

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

**ACCI Reply Submission**

**28 March 2024**



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## Introduction

1. ACCI seeks to respond, predominantly, to the submissions of unions with respect to proposals to vary modern awards to include a delegates rights term.
2. The employee organisations which made a submission are:
  - Australian Council of Trade Unions (**ACTU**);
  - National Tertiary Education Union (**NTEU**)
  - Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) Manufacturing Division;
  - CFMMEU Construction Division;
  - Australian Municipal, Administrative, Clerical and Services Union (**ASU**);
  - Australian Workers Union (**AWU**);
  - Mining and Energy Union (**MEU**);
  - Shop Distributive and Allied Employees' Association (**SDA**);
  - Australian Nursing and Midwifery Federation (**ANMF**);
  - United Workers Union (**UWU**); and
  - Communications, Electrical and Plumbing Union (**CEPU**).
3. The submissions can be divided into three distinct groups, those that support the ACTU's model term without amendment, those that support the ACTU's model term but suggest minor amendments, and those that file separate proposals.
4. To the degree that multiple submissions may be dealt with simultaneously, ACCI will do so. In the cases of the NTEU, the ASU, the SDA, the ANMF, and the UWU, this will be the case. Each of those submissions simply support the ACTU's model clause without amendment.
5. In addition to those above, having read the minor amendments advanced by the AWU, the AMWU, the CFMMEU Manufacturing Division and the CEPU to the ACTU's model clause, they are sufficiently similar, in ACCI's view, to be dealt with simultaneously too.
6. Separate to that grouping, ACCI will individually address the submissions of the MEU and the CFMMEU Construction Division.
7. ACCI will then briefly deal with the submissions of other employer groups.
8. From the outset, ACCI opposes all of the model clauses advanced by unions and instead re-advances its own.
9. The clauses which the unions have put forward go far beyond what is set out as the scope of rights for workplace delegates under the legislation.

10. ACCI reiterates its initial submissions in respect of this process. The legislation clearly stipulates 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).<sup>1</sup>
11. Workplace delegates’ rights with respect to reasonable communication, reasonable access to the workplace and workplace facilities, and reasonable access to paid time for training purposes are all similarly constricted to the purposes of industrial interests.<sup>2</sup>
12. It is clear through these repeated references that it was the desire of the Parliament to ensure that workplace delegates are not afforded rights which are unrelated to the industrial interests of employees in the workplace.
13. It is ACCI’s position that the Commission must constrict industrial interests to those matters which are directly relevant to the employee’s employment, namely disputes, consultation about major workplace change or changes to rosters or hours of work, bargaining, and performance and disciplinary matters.<sup>3</sup>
14. This would be consistent, in our view, with what the drafters were seeking to achieve for the reasons canvassed at [20] to [28] of ACCI’s initial submission.
15. It is in fact the case that unions have sought to go far beyond what could be considered, in ACCI’s view, the industrial interests of employees and have instead sought to insert new rights for workplace delegates into modern awards. Where this is the case, this approach should be rejected.
16. It is not the prerogative of modern awards to provide a safety net above what the Act legislates, that is firmly in the realm of enterprise agreements (**EA**). Modern award delegates’ rights terms should not venture beyond clearly a minimum safety net of rights for workplace delegates.
17. This has been clearly explored by the courts in its examination of section 138 of the Act, which states:

*‘A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.’*  
(emphasis added).
18. The Federal Court clearly stated that:

*“The words “only to the extent necessary” in s 138 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 Pt 2-4.”*<sup>4</sup>(emphasis added).

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<sup>1</sup> Fair Work Act 2009, section 350C(2).

<sup>2</sup> Fair Work Act 2009, section 350C(3).

<sup>3</sup> ACCI Submission to the FWC’s Variation of modern awards to include a delegates’ rights term process at page 10.

<sup>4</sup> [2017] FCAFC 123.

