

ACCI Submission

Variation of Modern Awards to Include a Delegates' Rights Term

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INTRODUCTION

1. On 18 January 2024, the President issued a Statement¹ commencing a process to vary all modern awards so that they include a delegates' rights term for workplace delegates by 30 June 2024.
2. The Australian Chamber of Commerce and Industry (**ACCI**) welcomes the opportunity to make submissions in relation to the Fair Work Commission's (**Commission**) process to vary modern awards to include a delegates' right term.
3. These submissions outline:
 - a) the principles ACCI says should apply when the FWC is exercising its statutory function to include a delegates' rights term in modern awards (**Part I**); and
 - b) the specific provisions this term should take (**Part II**).

¹ President's Statement, *Variation of modern awards to include a delegate's rights term* (AM2024/6) (18 January 2024)

PART I: PRINCIPLES

4. This part outlines the key principles which ACCI submits should guide the Commission in developing the new delegates' rights term and justifies the approach ACCI has taken in Part II of this submission.

PRINCIPLE 1: A WORKPLACE DELEGATE IS FIRST AND FOREMOST AN EMPLOYEE

5. As a starting point, workplace delegates have always been understood as employees of the relevant employer, and nothing in section 350C of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (**Amending Act**) changes this.
6. Section 350A(1) defines a workplace delegate as:
 - (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.
7. An employee organisation means an "organisation registered under the Registered Organisations Act"². Trade union rules (as registered organisations) provide for workplace delegates, including how they are authorised. This means that it is the union itself, which is given broad discretion to appoint and authorise workplace delegates.
8. A workplace delegate is not necessarily the chosen representative of employees rather they are appointed by the union (a registered employee organisation) as a workplace delegate.
9. Historically, Commonwealth tribunals have applied the approach that the workplace delegate should not interfere with the effective working of the employer and must continue to follow direction from their employer³. This is in recognition of the fact that workplace delegates are first and foremost employees, who must continue to follow the lawful and reasonable direction of their employers and who have a full time (or part-time) job to complete day to day.
10. In giving effect to the delegates' right terms in modern awards, the Commission must keep this in mind and ensure that the term doesn't interfere with the employer's right to direct the employee to undertake the job they were employed to do. A failure to do so may tilt the workplace delegate away from being an employee first towards being a full-time union official, working on-site and who is paid for by the employer.
11. This consideration necessitates restrictions on how many delegates can be appointed by trade unions for a particular worksite, the scope of matters which the workplace delegate can enliven the rights and protections under section 350C and the time spent on such matters.

² Section 12, Fair Work Act 2009 (Cth)

³ See for example, Re *F.E.D.F.A. and Garden Island Dockyard* (1964) 2107 C.A.R. 806.

