO INCLUDE DELEGATES RIGHTS

**AM2024/6**

28 MARCH 2024

## **NSW BUSINESS CHAMBER AND AUSTRALIAN BUSINESS INDUSTRIAL**

The New South Wales Business Chamber Ltd (**BNSW**) is New South Wales' peak business organisation with nearly 100,000 members, spanning most industry sectors and sizes. BNSW is a registered state industrial organisation under the *Industrial Relations Act 1996 (NSW)*, as well as federally registered under the *Fair Work (Registered Organisations) Act 2009 (Cth)*.

Australia Business Industrial (**ABI**) is the industrial relations affiliate of BNSW. ABI is federally registered under the *Fair Work (Registered Organisations) Act 2009 (Cth)* and engages in policy advocacy on behalf of its membership as well as engaging in industrial advocacy in State tribunals and the Federal tribunal.

1. This reply is focussed on the submission made by the ACTU dated 1 March 2024 as it is the primary union submission.
2. Not responding to any of the ACTU affiliates should not be taken to mean we agree with their submissions.
3. It is disappointing that the ACTU having been given an 'inch' by the Commonwealth seeks to take a 'mile'. The extent of its overreach is unfortunate as it suggests that reasoned and prudent dialogue will be limited in the consultation process.
4. A number of general comments are made in reply to the ACTU submission and then a number of more specific ones.

#### General Observations

5. Sections 350A and 350C of the *Fair Work Act 2009* (Cth) (**Act**) work to give effect to the historical and ordinary understanding of the role of the union delegate. These provisions do not represent the seismic shift endorsed in the ACTU submission.
6. The words of section 350C of the Act are clear on their face and contextually must be read with the objects of the Act, the modern awards objective, s 138 and freedom of association. An appeal to international conventions can only be taken so far given the clarity of this language in its context. The Commission's primary consideration must be the language of the Act, specifically s 134 and s 138 which indicate what modern awards should include.
7. The ACTU submission operates on the basis that the workplace delegate has a degree of immunity and entitlement such that the status of workplace delegate elevates a person *beyond* the status of employee. The effect of the ACTU proposal is that a workplace delegate would be free to abandon their work and workstation at will irrespective of the impact this has on the work process. This is not appropriate, supported by the statute, nor has this been a historically accepted position with respect to workplace delegates.
8. Critically, there is nothing in the language of section 350C of the Act or elsewhere in the Act to warrant this and neither is there any evidence advanced for it. Regardless of delegate status, an employee cannot abandon their work or workstation without the employer's prior approval as this would (absent an award condition) constitute unlawful industrial action under Part 3-3 of the Act.
9. With respect to the right to communicate, the ACTU submission also operates on the basis that the workplace delegate should have a degree of immunity to interfere with another employee's work such that they can be prevented from performing work when

the workplace delegate exercises a right. Indeed, it is proposed that an employee can abandon their work unilaterally if this is associated with the exercise of a delegate's right.

10. Again, there is nothing in the language of section 350C of the Act to warrant this and neither is there any evidence advanced for it. Again, interfering with the ordinary performance of work would constitute unlawful industrial action under the Act.
11. Even with section 350C (and 350A) of the Act, the delegate must be subordinate to the lawful and reasonable directions of the employer. This can be achieved alongside the new union delegates rights without resort to the overreach of the ACTU submission and indeed, this has been the position historically; see *Grubisic v Chubb Security Services Limited* [2011] FWA 4322 (21 July 2011).
12. The ACTU submission effectively seeks to mandate the workplace delegate as the intermediary between an employer and their employee irrespective of the wishes of the employee. This is contrary to accepted right of an employer to engage with their employee directly. This is also contrary to the note that the legislature so carefully included in section 350C (2):

*Note: This section does not create any obligation on a person to be represented by a workplace delegate.*

13. This is evident from clause 2(2) of the ACTU proposal which sets out various activities well beyond the simple notion of representing a member who has asked for representation. The effect of this is to extend the delegate's role to broader advocacy and require the employer to adjust their ordinary method of organising work to facilitate the union delegate (see clause 2(2)(l) etc).
14. Many employees who may be entitled to representation will not seek the assistance of a workplace delegate and certainly have the right to choose to seek it or not.
15. Proposed clause 2(3) of the ACTU proposal is another example of this in that it empowers the union delegate to be a de facto industrial representative akin to a union official irrespective of any defined need for them to participate. The union delegate is not a union official, or a paid agent or lawyer engaged by the employee.
16. It is perhaps uncontroversial that the practical motivation of the ACTU submission is to promote the unionisation of Australian workforces rather than give effect to limited and enumerated rights for workplace delegates as now included in the Act.
17. There is certainly no warrant included in the Act, including and most relevantly s 134 the modern awards objective, to facilitate this 'goal'.