19. Additionally, the modern awards objective clearly states that the purpose of modern awards is to provide a “fair and relevant minimum safety net of terms and conditions”.<sup>5</sup>
20. The word fair in this context is inextricable from a need to balance the perspectives of employers and employees fairly. This has been explored at length by the Expert Panel undertaking the Annual Wage Review.<sup>6</sup>
21. The notion that delegates should be provided rights beyond what is explicitly mandated on the face of the legislation could conflict with the need to ensure a “fair and minimum safety net of terms and conditions” (emphasis added).
22. Naturally the word minimum as referenced in section 134 of the Act is innately compatible with what is expressed on the face of the legislation as the rights afforded to workplace delegates. These rights cannot be infringed without penalty and therefore already represent the minimum.
23. Therefore, anything beyond what is allowed for on the face of the legislation, naturally transgresses against the in-built notion of minimum as it relates to the modern awards objective.
24. As noted previously by the Commission with respect to the exercise of its powers to vary modern awards, a distinction must be drawn between “that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.”<sup>7</sup>
25. Union proposals therefore err with respect to their model clauses and their interaction with the modern awards objective. Whilst unions may consider their proposals to be desirable, many are not necessary. Such proposals should not be accepted.
26. In this reply submission, ACCI will deal with:
  - The greater detail this award term should provide, as referenced by the Explanatory Memorandum (**EM**);
  - Common issues across union proposals;
  - In specificity, the ACTU model clause including amendments proposed by other unions, the MEU clause, and the CFMMEU Construction Division clause; and
  - Submissions of other employer groups.

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<sup>5</sup> Fair Work Act 2009, section 134.

<sup>6</sup> [2022] FWCFB 3500 at [18].

<sup>7</sup> [2017] FWCFB 1001 at [135]–[136].

## Greater Detail, Not Additional Rights or Obligations

27. The President’s statement and multiple union submissions reference the Explanatory Memorandum (**the EM**) of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [827] and [830],<sup>8</sup> which states “... for most employees, modern awards and enterprise agreements would provide greater detail for particular industries, occupations and enterprises”, and that s 350C(4) would ensure, where this is the case, that:

“employers can rely on [the award or agreement term] as a complete statement of their obligations under new subsection 350C(3).”
28. It appears that union submissions have confused the call for greater detail as expressed in the EM, and as referenced by the President, as a call for workplace delegates to be provided additional rights, or to impose new obligations on employers.
29. This is a blatantly incorrect interpretation.
30. The EM states that the awards are to express a ‘statement of their obligations under new subsection 350C(3)’. Here meaning, those that already exist under the legislation. It is a direct reference to the obligations already created by the rights of delegates under 350C(3). There is no interpretation of this statement which could justify additional obligations being imposed on employers or additional rights being provided to delegates.
31. Nowhere in the EM does it state that this greater detail should result in additional rights or obligations. Any interpretation that asserts such a conclusion should be rejected.
32. Greater detail does not have any implication of additional obligations or rights. It is simply to be an elucidation of those already extant and provided for by the legislation. ACCI suggests that parties which argue otherwise are deliberately misconstruing the EM for their own purposes and those proposals should not be accepted.

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<sup>8</sup> See [2024] FWC 150 at [7]; ACTU Submission to the FWC’s Variation of modern awards to include a delegates’ rights term process at [57]; MEU Submission to the FWC’s Variation of modern awards to include a delegates’ rights term process at [8].

## Common Issues Across Model Clauses

### ***No definition of industrial interests***

33. All union model clauses fail to address industrial interests and how they should be defined. In ACCI's view, this is a failure on the unions behalf to properly grapple with the key intent of the legislation. The effect is that the clauses in question fail to adequately justify their model clauses because they are not expressed in terms of industrial interests and should not be accepted.
34. Section 350C of the Act contemplates on no less than three occasions that the rights of delegates are only afforded in the context of industrial interests.
35. In the context of the Act, it is concerning that unions have called for certain rights for delegates without an attempt to assure the Commission that they would in fact be necessary in the context of the industrial interests of union members or other employees eligible to be union members.

