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IN THE FAIR WORK COMMISSION

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

Matter no: (AM2024/6)

Party: “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Union (AMWU)

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

In Response to the parties’ submission to this variation.

Introduction

1. The “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers Union (“AMWU”) represents over 55,000 workers across a variety of industries across Australia.
2. The AMWU submission in reply is directed in response to the other parties’ submission to this variation. Unless otherwise indicated, we continue to press those submissions made in our submission of 1 March 2024.

Reply to other parties’ submissions.

3. In considering the content of a Delegates’ Rights term in a Modern Award, it is important to remember that workplace delegates serve a critical role beyond their duties as employees. They are elected representatives who provide a voice for workers, facilitating democratic participation within the workplace. Delegates are volunteers who perform their union duties on an unpaid basis in addition to their normal job at work.

4. Delegates also provide employees with an opportunity to solve issues emerging in the workplace through communication with management. By giving employees, the opportunity to express their concerns and improve their situation, workplace delegates contribute to reduce resignations, ultimately reducing labour turnover. This benefits employers as lower turnover and longer tenure can reduce hiring and training costs and increase productivity¹.

The Award term should not specify a limit on the number of delegates at each worksite

5. While the AMWU recognizes that workplace delegates are, of course, employees of the employer and so they should perform the work they were employed to do, we oppose the conclusion that Australian Chamber of Commerce and Industry (ACCI) made on paragraph 9,10 and 11 of their submission that “ This consideration (that delegates are primarily employees) 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 .
6. In doing so ACCI, undermines the significant responsibility workplace delegates hold in representing their colleague’s interests, particularly in negotiations, health and safety matters and dispute resolution among many others³. Imposing strict limitations on the number of delegates and the scope of their activities, as suggested by ACCI, could severely hinder effective representation.

¹ OECD (2019), Negotiating Our Way Up: Collective Bargaining in a Changing World of Work, OECD Publishing, Paris ,<https://doi.org/10.1787/1fd2da34-en>

² ACCI Submission Variation of Modern Awards to Include a Delegates’ Rights Term 1 March 2024 at paragraph 9, 10, and 11 <https://www.fwc.gov.au/documents/awards/awards/2024/am20246-sub-acci-010324.pdf>

³ OECD (2019), Negotiating Our Way Up: Collective Bargaining in a Changing World of Work, OECD Publishing, Paris, <https://doi.org/10.1787/1fd2da34-en>.

7. On top of that the AMWU would like to point out how the ‘Closing Loopholes’ amendments have a clear legislative intent toward enhancing, rather than restricting, the capabilities of workplace delegates to represent their member effectively, and so, suggesting a limit on the number of delegates at a worksite could potentially undermine the intent of the legislation⁴.
8. Moreover, the legislation emphasises the importance of considering the “reasonable” needs of the employer based on the size and nature of the enterprise, the resources of the employer, and the facilities available at the enterprise. This suggests a flexible approach to delegate rights, acknowledging that the needs of workers and their representation may vary significantly across different workplaces and industries, rather than a fixed cap or restriction that does not account for these variables.
9. The AMWU submits that there are two obvious arguments that support the need for flexibility in numbers at a worksite. The first is one of freedom of association. Not only do workers have a right to join a union; they also have a right to choose which union they wish to join without hindrance from the employer. It is not uncommon for there to be more than one union who is eligible to represent the industrial interests of some, if not all, of the workers at a particular enterprise. As such, a fixed number of delegates based merely on a headcount of a worksite could potentially disenfranchise some workers from electing a representative who properly represents their interests.
10. Another limitation on the use of a head count is the arrangement of work rosters. If work is performed in shifts, there are benefits for both workers and employers if delegates are available across all shifts. This allows for delegates with knowledge of the conditions of the shift to assist in matters involving their colleagues, as well as reducing the potential for delay in matters where workers request representation in dealing with management.

⁴ [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023 Revised Explanatory Memorandum](#) at [85]

11. In addition, having multiple delegates at a work site means if one or more delegates are sick, on holiday, or leave the job, there are other delegates who can fill in for them. It also means that delegates aren't overwhelmed in trying to meet the needs of the members they represent as well as do the work required of them by their employer.