18. Therein lies the fundamental issue with the ACTU's proposal. The content of modern awards is determined by the Commission having regard to the relevant sections of Act. There is *nothing* within the Act which could be said to support a clause of such scope and influence into modern awards. Had the Federal Government wished to create rights of the kind sought by the ACTU it could have done so when it changed the law. By way of example, the modern awards objective could have been updated to include the need to facilitate the productive exercise of delegates rights for the betterment and empowerment of the union movement in Australia. The modern awards objective does not include anything approaching that. Alternatively, the Federal Government might have published a model clause which in some way resembled the ACTU proposal. It did not. The ACTU proposal is without support, without warrant and should not be accepted.

### Specific Matters

#### *Right to Represent*

19. The ACTU seeks to develop a set of rights way beyond the legislature. Refer for instance to clauses 2(2)(e), (f), (g), (i), (k), (l), (m) etc.
20. With respect to clause 2(2), it is not the role of an employer to *facilitate* union related communication rather an employer should allow it. An employer (and unions) must also respect that employees may not want to be involved in such communication.
21. Clause 2 (2)(m) is particularly alarming as the rights an award would create are those rights created by the union under its registered rules which the employer has no control or visibility over; neither does the Commission.
22. The nature of these ambit claims is to produce an outcome that offends section 134 by failing to support a fair and relevant minimum safety net for employees and employers rather manifesting in a maximum safety net for employees alone.

#### *Leave*

23. The ACTU submission appears to simply omit the Commonwealth's exclusion for small business in section 350C(3)(b)(ii) of the Act. Not only is this contrary to section 3(g) of the Act, but the departure from section 350C(3)(b)(ii) is entirely unsupported and unwarranted.
24. Other elements of the proposal that overreach are evidenced by clause 3(4) and go far beyond training a union delegate to act responsibly in that role and extend to the employer paying for them to participate in the management of the union. Nothing of this kind is contemplated by section 350C.

25. Setting five days as the standard for trade union delegate training is a reckless disregard for small and medium businesses. It fails to understand the impact and cost of such leave on these businesses which includes the time off and also the cost of replacing them.
26. The ACTU submission abandons the notion of reasonableness enshrined in the legislation by clause 3(3) and in fact embeds manifest unreasonableness.
27. The ACTU submission abandons the legislatures desire to allow contextualisation to the circumstances of the enterprise in clause 3.
28. The sheer complexity of the ACTU submission offends section 134(1)(g).
29. There is no attempt to understand the economic consequence of their claim for a uniform training leave quantum. It fails to consider the concept of business size or the vagaries of a capacity to release. By way of example, a small childcare centre, required by regulation and 'ratios' (as well a client/customer expectation) to operate at a specific staffing level will face different and more difficult challenges replacing absent employees than a large manufacturing or mining setting.
30. It also perverts the notion of reasonableness in the legislation and replaces it with the unwarranted and prejudicial test of "unjustifiable hardship" in clause 3(6)(b) not contemplated by the legislation.

*Right to Communicate*

31. Clause 4(2)(a) is a proposition that should be prevented by the protections of freedom of association and an award clause should not implicitly suggest that joining a union is endorsed.
32. Clause 4(2)(d) is also a proposition that should be prevented by the protections of freedom of association and an award clause should not implicitly endorse union membership by imposing the union delegate into a process that is part of the normal processes of the employer; suggesting that the employer endorses the union and union membership beyond the rights that section 350C provides.
33. The clause put forward by the ACTU goes well beyond what ACTU affiliates would ever likely achieve in bargaining. Self-evidently, it is not a clause which only contains obligations or entitlements 'only to the extent necessary to achieve the modern awards objective'.<sup>1</sup> Even at a superficial level, the notion that all modern awards should be supplemented with a 5 page, 50+ subclause regime for union delegates, giving rise to

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<sup>1</sup> See s 138 of the Act

entitlements more generous than the vast majority of enterprise agreements is totally incongruous given the current state of union membership in Australia.

34. There is no warrant in section 350C for the employer to yield access to employer based internal communication platforms to allow a union delegate to broadcast union activism to a workforce as a whole as clause 4(5) provides.
35. Clause 4(6) operates with simple impracticality requiring employers to modify their normal and acceptable policies and perhaps software to protect union delegate communications; if union delegates want to ensure confidentiality of their communications, they should use their own union provided means of doing this rather than unreasonably require employers to change their operating systems to accommodate this; assuming this is even technically possible. Union delegates would ordinarily use a personal smart phone likely using an encrypted App for this rather than imposing unreasonable requirements on employer platforms.
36. If the Commission was lulled into being attracted to these it would need to enumerate reciprocal rights and obligations to combat workplace delegate mischief and abuse.
37. For instance:
  - (a) the reciprocal obligation to clause 4(a) would be that the union delegate must not induce an employee to be represented by them or the union.
  - (b) the reciprocal obligation to clause 4(c) would be that the union delegate must not prevent an employee or the employer from directly engaging should both wish to do so.
  - (c) the reciprocal obligation to clause 4(7)(a) would be that the union delegate must not induce or coerce an employee from disclosing information.
  - (d) the reciprocal obligation to clause 4(8)(a) would be that the union delegate must not disclose information unless authorised by the employee.
  - (e) the reciprocal obligation to clause 4(8)(b) would be that the union delegate must not disclose confidential information unless authorised by the employee.
  - (f) the reciprocal obligation to clause 4(6) would be that the union delegate must not knowingly infringe privacy of an employee who has not authorised the conduct.
38. Finally, the ACTU proposal explicitly takes union delegates into the realm of bargaining.
39. The Act sets out clear parameters for bargaining and clear roles for bargaining centred on the notion of a bargaining representative. The Act does not mandate any role for union delegates in the context of this statutory role and it is inappropriate and unnecessary to create one through the limited role contemplated by section 350C. For