### ***Inconsistency with the modern awards objective***

36. As explored above, the purpose of the modern awards is to provide a "fair and minimum safety net of terms and conditions" (emphasis added).<sup>9</sup>
37. As section 138 of the Act later mandates, "A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective" (emphasis added).
38. This is meant to emphasise the purpose of modern awards to simply provide a minimum safety net.<sup>10</sup>
39. The unions, by seeking rights far beyond the clear minimum provided under the legislation, have lodged model clauses which are inconsistent with the modern awards objective and therefore cannot be accepted.
40. It is terribly difficult, for example, to understand how an obligation on an employer to provide an iPad to a workplace delegate, as advanced by the CFMMEU Construction Division, can ever be described as a minimum safety net.
41. ACCI advances the position that the purpose of modern awards is to provide a minimum safety net, this notion must apply to the rights of workplace delegates as seen through the lens of the modern awards objective. Proposals which seek to supplant this process by lodging submissions for what are quasi-EA terms should be outright rejected.
42. Additionally, section 134 outlines that there is to be a fair safety net for employers and employees. In that context is important to remember that only 8 per cent of the private sector are union members.<sup>11</sup> Imposing such significant obligations on employers above and beyond the rights allowed for in the Act, as the unions have called for in their

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<sup>9</sup> Fair Work Act 2009, section 134.

<sup>10</sup> [2017] FCAFC 123.

<sup>11</sup> Characteristics of Employment, Australia, ABS, August 2023



submissions, to the benefit of a maximum of 8 per cent of employees cannot be understood to be fair to employers.

### ***'Reasonable' ignored***

43. A consistent issue across union clauses is the lack of clarity they attempt to provide with respect to reasonableness.
44. Each of the new rights provided to workplace delegates in the Act are couched in the language that they are to be reasonable.<sup>12</sup> The practical expression of these rights is therefore to be carried out reasonably in the workplace.
45. Reasonableness implies that there are instances where an employer may refuse the workplace delegate's right to paid training leave, communications, or access to facilities. Model clauses should reflect that. An employer should not need to go searching through the Fair Work Act to understand considerations relevant to the reasonableness of delegates rights.
46. Although the ACTU and the CFMMEU Construction Division's model clauses repeatedly reference the word reasonable when referring to the rights of delegates, they fail to identify a proper construction of reasonable in their model clauses.
47. Furthermore, in failing to explicate the reasonableness of actions which may be undertaken in their model clauses, unions fail to adequately articulate how their proposals are consistent with the legislation.
48. The only point at which the ACTU approach an understanding of reasonable is in respect to communication rights.<sup>13</sup> The ACTU asserts that reasonable in the context of communication should only be understood to reference the amount of communication a delegate might engage in.
49. ACCI disagrees with this interpretation. Reasonableness also refers to when the communication occurs. Respectfully, workplace delegates are first and foremost employees. Where possible delegate activities should occur outside of time when the delegate is supposed to be working for their employer – consistent with the purpose for which an employer hired and pays the employee. To that end, where possible, delegates should communicate with employees about their industrial interests during rest breaks.<sup>14</sup> If communication is to occur outside rest breaks, then the delegate should obtain the agreement of the employer, who cannot unreasonably refuse their consent.

### ***Workplace delegates are not union officials***

50. Workplace delegates are not union officials. They are not employed by the union to undertake work explicitly in the interests of the union. Their role is to represent the industrial interests of union members and employees eligible to be union members who wish the workplace delegate to represent them.<sup>15</sup>

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<sup>12</sup> Fair Work Act 2009, section 350C.

<sup>13</sup> ACTU Submission to the FWC's Variation of modern awards to include a delegates' rights term process, page 16.

<sup>14</sup> ACCI Submission to the FWC's Variation of modern awards to include a delegates' rights term process, page 11.

<sup>15</sup> Fair Work Act 2009, section 350C.

51. Union submissions repeatedly seek to allow workplace delegates to undertake roles and responsibilities which are not within the purview of those industrial interests. The rights afforded under the Act do not represent a new ability for unions to allow an employee to fulfil the role of an official at the expense of employers.
52. Where such an approach is taken, the Commission should not accept it. It is evident, for example, in model clauses where union submissions have called for workplace delegates to be able to ask workers to join the union. Or where union submissions call for delegates to undertake work outside of their regular working hours, such as to represent union members at a tribunal.
53. The legislation does not require employers to pay for union work which a workplace delegate voluntarily undertakes or that their union encourages them to take outside of their working hours. It is patently not fair to suggest such an outcome and therefore, not only is it out of scope, but such proposals are also inconsistent with the modern awards objective.
54. More broadly union proposals can easily be construed as an attempt to outsource responsibilities to workplace delegates that are the responsibility of full-time union officials paid by the union and have them covered at the expense of the employer. ACCI opposes this.