PRINCIPLE 2: THE MODERN AWARD PROVISION(S) SHOULD BE LIMITED TO THE DELEGATE RIGHTS OUTLINED IN SECTION 350C

12. Section 350C of the Amending Act necessitates a modern award term(s), which deals with four distinct workplace delegate rights:
- a) entitlement to represent the industrial interests of members and eligible persons (**representation**);
 - b) reasonable communication with members (and eligible non-members) of an employee organisation in relation to their industrial interests (**communication**);
 - c) reasonable access to facilities within the enterprise for the purpose of representing the industrial interests (**access to facilities**); and
 - d) other than for small businesses (fewer than 15 employees), reasonable access to paid time, during normal working hours, for the purpose of training related to representing industrial interests (**paid time off to attend training**).
13. ACCI submits that any delegates rights' term should be confined to the above subject matter.
14. The reasons for this are threefold:
- a) Firstly, as a term that will be included in a modern award, the delegates' rights term will be enforceable as a civil penalty provision under the Fair Work Act (**FW Act**). This means that care needs to be taken in mandating any rights that cannot easily or practicably be accommodate in all circumstances. Otherwise, employers of all sizes could be subject to pecuniary penalties for failing to comply with clauses that might not have been considered with the employer's circumstances in mind. The enforceable nature of modern awards warrants a contained and specific set of obligations/rights being conferred, as opposed to unfettered or broad-ranging provisions.
 - b) Secondly, industrially, delegate's rights clauses have not traditionally conferred unfettered or untrammelled rights. Rather, terms of this nature which have typically appeared in enterprise agreements have limited the rights to confined subject matter such as representation, communication, access to facilities and paid time off to attend training. It would be consistent with the industrial history of delegates' rights terms to have the terms targeted to particular subject matter.
 - c) Thirdly, it remains uncontroversial that employers retain the managerial prerogative to generally direct when, where and how work is to be performed.⁴ For a business to operative productively, the Commission has generally left matters of work organisation to employers - subject to any overriding statutory or industrial instrument obligations. Any delegates rights provision should ensure that access to communication or facilities or representation (or other rights) are not cast so broadly so as to impair the ability of a business to operate as it sees best to maximise productivity of output.

⁴ See, for example, *Construction, Forestry, Mining and Energy Union v HWE Mining Pty Limited* [2011] FWA 8288 at [7]-[9] and *Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales* (1984) 295 CAR 188 at [11]-[12]; *Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales* (1984) 295 CAR 188

15. Importantly, the rights outlined in section 350C of the FW Act must be construed and given effect only to the extent necessary to enliven the purposes of the FW Act and the Amending Act.

16. In relation to the Amending Act, the Revised Explanatory Memorandum to the Amending Act provides as follows:

Part 7 of Schedule 1 would insert statutory workplace rights for workplace delegates to support their role in representing workers and a general protection for workplace delegates to facilitate the exercise of these rights. It would also provide for modern awards and enterprise agreements to detail the specific requirements for various industries, occupations and workplaces.

17. In relation to the purposes of the FW Act, this involves an evaluative exercise balancing the objects of both Part 3-1 and the objects of the FW Act itself as well as ensuring any terms meet the modern awards objective. This means the Commission's terms should focus on all of the following (amongst other objectives listed in the statute):

- a) the protection of workplace rights and freedom of association (which are called out in the objects of Part 3-1);⁵
- b) providing conditions that are flexible for business, promote productivity and economic growth for Australia's future;⁶
- c) ensuring that in making award terms, the FWC takes into account the needs of small and medium sized business;⁷
- d) ensuring an easy to understand, simple, stable and sustainable modern awards system;⁸ and
- e) ensuring that in making terms, the FWC takes into account the impact of exercising modern award powers on business, employment costs and the regulatory burden.⁹

18. All of these factors reinforce the need to ensure that representational rights in s350C are given effect, but not beyond the extent that is necessary to support the role of workplace delegates, ensure freedom of association and protection of workplace rights.

19. Should the Commission go beyond inserting terms necessary to meet these aims, then it is likely that such terms will sit inconsistently with the other objectives outlined above that also influence the exercise of the FWC's functions in this regard.

PRINCIPAL 3: THE MODERN AWARD PROVISION(S) SHOULD INCLUDE A DEFINITION OF "INDUSTRIAL INTERESTS"

20. Section 350C(2) of the FWA provides that, "*the workplace delegate is entitled to represent the industrial interests of those members, and any persons eligible to be such members, including in disputes with their employer*" (emphasis added).

⁵ Fair Work Act 2009 (Cth) section 336.