The term should not define “industrial interests”

12. New subsection 350C(2) provides a key right for workplace delegates to “represent the industrial interests of members, and other persons eligible to be a member, of the relevant employee organisation, including in a dispute with their employer”.

13. The AMWU notes that business groups have exhorted “that the Commission will need to approach any amplified workplace delegates’ rights claims cautiously to ensure that the notion of freedom of association is not directly or indirectly undermined”⁵. As part of this supposed safeguard, certain employer groups seek a definition of “industrial interests” in the form of a specific and exhaustive list of items.⁶

14. Firstly, the AMWU notes that, rather than undermining the freedom of association, the amendments to the *Fair Work Act (2009)* (“the Act”) have positively engaged the right to freedom of association. As explained in the Revised Memorandum of Understanding “These provisions engage and promote operative articles of the Workers’ Representative Convention, 1971 (No. 135) of the ILO (ILO Convention 135), which Australia has ratified”⁷. These amendments ensure that workplace delegates are afforded these basic rights within the workplace to carry out their

⁵ Australian Business Industrial and Business New South Wales Submission 29 February 2024 at paragraph 4, <https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-abi-290224.pdf>

⁶ Australian Chamber of Commerce and Industry (ACCI) submission at paragraph 27 <https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-acci-010324.pdf>

⁷ [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023. Revised Explanatory Memorandum](#)
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delegate duties. Robust delegate rights are essential for a truly free and fair workplace where employees can voice concerns and contribute to improvements without fear.

15. The submission by employer groups to define or list what “industrial interests” are may actually work *against* freedom of association. We support the ACTU’s submission that “the right to represent the industrial interests....” is not conditioned or qualified nor should it be. In our view there is no need to put limits on what constitutes “industrial interests”.⁸

16. “Industrial interests” should be viewed in the most beneficial way possible so to allow delegates to fulfil their role. If the Commission believes that there needs to be some description of what “industrial interests” are, the AMWU submits that the term should clearly indicate that it is *not* an exhaustive list.

The concept of reasonableness

17. Many elements of the rights conferred by section 350C are conditioned by what is “reasonable”. This is already provided for in the Act by having regard 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 enterprise⁹.

18. Some business groups’ proposals¹⁰, that additional factors should be considered in determining what is reasonable, are opposed strongly by the AMWU.

⁸ ACTU Submission, 1 March 2024 at paragraph 65,66 and 67
<https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-actu-010324.pdf>

⁹ Section 350C(5) of the Act

¹⁰ ACCI Submission Variation of Modern Awards to Include a Delegates’ Rights Term 1 March 2024 at paragraph 36 <https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-acci-010324.pdf>

19. Section 350C(5), as drafted, already recognises the diversity of Australian workplaces and the AMWU sees no reason to add other limits to the concept of what is “reasonable” in the Award clause. It provides a balanced and sufficient framework for evaluating what an employer must provide in order to satisfy the obligations of both the Act and the model term. Considering the range of employers who are bound by the different modern awards (and in some cases, more than one modern award), the simpler the term, the better.

A delegate’s right to training without loss of pay

20. The business groups proposals to include specific criteria in modern awards terms for determining “reasonableness”, of accessing paid time for training introduces a level of specificity that could potentially undermine the flexibility needed for effective delegate training.

21. It is the AMWU’s position that the training of delegates is of benefit to both workers and employers. A delegate who is knowledgeable about how their industrial instrument works and what are genuine rights, entitlements and obligations at law can triage workplace issues and ensure only genuine issues need to be addressed by management. Further, it can provide for the more efficient running of disputed issues in the workplace.

22. A significant concern of the AMWU is that some businesses have argued in their submission that delegates who attend union training should be paid only the ordinary time earnings to the exclusion of any allowances or penalty rates for travelling time, fares, shift work or overtime¹¹. Clearly this is not in line with the intent of the legislation in the AMWU view, for the following reasons:

- By compensating delegates only at their base rate of pay and excluding relevant allowances and penalty rates (including, if relevant, overtime) that

¹¹ ACCI Submission Variation of Modern Awards to Include a Delegates’ Rights Term 1 March 2024
<https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-acci-010324.pdf>

they would have earned had they worked during those hours, the legislation's spirit of providing "reasonable access to paid time, during normal working hours, for the purposes of related training" is not fully honoured. The AMWU supports the ACTU's position that Delegates be paid their **full rate of pay** while they are exercising the right to training.

