

## IN THE FAIR WORK COMMISSION

*Fair Work Act 2009 (Cth)*

**Variation of Modern Awards to Include a Delegates' Rights Term**

**(AM2024/26)**

### NTEU REPLY SUBMISSIONS

#### Background

1. The **National Tertiary Education Industry Union** provided a submission dated 6 March 2024 in which it supported the submission of the **Australian Council of Trade Unions** dated 1 March 2024 (**ACTU submission**) and submitted that the ACTU draft model clause contained in Annexure A (**ACTU draft model clause**) should be included in the four modern awards in which NTEU has an interest. NTEU adopts the ACTU submission as its own, and in particular emphasises paragraphs [72] – [83] regarding access to facilities and the importance of confidential communications between workplace delegates and members or workers eligible to be members.
2. The NTEU focusses these submissions in reply on the submissions made by the **Australian Higher Education Industrial Association** dated 1 March 2024 (**AHEIA submission**), and makes a brief reply to one aspect of the submissions of the **Australian Industry Group** dated 4 March 2024 (**AIG submission**). In the AHEIA submission AHEIA submits that the higher education sector's two main awards, the Higher Education – Academic Staff – Award 2020 and the Higher Education – General Staff – Award 2020 (the **HE Awards**) should be amended slightly to state that the rights of workplace delegates are set out in section 350C of the *Fair Work Act 2009*. For the reasons that follow that submission should be rejected and the ACTU model clause should be included in the HE Awards and the other two Awards in which NTEU has an interest.
3. NTEU has had the opportunity to review the ACTU reply submission. NTEU supports the submissions made therein.

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## Legislative Context

4. The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) received Royal Assent on 14 December 2023. Section 149E of the Closing Loopholes Act requires that a modern award must include a delegates' rights term for workplace delegates covered by the Award.
5. Section 350A of the *Fair Work Act 2009* (Cth) as amended by the CL Act provides for the protection of workplace delegates. It creates a number of offences relating to conduct of an employer towards workplace delegates. They relevantly include knowingly or recklessly making a false or misleading representation to a workplace delegate and unreasonably hindering, obstructing, or preventing the exercise of the rights of a workplace delegate.<sup>1</sup>
6. Section 350C provides the rights that delegates are entitled to. Relevantly for these submissions, those rights include the right to reasonable communication with members of the union or those people entitled to become members of the union in relation to their industrial interests, as well as reasonable access to the workplace and workplace facilities of the employer for the purposes of representing the interests of members and potential members.
7. Subsection (4) of s 350C provides that an employer of a workplace delegate is taken to have afforded those rights if it has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate. The explanatory memorandum that employers 'can rely on the [award or agreement term] as a complete statement of their obligations' under s 350C.
8. Section 205A(1) provides that an enterprise agreement must include a delegates' rights term for workplace delegates to whom the agreement applies. Subsection (2) provides that if, when the agreement is approved, the delegates' rights term is less favourable than the delegates' rights term in one or more modern awards that cover the workplace delegates, that enterprise agreement term has no effect and the most favourable term of those modern awards is taken to be a term of the enterprise agreement.
9. Section 3 provides the objects of the FW Act. The objects relevantly include

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<sup>1</sup> FW Act s 350A(1)(b) and (c).

*“enabling fairness and representation at work and the prevention of discrimination by recognising the right to be represented, protecting against unfair treatment and discrimination, and providing accessible and effective procedures to resolve grievances and disputes”.*<sup>2</sup>

10. Section 134 contains the modern awards objective. Relevantly to these submissions, it provides that the modern awards objectives include the ‘need to ensure a simple, easy to understand... modern award system’.<sup>3</sup>
11. Section 138 of the FW Act relevantly provides that an award must include terms that it is required to include, but only to the extent necessary to achieve the modern awards objective.
12. Section 578(1)(a) provides that in performing its functions, the Fair Work Commission must take into account the objects of the FW Act, and any objects of the part of the Act.
13. Having regard to the scheme of the FW Act and the matters the Commission must take into account in performing its functions (both generally and in relation to award matters) NTEU submits that it is both within power and necessary for the Commission to include the ACTU draft model clause in the HE Awards.

## **Reply to AHEIA Submission**

*Only to the extent necessary to achieve the modern awards objective*

14. The AHEIA submission, at [1], submits that the HE Awards should be amended slightly to state that the rights of workplace delegates are set out in s 350C of the FW Act. NTEU submits that this is undesirable and would not achieve the modern awards objective of ensuring simple, easy to understand modern awards. NTEU submits that instead the ACTU draft model clause should be inserted in those two awards.
15. NTEU accepts that, as noted at [3]-[4] of the AHEIA submission, the expression ‘necessary to achieve the modern awards objective’ in s 138 of the FW Act was

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<sup>2</sup> FW Act s 3(e).