⁶ Fair Work Act 2009, section 3(a)

⁷ Fair Work Act 2009, section 3(a)

⁸ Fair Work Act 2009, section 134(1)(g)

⁹ Fair Work Act 2009, section 134(1)(f)

21. The provision clearly contemplates representation being limited to the representation of member industrial interests and contemplates that such interests could involve disputes with their employer.
22. However, the existence of a dispute is not what triggers the right of representation in s350C. Rather, the right of representation relates to, and is confined to, the “industrial interests” of the members and potential members. To the extent that disputes arise that go beyond an employee’s industrial interests, the rights of representation would not fall within the scope of s350C of the Act.
23. If the industrial interests of members are not clearly defined, one could contemplate scenarios where the right of representation becomes unwieldy and goes beyond what is contemplated by the statute.
24. Relevantly, in the different context of “*right of entry*” for union officials (as opposed to delegates), the Federal Court recognised that while section 484 of the FW Act imposes no express restrictions on the types of discussions which might justify a permit holder exercising right of entry under that section, allowing discussions of a social nature, or otherwise not related to the work performed or the representational role of the permit holder, would go beyond the purpose for which right of entry powers are granted.¹⁰ While this considers a different area of law, similar practical considerations will arise in the context of workplace delegates.
25. Additionally, interests which are industrial are typically marked by what the Courts have described as an ‘industrial character’. This has particularly been called out in the industrial action context, where Courts have held that not all changes in the performance of work constitute “*industrial action*”.¹¹ Instead, Courts have looked for disputes of an industrial character that typically might involve bargaining or “*workplace dispute*”.¹²
26. Again, matters which are not directly relevant to an employee’s employment, such as disputes about social or political matters or disputes about matters affecting other employees as opposed to the employee or groups of employees the subject of representation, should not be the subject of the delegates rights term. This may also include, in certain circumstances, activities involving recruitment of members or communicating about political or other union campaigns.
27. Having regard to the above, and to alleviate these concerns, ACCI proposes that a definition of “*industrial interests*” be included in the model modern award provision(s). The proposed term should limit the scope of matters a workplace delegate can engage with and be confined to the matters listed below - which lie at the heart of an employee’s industrial interests:
 - a) disputes involving an employee of the enterprise under an “*industrial law*” (as defined under the FW Act), including an industrial instrument;
 - b) consultation about major workplace change or changes to rosters or hours of work; (consistent with the existing model terms which give employee representatives rights);
 - c) bargaining; and

¹⁰ *ABCC v CFMEU (The Cup of Tea Case)* [2018] FCA 402 at [70]

¹² *Viva Energy Refining Pty Ltd v Jones* [2018] FWC 1542 at [38].

d) matters relating to discipline and performance.

28. Should the Commission not restrict the term to an identifiable range of industrial interests, then the risk increases that the term ultimately inserted into modern awards might go beyond that necessary to give effect to the objects of Part 3-1 and start to conflict with the other type of Fair Work Act objects and modern awards objectives identified in paragraph 17above.

PRINCIPLE 4: THE MODERN AWARD PROVISION(S) SHOULD ENSURE THAT ANY RIGHT INTRODUCED ALIGNS WITH WHAT IS REASONABLE, AS CONTEMPLATED BY SECTION 350C

29. Many elements of the rights conferred by section 350C are conditioned by what is “reasonable”.

30. By way of example, the terms say that the right conferred is to “*reasonable communication*”, “*reasonable access to facilities*” and “*reasonable access to paid time off for training*”.

31. In determining what is “*reasonable*”, it follows that some regard must be had to the circumstances of the persons subject of the right (both employers and employees).

32. Importantly, what might be reasonable in one context, might not be reasonable in another. This is expressly called out by s350C(5) which provides that, in determining what is reasonable, regard must be had to:

- 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.

33. By expressly calling these matters out, the s350C inferentially directs that some consideration be given to the circumstances at each enterprise before the extent of the delegates’ rights are codified.

34. This type of issue is evident in relation to other elements of the Fair Work Act, where it has been recognised that individual circumstances must be considered in order to ultimately determine what is reasonable in any case.