#### ***No consideration of small business***

55. Of significant concern is the absence of an attempt in union submissions to grapple with how their model clauses may impact on small businesses.
56. One of the key considerations with respect to the reasonable application of workplace delegates' new rights is the size of the enterprise within which the rights are to be carried out.<sup>16</sup>
57. With respect, many of the union submissions are therefore unworkable for small businesses and should be afforded less weight in the Commission's consideration.

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<sup>16</sup> Fair Work Act 2009, section 350C(5).

## ACTU Submission

**Supported by the NTEU, UWU, ASU, ANMF and SDA – addressed as one.**

**Supported with minor amendments suggested by the AWU, AMWU, CFMMEU Manufacturing Division and CEPU.**

58. ACCI opposes the ACTU's submission. The rights the ACTU seek for workplace delegates in their submission are not compatible with the obvious constraints the Act has imposed.
59. The proposed model clause goes, in ACCI's view, beyond a minimum safety net of terms and conditions and ventures into what should distinctly be the prerogative of enterprise bargaining.

### **ACTU Proposal – '2. Right to represent'**

60. The right to represent provisions seek to empower workplace delegates with several entitlements which are beyond the scope of this process. It seeks to allow a delegate, among other things, to:
- b) reasonable access to management, for the purpose of representing and advocating on behalf of union members, the union, and persons eligible to be union members.*
  - c) be provided with information relevant to the exercise of their right to represent. Provision of information to a workplace delegate or provision of information by a workplace delegate to their union will not constitute a breach of confidentiality;*
  - d) participate in any dispute or grievance in the workplace;*
  - e) participate in any consultative process;*
  - ....
  - h) communicate with persons eligible to be union members about joining the union.*
  - i) advocate for and make submissions on behalf of their union, union members and persons eligible to be union members to any third party, tribunal, or forum.*
  - ....
  - l) Access to shift, roster, and other flexible work changes where necessary to facilitate the exercise of their right to represent during work time;*
  - m) any other activities within the scope of their delegation as determine by their union.*
61. Clearly, these particular provisions cannot be accepted. They are all, in ACCI's view, beyond the scope of representing the industrial interests of employees and venture beyond what would be appropriate for inclusion in modern awards.
62. The effect of these entitlements would be to afford rights to workplace delegates far beyond the fair and minimum terms which should be provided in line with the modern awards objective.

63. Whilst all of the above are out of scope, some of the listed matters are particularly egregious and warrant further discussion.
64. Clause 2.2d), seeking to allow a delegate to participate in any dispute or grievance lacks clarity and could give rise to the notion that a workplace delegate has a positive right to inject themselves not only into formal disputes but to any matter where disagreement might occur not rising to the level of dispute. The use of the word any also implies that the dispute or grievance need not involve a union member or employee eligible to be a union member who wish the workplace delegate to represent them. This is inappropriate and beyond the scope of delegates' rights.
65. Clause 2.2e), which would provide that delegates may participate in any consultation process seeks to allow delegates to insert themselves into all manner of discussions which may have nothing to do with the industrial interests of union members. On that basis it should not be accepted.
66. Self-evidently, an entitlement to communicate with members about joining a union, as called for in clause 2.2h), is out of scope – industrial interests cannot logically extend to the workplace delegate undertaking promotional activities for the union.
67. ACCI rejects the notion that workplace delegates should be allowed to access shift, roster, or flexible work arrangements to facilitate their role as a workplace delegate. Whilst a workplace delegate carries out an important function, fundamentally and more importantly they remain an employee. The delegate's role should not interfere with their primary employment duties and therefore clause 2.2l) cannot be accepted.
68. Clause 2.2m) is egregiously out of step of with what should be contemplated in this process and would essentially provide unfettered rights to workplace delegates which are completely subject to the decisions of a union, which itself is removed from the concerns of individual employers. This is patently unfair to employers and on that basis cannot be consistent with the modern awards objective in that respect.
69. Clause 2.2m), in particular draws attention to a point ACCI made earlier. The ACTU proposal can easily be construed as an attempt to outsource responsibilities to workplace delegates that are the responsibility of full-time union officials paid by the union and have them covered at the expense of the employer. ACCI opposes this.