<sup>3</sup> FW Act, s 134(1)(g).

considered by the Full Court of the Federal Court in *Anglo Coal*, and that expression was held to

*“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 Part 2-4”.*<sup>4</sup>

NTEU submits that this statement supports NTEU’s position that the ACTU draft model clause be included in the HE Awards because it is necessary to provide a simple and easy to understand modern award system.<sup>5</sup> On the other hand, AHEIA’s proposal to include a bare statement that workplace delegates rights are contained in s 350C of the FW Act would be contrary to that awards objective and NTEU notes that the Australian Industry Group’s submission dated 4 March 2024 echoes this position (in principle if not in application, at [76]. Some hypothetical (but likely) examples illustrate this point.

16. Section 350C provides that workplace delegates’ rights include the right to reasonable communication with members and potential members, as well as reasonable access to the employer’s facilities in order to facilitate this communication.
17. Much of the communication between workers in the higher education sector is facilitated through email or other electronic communication. Employers in the sector often facilitate this communication through email distribution lists for local work areas or through intranet pages or other internet-based programs such as Microsoft Teams or Zoom.
18. NTEU has a strong view that s 350C(b)(i) entitles workplace delegates to access to email communications with members and potential members through the provision of the email addresses of workers in the workplace delegate’s work area, and the use of those area-specific distributions lists as well as Teams or Zoom for the purpose of representing those workers’ industrial interests.
19. It is almost certain that a workplace delegate will request the use of the employer’s email facilities and distribution lists. If an employer took the (in NTEU’s view,

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<sup>4</sup> *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCACF 123

<sup>5</sup> *FW Act* s 134(1)(g).

erroneous) position that a workplace delegate was not entitled to that access and represented that view to the delegate, it is possible that that employer will have breached s 350A.

20. Another likely scenario is a workplace delegate requesting paid time off to attend training relating to their role as a workplace delegate. On AHIEA's formulation, an employer would need to determine whether the provision of that paid time off was reasonable having regard only to s 350C(b)(ii) and the requirement to provide reasonable access to paid time both in relation to the length of notice provided for that request, as well as the reasonableness of the length of time off requested. The ACTU draft model clause provides sufficient detail to allow an employer to know exactly how much time they are required to provide to a workplace delegate in each year, and both the employer and workplace delegate know that four weeks' notice of the intention to take such leave.
21. AHEIA's formulation leaves an employer in an unenviable position of having to determine the exact metes and bounds of 'reasonable communication', 'reasonable access' to the workplace and workplace facilities, and 'reasonable access to paid time... for the purpose of related training' under penalty of civil remedy prosecution if they represent a misleading view to a workplace delegate. Conversely, the ACTU draft model clause provides clear guidance on what is required of employers so that they can easily comply with their obligations. NTEU submits that if AHEIA's proposal was accepted it would become a make-work scheme for industrial relations lawyers as the parties try to determine the rights and obligations of workplace delegates and their employers.
22. Conversely, if the delegates' rights term in the HE Awards do not include the right to access email lists or post on employer intranet sites the right to reasonable communication in s 350C will be rendered largely nugatory. That is so because the vast majority of worker communication in higher education is facilitated through electronic means. While working from home has historically been a feature of work in the sector, particularly for academic workers, this has only increased since the COVID-19 pandemic. Another feature of work in the higher education sector is that it is often geographically dispersed across multiple campuses, which may be in different states. Therefore a workplace delegate may need to discuss a particular decision by an employer that affects a particular working group (eg academic workers in the Arts Faculty, or professional staff workers in libraries) who are not physically connected. Without access to email lists and electronic

communications such as Teams, workplace delegates will be left to hold discussions with workers about their industrial interests in empty lunchrooms with only instant coffee and expired milk as an audience, meaning that the right to reasonable communication and access to facilities has been denied.

23. It is likely that similar considerations will be relevant to the two other non-higher education awards in which NTEU has an interest.

24. For these reasons the ACTU model clause better meets the modern award objective of creating a simple and easy to understand modern award system which is consistent with the obligation to only include terms to the extent necessary to meet those objectives.

#### *Interaction between Enterprise Agreements and Award Delegates' Rights Terms*

25. At [5] of the AHEIA submission, AHIEA states that the higher education industrial framework is unique, with nearly complete enterprise agreement coverage. NTEU agrees. AHIEA further states that because of this, 'modern awards do not act as a source of employment conditions except for the better off overall test'. NTEU disagrees.

26. Section 205A of the FW Act as amended by the CL Act provides that an enterprise agreement must include a delegates' rights term for workplace delegates to whom the agreement applies. Subsection 2 provides that if, when the agreement is approved, the delegates' rights term is less favourable than that in an applicable modern award, the enterprise agreement term has no effect and the most favourable term in the modern awards is taken to be a term of the enterprise agreement. In NTEU's view, this means that there must be a global (rather than line-by-line assessment) of whether or not a negotiated term is less favourable than an applicable award term.