35. By way of example, when it comes to inserting terms into modern awards directing employees to take annual leave, the Full Bench of the Commission in *4 Yearly Review of Modern Awards - Annual Leave* held that it was not possible to include terms in a modern award for directing annual leave to be taken unless the needs of the individual employee and circumstance were taken into account. This is because the Act does not permit such directions to be given unless the requirement to take leave is “*reasonable*”:

[92] Pursuant to s.93(3) of the Act, the power of the Commission to include a provision in modern awards which facilitates an employer directing an employee to take accrued annual leave is conditioned on that direction being reasonable. In determining what is reasonable, all relevant considerations, including those set out in paragraph 382 of the Explanatory Memorandum, must be taken into account. It can be assumed that in formulating a direction to take leave, the employer will have considered the needs and circumstances of the employer’s

*business. But to ensure that the direction is reasonable in terms of s.93(3), the needs and circumstances of the individual employee must also be taken into account.*¹³

36. Having regard to the above, in determining what is “reasonable” for the purposes of a delegates rights clause, ACCI submits that the following factors should be taken into account as part of, or in addition to, those identified in s350C(5):
- a) The impact on the employer's output;
 - b) The fact that work typically undertaken as a delegate might distract from the employee's usual duties as an employee and may require additional resourcing to be put in place if excessive provision is made for delegates activities;
 - c) Cost pressures on the employer, depending on their size and other available workers;
 - d) The ease with which facilities can be provided (and at what cost); and
 - e) The maximum number of persons likely to be represented by the relevant delegates (if known);
 - f) The extent to which employees have participated in the process to elect or otherwise appoint the workplace delegate(s).
37. Having regard to the above, ACCI submits that it will not only be difficult, but simply impossible, to draft a modern award provision(s) that contemplates what is reasonable for each and every organisation/scenario, nor should it do so.
38. Rather, ACCI submits that the modern award provision(s) should be facilitatory and procedural and serve as a safety net providing for additional guidance (where necessary) to be applied to each individual organisation.
39. By way of example, the modern award provision(s) should set out a process whereby both the employer and the employee can agree on the relevant delegates rights at the particular enterprise. By providing a process for the parties to reach an agreement on the exercise of rights, the clause can maximise the scope for rights to be enterprise specific. It would only be failing agreement that some default / fall back provision might be required. Such a fall-back provision could simply require the employer to provide access, communication and paid time off work that is “reasonable” (taking into account the factors listed at paragraph 37)- thereby ensuring the limits of the delegates rights outlined in s350C of the Act are adhered to.
40. This approach will see workplace specific matters to be decided at the enterprise level through agreement terms. Unionised workforces, who have workplace delegates, are likely to have enterprise agreements in place. It makes sense to allow these matters to be determined at the workplace level.

¹³ [2015] FWCFB 3124

PART II: PROPOSED MODERN AWARD PROVISION(S)

41. Having regard to the above principles, ACCI propose that the modern award provision(s) contain the following key details.

1. REPRESENTATION GENERALLY:

- 1.1 The provision should simply state that a workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer.
- 1.2 It should clarify that a workplace delegate is an employee of the relevant employer and that the provision does not create any obligation on a person to be represented by a workplace delegate.
- 1.3 It should replicate the definition of “workplace delegate” at section 350C(1). It should clarify that the rights cannot be exercised until such time as the employer has been notified in writing of this appointment.
- 1.4 It should limit the number of delegates that may be appointed by a union at a given worksite, with particular reference and consideration of enterprise size. ACCI would not be opposed to the approach outlined in the table below.

No. of full time and part-time employees	Max. no. of delegates
1-30	1
31-50	2
51-100	3
101 and over	4

- 1.5 It should define “industrial interests” to be matters pertaining to:
- (a) disputes involving an employee of the enterprise under an “*industrial law*” (as defined under the FW Act), including an industrial instrument;
 - (b) consultation about major workplace change or changes to rosters or hours of work; (consistent with the existing model terms which give employee representatives rights); and
 - (c) bargaining; and
 - (d) matters relating to discipline and performance.