### ***ACTU Proposal – '3. Right to paid training leave'***

70. Turning to clause 3 of the ACTU's model term, which outlines the right to paid training leave, ACCI sees several deficiencies. First and foremost, ACCI is severely concerned by the ACTU's decision not to clearly state that small businesses are exempted from this particular right. This must be included in the model clause.
71. Subclause 3.2 simply requires that the training course be approved by the union. ACCI submits that this would not be compatible with the fairness principle in the modern awards objective – the employer should be afforded the ability to assess the training for its relevance, it should not merely be at the whim of the union. It would, for example, be inappropriate for a union to nominate a training course which might profit that union. This

is highly pertinent under the new arrangements given that employers will be paying the employee while they attend. Relatedly, the omission in latter subclause 3.6 of an ability of the employer to reject paid training leave on the basis that it is not relevant or not fit-for-purpose renders this proposal unworkable for employers.

72. The ACTU's proposed notice period at 3.5 is insufficient. It is ACCI's position that employers should be provided at least 6 weeks' notice of the intent to take paid training leave, which would allow them to, if necessary, assess the relevance of the curriculum of the training.
73. Again, with respect to subclause 3.6b), ACCI would highlight the fairness principle in the modern awards objective. It is simply not fair or reasonable to argue that an employer should only be allowed to refuse paid time off for training because it would cause 'unjustifiable hardship' to the business.
74. It should be noted that while employee representatives chosen by the employees, rather than appointed by the union, will have no such rights, this proposal would render a workplace delegate's right to take paid training leave stronger than the rights of employees to take certain leave allowed for under the National Employment Standards (**NES**). Take for example annual leave, where an employer may refuse annual leave if it is reasonable to do so.<sup>17</sup> It is unclear on what basis the ACTU is advancing the proposition that it should be substantially more difficult for an employer to refuse leave to a workplace delegate for training purposes than annual leave to all employees. This should not be accepted.
75. The ACTU also omits a requirement for the employee to show proof of attendance or for the training to have been conducted by an RTO whose scope of registration includes industrial relations training. Further, the ACTU model clause does not articulate that the employer is not liable for any additional expenses associated with the employee's attendance, which ACCI does not believe is appropriate. These are essential safeguards to ensure that the right to paid training leave is not abused and that where paid training leave is taken, the training is of benefit to the employee and the employer.

#### ***ACTU Proposal – '4. Right to communications'***

76. From the outset the ACTU proposal at 4.1 seeks to embolden the rights of workplace delegates beyond the clear intent of the legislation by proposing the wording that a delegate has the right to "have reasonable communications (including discussions)... in relation to any matter or subject". This is contradictory to section 350C(3), which clearly states that the workplace delegate is to have the right to reasonable communication about industrial interests only. This proposal should be rejected, it is not consistent with a fair and minimum safety net and attempts to go much further than the baseline rights afforded under the Act.
77. Subclause 4.2 is unnecessary and again contradictory. The clause seeks to list a range of matters about which the delegate is to have the right to reasonably communicate with union members or eligible employees who wish the workplace delegate to represent

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<sup>17</sup> Fair Work Act 2009, section 88(2).

them. Again, the legislation is clear, a delegate is to only have the right to reasonable communication about industrial interests. The ACTU's decision to not grapple with a proper construction of industrial interests means, in ACCI's view, that this subclause too cannot be accepted.