the purposes of the Act, the role of bargaining representatives comes with specific statutory conditions including an obligation to engage in bargaining in good faith.<sup>2</sup>

40. The imposition of union delegates into 'collective bargaining' through an award clause implicitly undermines freedom of association as is evidenced by clauses 2(5), 4(2)(a) and clause 4(2)(d) of the proposal.

#### Characterisation of Workplace Delegates

41. It should be unsurprising that the parties have different perspectives on the institution of workplace delegates as a role within modern workplaces.
42. As a general theme, the ACTU Submission characterises workplace delegates as 'better angels' within workplaces driving harmony and benefit for all.
43. A more realistic perspective (in the context of paid training leave) was identified in the *Retail Trade Union Training Leave (State) Award [1994] NSWIRComm 154* (15 December 1994):

*In our opinion, on the material before us, such benefits as may accrue to an employer from TUTL e.g. prevention of disputes and/or their escalation, come somewhat by way of a side wind. The primary object of the training seems to be to assist and further the interests of the unions and their members against the employer in situations of possible conflict, whether in actual or potential dispute situations or in workplace/enterprise bargaining. The efforts of the unions and their delegates are, naturally enough, usually directed at getting the best possible result for members and the thrust of training is structured to that end.*

44. Workplace delegates are representatives for members and those eligible to be members who seek their assistance.
45. Any experienced industrial practitioner will know that workplace delegates may be constructive and reasonable through to destructive and unreasonable and every shade in between.
46. Ultimately, the characterisation of workplace delegates and the respective value placed on the concept by the parties matters little.
47. What matters is the words of Act.

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<sup>2</sup> See s 228 of the Act.



48. There is nothing within the words of the Act which would warrant or justify the ACTU proposal. It is not consistent with a fair and relevant minimum safety net and is not remotely necessary to achieve the modern awards objective.

Matters of Agreement

49. While the ACTU submission and proposal raises many controversial matters not arising or needing to arise from section 350C there are a limited number of matters that we can agree with the ACTU on, and it is important in the context of “consultation” (as opposed to a contested hearing) to identify these.
50. We agree with the ACTU in paragraph 12 that union delegates are not experts in workplace relations and are in fact not meant to be. They are first and foremost employees employed to perform work. They are meant to be a conduit to the union and should raise matters with their union that require expertise.
51. We agree with the ACTU in paragraph 11 that it would be hard to contemplate an office worker not being given a computer to perform their job, but this is “their job”. Being a union delegate is not “their job” it is a role played subject to limited rights separate to them performing their job which the employer provides what is required for them to perform this.

Amended Proposal

52. Having regard to the initial submissions filed by the parties, an amended draft clause put forward by BNSW and ABI is included at Annexure A.

## ANNEXURE A

### X. WORKPLACE DELEGATES RIGHTS

X.1 A **workplace delegate** is a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise.

X.2 A workplace delegate is entitled to represent the industrial interests of members, and any other persons eligible to be such members under the rules of the employee organisation, including in disputes with their employer.

*Notation: This does not create any obligation on an employee to be represented by a workplace delegate.*

X.3 A workplace delegate is entitled to:

- (a) reasonable communication with those referred to in clause X.2, in relation to their industrial interests; and
- (b) for the purpose of representing those interests:
  - (i) reasonable access to the workplace and workplace facilities in the enterprise; and
  - (ii) unless the employer of the workplace delegate is a small business employer—reasonable access to paid time, during normal working hours, for the purposes of delegate training.

#### X.4 Reasonableness

In determining what is reasonable for the purposes of this clause, regard must be had to the following:

- (a) the size and nature of the enterprise;
- (b) the resources of the employer of the workplace delegate; and
- (c) the facilities available at the enterprise.

**Filed on behalf of Business NSW and Australian Business Industrial by Australian Business Lawyers & Advisors:**

**Nigel Ward**  
CEO + Director  
Australian Business Lawyers & Advisors

**Julian Arndt**  
Director  
Australian Business Lawyers & Advisors

**28 March 2024**