

Australian Nursing and Midwifery Federation
Variation of Modern Awards to Include a Delegates' Rights
Term
(AM2024/6)

Submission in Reply

1. The Australian Nursing and Midwifery Federation ('**ANMF**') welcomes the opportunity to provide a submission in reply as part of the Fair Work Commission's ('**FWC**') process for varying modern awards to include a delegates' rights term. This submission should be read in conjunction with the ANMF's submission filed on 1 March 2024.
2. The ANMF has had the opportunity to view both the original submission and the submission in reply of the Australian Council of Trade Unions ('**ACTU**') and supports both the proposed model clause and the underlying rationale and analysis provided.
3. The ANMF has also given consideration to the original submissions provided by numerous interested parties and will provide some comment in relation to the positions taken by certain employer groups. This submission in reply should not be considered exhaustive and the ANMF reserves the right to raise further issues ahead of the FWC's determinations on this matter coming into operation.

Identifying the Delegate

4. The ANMF notes that many of the employer submissions indicate a preference for a model delegates' rights terms to require that delegate and or the registered organisation of which they are a member to write to an employer indicating their delegate status as a precondition for the rights and protections under the *Fair Work Act 2009* (Cth) ('the **Act**') being enlivened.
5. For example, both the Australian Chamber of Commerce and Industry ('**ACCI**')¹ and the Australian Industry Group ('**AiG**')² indicate that a model clause should

¹ ACCI Submission at [41, clause 1.3].

² AiG Submission at [83, clause X.3 [*sic*]]. Note, clause X.3 appears twice in the proposed delegates' rights term. This reference relates to the first clause X.3.

require an employer to receive written notification of delegate status, and in the case of AiG, of delegate status ceasing.

6. By contrast, Australian Business Industrial ('**ABI**') take a slightly nuanced approach, stating that the employer's knowledge of a delegate's status is a more practical consideration.³
7. The ANMF accepts that from a practical perspective an employer may need to be aware of a delegate's status in order for certain rights and protections under the Act to be afforded. A request to participate in delegate training will necessarily require a disclosure of the delegate's status, if not already known by an employer. However, the ANMF rejects any assertion that the enlivening of those rights and protections should in any way require a prescriptive process as a precondition.
8. Firstly, the Act already provides a process for the election or appointment of a delegate, subject to the rules of the registered organisation of which they are a member.⁴ The legislature clearly contemplated in the framing of the Act for this appointment or election to be the catalyst for a delegate attaining specific statutory rights and protections. The Act certainly does not contemplate any interim period between the election or appointment of a delegate and the employer's notification of that fact (written or otherwise) where those rights and protections do not exist.
9. Secondly, it should be noted by the FWC that the delegate's rights provisions in the Act have been deliberately placed within the general protections framework of the Act. The rights, attributes and activities outlined in Part 3-1 of the Act confer a right to be protected from adverse action being taken ***because of*** those rights, attributes or activities. To require a validly elected or appointed union delegate to write to an employer in order for their delegate status to be protected could lead to illogical outcomes whereby an employer could argue that they are lawfully entitled to take adverse action against a delegate due to a lack of written notification in circumstances where it is clear that the employer knew of the delegate's status and took adverse action ***because of*** that status. This would be akin to requiring a female or same sex attracted employee needing to write to an employer to inform of their sex or sexual preference as a precondition to their rights being protected from unlawful discrimination under section 351 of the Act. In no other area of the general protections framework is this a requirement. To do so here would be conceptually inconsistent the way in which the rest of Part 3-1 of the Act operates.

³ ABI Submission at [2.9].

⁴ *Fair Work Act 2009* (Cth), s 350C(1).

10. Thirdly, the proposed requirement for written notification of a delegate's status raises concerning questions around the rights of delegates whose status pre-dates the insertion of a delegates' rights clause into modern awards. It would be manifestly absurd for an existing delegate to suddenly lose their delegate role (and the rights that come with it) in circumstances where their employer has long been aware of the delegate's status.
11. The FWC should avoid any proposal to frame a modern award term in a manner that would potentially curtail or limit the proper application of the delegates' rights provisions under the Act.
12. To the extent that an employer may wish to satisfy themselves of a delegate's status to ensure that their conduct is consistent with the Act, they already have the ability to contact the offices of a registered organisation by writing or otherwise. There is no need for the FWC to facilitate this through the framing of a modern award term.

Reasonable Access to Training

13. In its earlier submission of 1 March 2024, the ANMF argued that in terms of setting the modern awards benchmark for delegate training, 5 days per annum per delegate would be appropriate, especially in the nursing and midwifery professions where such entitlements are commonplace in the public sector.⁵ For the avoidance of doubt, this proposition would not extend to a small business employer, consistent with section 350C(b)(ii) of the Act.
14. Multiple employer group submissions have proposed to limit access to training by capping the number of delegates eligible to receive such training per year. ACCI have proffered a sliding scale from 1 to 4 delegates based on the number of employees at a worksite whereby any worksite with 101 or more employees will be able to have 4 delegates participate in training.⁶
15. The ANMF would urge the FWC to exercise caution around placing an arbitrary limit on the number of delegates who are eligible to receive training in any given year. The underlying rationale for delegates receiving training is to ensure that they can navigate and discharge their duties competently. It follows that any denial of access to such training will hinder a delegate's ability to perform their role and would be unreasonable.
16. The ANMF notes that section 350C(5) of the Act outlines the test for reasonableness with reference to an employer's size and nature, resources and

⁵ ANMF Submission at [6-8].

⁶ ACCI Submission at [41, clause 1.3].

facilities. As ABI highlights in their submission, reasonableness is inherently contextual.⁷

17. As such, to set the modern award term concerning delegates rights in a manner that is restrictive would nullify the role of the FWC considering reasonableness in the relevant context.
18. From a practical perspective, one must consider the likelihood that multiple unions and delegates may have a presence in any particular workplace. For example, in a hospital setting, medical practitioners, nurses, midwives, allied health professionals, orderlies, catering staff, cleaners and administrative staff may all be members of different unions and seek to be represented industrially through different delegates.
19. A hospital is also a very complex workplace with multiple units that operate autonomously. A nurse delegate working in the Accident and Emergency Department of a hospital may not be well placed to represent the industrial interests of nurses working in the Intensive Care Unit, and vice versa.
20. To apply a blanket rule of no more than 4 delegates per worksite irrespective of size and complexity in nature, including the need for industrial interests to be properly facilitated, would run counter to the reasonableness test. Instead, the ANMF prefers the ACTU's proposed model for all delegates to be allowed at least 5 days per annum, per delegate to ensure that no delegate is denied their statutory right.⁸

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⁷ ABI Submission at [6.2].

⁸ ACTU Submission, Annexure A, clause 3.