- By paying a Delegate who attends workplace training only their base rate of pay, particularly if they are attending hours that would qualify for shift loadings, or if they are entitled to a casual loading, means that the Delegate is bearing a financial cost to attend training. This sacrifice and the commitment to improving workplace representation should be recognized and compensated accordingly.
- Providing full compensation for training time acknowledges the importance of the delegate's role and supports the development of highly skilled delegates who can advocate more effectively for their colleagues and promote a better workplace environment.
- Just as employees are compensated for their time and expertise during regular and/or overtime hours, union delegates deserve the same consideration for their training time.

23. In particular, the assertion that long-standing delegates do not need ongoing training¹² overlooks the importance of continuous professional development of delegates. For example, in the past five years there has been significant changes in workplace laws and industrial instruments. This includes:

- a. changes to conditions contained in Awards following the finalisation of the Reviews of Modern Awards;

¹² Australian Industry Group submission at paragraph 75
<https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-aig-250124.pdf>

- b. changes to the definition of “casual employee” and the ability to convert to permanent employment; and
- c. four separate tranches of amendments to the Act in 18 months.

24. Just as industries evolve, so do the strategies, laws and technologies that underpin effective union representation and delegate rights. Limiting access to training based on tenure or past attendance restrains the ability of delegates to exercise effective representation of members. Under the proposed model, experienced delegates, for example, would be precluded from refreshing their skills or learning about changes to workplace laws and Awards. In workplaces where more senior delegates take the lead in managing disputes, this training may lead to more efficient resolution of issues, particularly in matters that must be first dealt with at the workplace.

The Delegate’s right to reasonable communication with employees

25. While it is reasonable for employers to have IT policies and procedures to protect their business interests, these policies should not be applied in a way that unduly restricts union delegates’ ability to communicate with members especially in today’s digital age where electronic communication is a primary mode of interaction. Therefore, the AMWU strongly opposes the AI Group’s proposal that the “new modern award clause should stipulate that access to reasonable communication with members by delegates or workplace facilities (to the extent that this captures access to IT systems) should comply with the employer’s IT policies and procedures”¹³. Employees have, most of the time, no say on what the content of those policies and procedures is and therefore they should not be used to limit the right of delegates to “reasonable communications” in a more restrictive way of what is already in the legislation.

¹³ Australian Industry Group submission at paragraph 77
<https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-aig-250124.pdf>

26. The blanket assertion that union delegates should not communicate with employees during work hours¹⁴ overlooks the practical realities of workplace schedules and the urgent need that might arise, particularly given that delegates have the right to represent employees including in disputes with their employers.¹⁵ The AMWU's view is that the three criteria identified in Section 350C(5) of the Act (size and nature of the workplace; resources of the employer and facilities available)¹⁶ already address the issues raised by business groups.

27. The AMWU also strongly opposes any provision that allows employers to monitor confidential delegates communications. Such practices intimidate employees and delegates, potentially undermining dialogue and trust and would certainly hinder freedom of association. Anecdotally, unions already encounter difficulties in visiting some workplaces using their right of entry where employees are hesitant to even speak to officials if managers are present. Monitoring of any communications by management is likely to deter employees from seeking help or raising concerns with their delegate, leading to unaddressed issues and a culture of fear and silence. We confirm our support for the definition of "confidential communication" as per the ACTU clause¹⁷.

28. The AMWU wish to fully participate in this review and hope that cooperation between the parties will lead to an Award clause that satisfy and enhance freedom of association in Australian workplaces and the rights of workplace delegates.

National Research Centre

28 March 2024

¹⁴ AIG submission "proposed clause at X9"

¹⁵ Section 350C(2) of the Fair Work Act 2009

¹⁶ Section 350C(5) of the Fair Work Act 2009

¹⁷ ACTU Submission, 1 March 2024 ACTU D. No 15/2024 at "Annexure A – clause 1. Definitions"
<https://www.fwc.gov.au/documents/awards/variatiions/2024/am20246-sub-actu-010324.pdf>