78. At 4.4, the ACTU model clause, the ACTU seeks to have any reasonable communication during work time to be treated as work time. Workplace delegates are first and foremost an employee. Their voluntary duties as a delegate should not impede their regular duties. Hence, reasonable communications should occur during breaks where possible. Additionally, when subclause 4.4 is viewed in combination with the ACTU's additional proposal to have the delegates provided with the right to ask employees to join unions covered under reasonable communication, this proposal becomes particularly inappropriate.

#### ***ACTU Proposal – '5. Right to access and use facilities'***

79. ACCI does not support the ACTU's model clause with respect to their drafting of 'the right to access and use facilities'.<sup>18</sup>
80. As ACCI advanced in its own submission, it is critical that the right to reasonable access is couched in the employer's ability to determine when and how the access to, and use of facilities is conducted.<sup>19</sup> This is particularly the case for a small business.
81. Small businesses for example, may only have one office space that is typically reserved for the manager. It would not be reasonable for a workplace delegate to essentially evict that manager at whim to conduct their delegate duties.
82. That is why it is essential that employers should, where possible, 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.
83. To the extent that the ACTU fail to identify or address this issue, their model clause is unworkable at a practical level for employers.

#### ***ACTU Proposal – '6. Right to Attend Meeting'***

84. There is no 'right to attend meetings' expressed in the legislation for workplace delegates. This is clearly not in scope of what should be considered for inclusion in modern awards.
85. This part is clearly not compatible with providing a 'minimum' safety net as developed in the modern awards objective as it seeks to create a new right for workplace delegates which have not been expressed in legislation previously.

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<sup>18</sup> ACTU Submission to the FWC's Variation of modern awards to include a delegates' rights term process, pages 24-25.

<sup>19</sup> ACCI Submission to the FWC's Variation of modern awards to include a delegates' rights term process, page 11.

### **AWU amendments to the ACTU's model clause**

86. The changes which the AWU suggests do not effectuate any change to remedy the significant issues with the ACTU's proposed model clause.

### **AMWU amendments to the ACTU's model clause**

87. The ACTU clause is already out of scope with the legislation and the modern awards objective. The AMWU amendments to the ACTU's proposed model clause would make the clause even less balanced and more unfair towards employers.
88. The AMWU seeks to amend the ACTU's model clause with respect to the following awards:
- *Manufacturing and Associated Industries and Occupations Award 2020*;
  - *Graphic Arts, Printing and Publishing Award 2020*;
  - *Food, Beverage, and Tobacco Manufacturing Award 2020*; and
  - *Vehicle Repair, Services and Retail Award 2020*.
89. The AMWU proposed three amendments to subclauses 2, 3 and 6 of the ACTU proposal, namely the areas of the clause which deal with the right to represent, the right to paid training leave and the right to attend meetings.<sup>20</sup>
90. With respect to subclause 2 of the ACTU model clause, the AMWU proposes an amendment which would provide that where a delegate attends the FWC, a court or tribunal, they will not be required to attend work for a rostered shift that commences later that day. Absence for that shift is to occur without loss of pay.
91. Whilst a workplace delegate carries out an important function, fundamentally and more importantly they remain an employee. The delegate's voluntary role should not interfere with their primary employment duties and therefore this amendment should not be accepted.
92. With respect to subclause 3 of the ACTU model clause, the AMWU proposes two amendments which would:
- One, allow delegates to not attend a shift without loss of pay after attending training; and
  - Two, explicitly provide that the onus of proof for refusal of paid training leave on 'unjustifiable hardship' grounds would rest with the employer.
93. Such a proposal would render a workplace delegate's right to take paid training leave stronger than the rights of employees to take certain leave allowed for under the NES. Take for example annual leave, where an employer may refuse annual leave if it is reasonable to do so.<sup>21</sup> It is unclear on what basis the ACTU and the AMWU is advancing

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<sup>20</sup> AMWU Submission to the FWC's Variation of modern awards to include a delegates' rights term process, pages 6-9.

<sup>21</sup> Fair Work Act 2009, section 88(2).



the proposition that it should be so substantially more difficult for an employer to refuse leave for training purposes to a workplace delegate than annual leave to all employers. This should not be accepted.