2. REASONABLE COMMUNICATION:

- 2.1 It should be clarified that communication between the delegate and other employees must be in relation to the other employees’ “industrial interests”, and no other matter.

- 2.2 Where possible, delegates should communicate with employees about their industrial interests during rest breaks. If communication is to occur outside rest breaks, then the delegate should obtain the agreement of the employer, who cannot unreasonably refuse their consent.
- 2.3 When considering whether a request for additional time to communicate with an employee about their industrial interests is reasonable the following factors will be relevant:
- a) The impact on the employer's output;
 - b) The fact that work typically undertaken as a delegate might distract from the employee's usual duties as an employee and may require additional resourcing to be put in place if excessive provision is made for delegates activities;
 - c) Cost pressures on the employer, depending on their size and other available workers;
 - d) The ease with which facilities can be provided (and at what cost); and
 - e) The maximum number of persons likely to be represented by the relevant delegates (if known);
 - f) The extent to which employees have participated in the process to elect or otherwise appoint the workplace delegate(s).
- 2.4 Communication should be conducted in private and directly with the employee(s) concerned. Use of employer notice boards or other communication facilities (including emailing "all staff") must only occur with the agreement of the employer.
- 2.5 While the employee may have access to their work email and phones for work undertaken as a workplace delegate, employers must retain their rights to monitor communication, if such a policy exists which allows them to do so. The provision might require the employer to notify the workplace delegate that they have such a policy in place.

3. REASONABLE ACCESS TO THE WORKPLACE AND WORKPLACE FACILITIES:

- 3.1 Again, it should be clarified that the use of workplace facilities is only permissible to the extent that it is necessary for the delegate to represent the industrial interests of another employee, and for no other purpose.
- 3.2 Use of workplace facilities is by agreement of the employer. If agreement cannot be obtained then the employer may be required to make available, as a minimum, a space where the delegate can safely perform the relevant activity the delegate seeks to engage in.
- 3.3 Employers should be able to determine the timeframes, or certain times of day, within which access to facilities will be provided to workplace delegates. Workplace delegates should not be provided free reign to access the workplace or workplace facilities whenever they choose, this would not be reasonable.
- 3.4 Outside of those times generally determined by the employer, a workplace delegate should be required to provide notice to the employer to make additional access to the workplace or workplace facilities available.

4. REASONABLE ACCESS TO PAID TIME, DURING NORMAL WORKING HOURS, FOR THE PURPOSES OF RELATED TRAINING

4.1 Again, the provision should clarify that the training must be directed to the effective representation of employees "industrial interests", and nothing else.

4.2 The entitlement should be to:

- g) A maximum of 5 days per delegate per year (non-cumulative);
- h) The training must be provided by a registered training organisation whose scope of registration includes industrial relations training.
- i) The delegate must give the employer 6 weeks' notice of their intention to attend such courses and the leave to be taken. The notice to the employer must include details of the type, content and duration of the course to be attended. Upon request, the course curriculum must be provided to the employer.
- j) Noting the small business exemption, leave is to be available according to the following scale for each worksite of an employer:

No. of full time and part-time employees	Max. no. of delegates eligible to attend training per year
16-30	1
31-50	2
51-100	3
101 and over	4

- k) An employer will not be liable for any additional expenses associated with an employee's attendance at a course other than the payment of ordinary time earnings for such an absence. For the purposes of this clause, ordinary time earnings should be defined as the ordinary weekly rate paid to the employee exclusive of any allowances or penalty rates for travelling time, fares, shift work or overtime.
- l) Leave of absence on training leave will be counted as service.

4.3 The employee must provide the employer with proof of attendance.

4.4 The employer should have a right to refuse the notice provided by the employee on certain bases where it cannot be accommodated due to reasonable operational requirements or because the employer believes that the training is not relevant to their workplace, or they reasonably believe the training is not fit for purpose.



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