27. Subsection 3 provides that if the modern award changes, the delegates' rights term taken to be a term of the enterprise agreement does not change.

28. Therefore, inclusion of a detailed delegates' rights term would be useful for inclusion in the HE Awards. That is so because it would provide an appropriate baseline for parties in bargaining. If a particular employer felt that a provision of the award delegates' rights term was inappropriate for its enterprise, it could trade for

union concessions in relation to the offending provision in exchange for other benefits for workplace delegates.

29. For example, an employer might take the position that the way it plans its teaching delivery means that it needs greater than four weeks' notice of an intention of a teaching staff member to undertake delegate training during teaching periods. This might be accepted by the NTEU at that site in exchange for another benefit above the award term that the employer views as appropriate to their enterprise.

30. The submission at [6] of the AHEIA submission is misconceived and confuses enterprise agreement terms which provide rights (eg to participate in consultation processes or represent members in dispute) that are conferred *on the NTEU* with rights that are provided to workplace delegates under s 350C.

31. While it is true that many higher education sector enterprise agreements contain terms that confer rights on unions who are covered by those agreements, those terms are included pursuant to s 172(1)(b) of the FW Act, which allows for an enterprise agreement to include terms that pertain to the relationship between employer(s) and registered organisations. The new workplace delegates' rights provisions are directed towards providing rights for employees who are appointed as workplace delegates under a union's rules, rather than regulating the relationship between that union (as a separate legal person) and the employer. NTEU currently does not have delegates under its rules, consequently there are no terms in enterprise agreements that provide rights to workplace delegates within the meaning of that term in s 350C.

32. Therefore, while it may be correct that there is nearly complete enterprise agreement coverage in the higher education sector, it is not the case that the modern awards cannot act as a source of employment conditions independently of the better off overall test. As such, it is important that the HE Awards be amended to include a prescriptive delegates' rights term that simply and clearly articulates employer and workplace delegates' rights that will provide either the baseline for bargaining or substantive rights. The ACTU draft model clause is such a term and NTEU submits that it is appropriate for inclusion in the HE Awards.

### **Reply to AIG submission**

33. At [77] of the AIG submission AIG submits that 'it would plainly be unreasonable for such communication to occur in a manner that is contrary to an employers IT

policies and procedures' and therefore any new modern award clause should stipulate that access to reasonable communication by delegates should comply with the employer's IT policies and procedures. NTEU submits that such a stipulation is inappropriate for the higher education sector and would significantly undermine delegates' rights to reasonable access to employer facilities. NTEU provides a number of examples from university IT policies.

34. The *Griffith University Information Technology Code of Practice* outlines a number of prohibited activities in using the University's information technology systems.<sup>6</sup> Some of those prohibited activities include 'forward[ing] electronic "petitions", or to ask recipients to forward messages' and 'solicit[ing] support (financial or otherwise) for... special causes not connected with a Griffith University effort'. It is easy to see how such prohibitions would interfere with a delegate's right to communicate with members and represent their industrial interests.
35. Emailing members or potential members a petition for a majority support determination or asking an employer to reconsider a decision it has made, or providing information about an industrial issue and asking recipients to forward it on to affected workers would plainly offend the policy. It would also be reasonable communication and use of employer facilities within the meaning of s 350C. Arguably, asking potential members to join the union would breach the policy's prohibition on seeking support for causes not connected to a Griffith University effort.
36. Curtin University's *Information and Communication Technology (ICT) Appropriate Use Procedure* states at cl 2.4.1(m) that users will not 'circulate information about other organisations via ICT Assets, except where these activities are for the business or purpose of the University'.<sup>7</sup> Depending on the construction of the phrase 'for the business or purpose of the University', it is possible that providing information about the NTEU to members or potential members would be a breach of this policy.
37. The above examples do not seek to be exhaustive but illustrate that if a delegates' rights term providing reasonable access to facilities for the purpose of communicating with and representing the industrial interests of workers in the HE

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<sup>6</sup> [Griffith University Information Technology code of practice](#), accessed on 27 March 2024.

<sup>7</sup> [Information and Communication Technology \(ICT\) Appropriate Use Policy](#), Curtin University, accessed on 27 March 2024.



Awards is conditioned on compliance with any applicable IT policy, as advocated for in the AIG submission, delegates' rights to reasonable use of employer facilities for that communication and representation will be seriously undermined to the point of being worthless.

## **Conclusion**

38. For the reasons set out above, NTEU submits that it is necessary to include the ACTU draft model clause in the four awards in which NTEU has an interest as outlined in our submission dated 6 March 2024. NTEU looks forward to participating in the consultation process and providing feedback on any proposed clause as it may relate to those Awards.

## **Campbell Smith**

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28 March 2024