94. With respect to subclause 6 of the ACTU's model clause, the AMWU proposes an amendment to the ACTU's 'right to attend meetings' subclause.
95. As canvassed above, this subclause of the ACTU's proposal is not in scope to begin with. ACCI will therefore not address this amendment as it seeks to vary something which should not be accepted at the outset.

### **CFMMEU Manufacturing Division amendments to the ACTU's model clause**

96. The Manufacturing Division (**MD**) puts forward amendments to the ACTU's model clause with respect to the below awards:
  - *Dry Cleaning and Laundry Industry Award 2020*;
  - *Textile, Clothing, Footwear and Associated Industries Award 2020*;
  - *Timber Industry Award 2020*; and
  - *Storage Services and Wholesale Award 2020*.
97. With respect to subclause 2 of the ACTU model clause, the MD proposes an amendment which would provide that where a delegate attends the FWC, a court or tribunal, they will not be required to attend work for a rostered shift that commences later that day. Absence for that shift is to occur without loss of pay.
98. Whilst a workplace delegate carries out an important function, fundamentally and more importantly they remain an employee. The delegate's role should not interfere with their primary employment duties and therefore this amendment should not be accepted.
99. With respect to subclause 3 of the ACTU model clause, the MD proposes two amendments which would:
  - One, allow delegates to not attend a shift without loss of pay after attending training; and
  - Two, explicitly provide that the onus of proof for refusal of paid training leave on 'unjustifiable hardship' grounds would rest with the employer.
100. Such a proposal would render a workplace delegate's right to take paid training leave stronger than the rights of employees to take certain leave allowed for under the NES. Take for example annual leave, where an employer may refuse annual leave if it is reasonable to do so.<sup>22</sup> It is unclear on what basis the ACTU and the MD is advancing the proposition that it should be so substantially more difficult for an employer to refuse leave for training purposes than annual leave. This should not be accepted.

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<sup>22</sup> Fair Work Act 2009, section 88(2).



### **CEPU amendments to the ACTU's model clause**

101. The CEPU's proposal would insert an additional subclause to the ACTU's model clause, with respect of 10 awards listed on page 2 of the CEPU submission.
102. The CEPU would insert a new section entitled 'Right to Provide Facilities'. The effect of this subclause would be to create a positive obligation on employers to provide the following to workplace delegates:
  - a telephone;
  - an iPad or equivalent, equipped with mobile Internet access;
  - a table and chairs;
  - a filing cabinet;
  - air-conditioning/heating;
  - access to stationery and other administrative facilities, including use of a photocopier, facsimile, use of email (if available on site), following consultation between the Union Delegate and Site Management;
  - a private lockable area;
  - a suitable workplace location to conduct confidential discussions with union member/s and persons eligible to be union members (including free from monitoring, surveillance, or recording).
103. ACCI asserts that this amendment should not be accepted is out of scope because it creates an additional obligation on employers not provided for under the legislation.
104. In seeking to provide that employers should have a new obligation not expressed in the legislation for workplace delegates, it is ACCI's view that this proposal is clearly not in scope of what should be considered for inclusion in the model modern awards clause.
105. This part is also not compatible with providing a 'minimum' safety net as developed in the modern awards objective as it seeks to create a new obligation which have not been expressed in legislation previously.
106. As canvassed earlier, it is not appropriate to suggest that as part of the minimum safety net, which modern awards should provide, that a workplace delegate be entitled to an iPad, for example. Similar concerns arise as to how this is compatible with the rights of workplace delegates being expressed only with the respect to the industrial interests of union members or employees eligible to be union members who wish the workplace delegate to represent them.

## MEU Submission

107. In ACCI's view, the MEU submissions suffer from many of the same issues as the ACTU's, namely that parts of the proposal are out of scope and inconsistent with the notion of minimum safety net.

108. The MEU's proposal would vary the following awards:

- *Black Coal Mining Industry Award 2020*;
- *Mining Industry Award 2020*;
- *Electrical Power Industry Award 2020*; and
- *Coal Export Terminals Award 2020*.

### **MEU proposal – '2. Right to represent'**

109. With respect to subclause 2, the MEU seeks to expand the rights of delegates significantly with respect to the 'right to represent' from what is on the face of the legislation.

110. The MEU seeks to provide a workplace delegate the entitlement to:

- access to a particular shift, roster, or other flexible work changes where necessary to facilitate the exercise of their right to represent during work time; and
- be released from normal duties for the purpose of the workplace delegate participating in bona fide union business, which would include:
  - the resolution of any dispute or grievance in the workplace.
  - any consultative process.
  - any court, or tribunal proceeding which relates to the industrial interests of a member or potential member who works in the same enterprise as the workplace delegate.
  - any event or meeting (however described) acknowledge by the rules of the relevant registered organisation.
  - any political lobbying delegation organised by the relevant registered organisation, and which impacts on the industrial interests of members or potential members of the relevant registered organisation.
  - any other bona fide union business.

111. ACCI rejects the notion that workplace delegates should be allowed to access shift, roster, or flexible work arrangement to facilitate their role as a workplace delegate. Whilst a workplace delegate carries out an important function, fundamentally and more importantly they remain an employee. The delegate's role should not interfere with their primary employment duties and therefore this clause cannot be accepted.

112. As previously articulated, the proposal to allow a delegate to participate in any dispute or grievance lacks clarity and could give rise to the notion that a workplace delegate has a positive right to inject themselves not only into formal disputes but to any matter where disagreement might occur not rising to the level of dispute. The use of the word any also implies that the dispute or grievance need not involve a union member or employee eligible to be a union member who wish the workplace delegate to represent them. This is clearly beyond the scope of industrial interests.
113. Additionally, providing that delegates may participate in any consultation process seeks to allow delegates to insert themselves into all manner of discussions which may have nothing to do with the industrial interests of union members or employees. On that basis it should not be accepted.
114. Self-evidently, entitlements to be released from duty for the purpose of any event or meeting organised by the relevant union, or to engage in political lobbying is not in scope of either industrial interests or the modern awards objective and should not be accepted.
115. Moving to subclause 2.5 of the MEU proposal, ACCI disagrees with the suggestion that workplace delegates should be paid by their employer to represent union members or persons eligible to be union members who wish the workplace delegate to represent them during time which they would not otherwise be at work.
116. Respectfully, workplace delegates are in those positions of their own volition, they should not be remunerated for anything they choose to engage in outside of their employment by their employer. Employers do not calculate the cost implications of hiring an employee on the proviso that they may later become a workplace delegate and then be paid for matters occurring outside their working hours. The modern awards objective states that the purpose of modern awards is to provide a “fair and relevant minimum safety net of terms and conditions”.<sup>23</sup> The word fair in this context is inextricable from a need to balance the perspectives of employers and employees fairly. This has been explored at length by the Expert Panel undertaking the Annual Wage Review.<sup>24</sup> This proposal is patently unfair to employers and is therefore not consistent with the modern awards objective.
117. More broadly the MEU proposal can easily be construed as an attempt to outsource responsibilities to workplace delegates that are the responsibility of full-time union officials paid by the union and have them covered at the expense of the employer. ACCI opposes this.

### ***MEU proposal – ‘3 Right to paid training leave’***

118. ACCI reiterates its concerns that the model clause must reference the exemption for small businesses from providing the right to paid training leave to workplace delegates. The MEU’s does not.
119. Subclause 3 of the MEU proposal simply requires that the training course be approved by the union only. ACCI submits that this would not be compatible with the fairness principle in the modern awards objective – the employer should be afforded the ability to assess

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<sup>23</sup> Fair Work Act 2009, section 134.

<sup>24</sup> [2022] FWCFB 3500 at [18].

the training for its relevance and whether it is fit-for-purpose, it should not merely be at the whim of the union. It would, for example, be inappropriate for a union to nominate a training course which might profit that union. This is highly pertinent under the new arrangements given that employers will be paying for the employee to attend.

120. The MEU's proposed notice period at 3.4 is insufficient. It is ACCI's position that employers should be provided at least 6 weeks' notice, which would allow them to, if necessary, assess the relevance of the curriculum of the training as referenced above and as called for in ACCI's initial submission at page 12.
121. Again, with respect to clause 3.5, ACCI would highlight the fairness principle in the modern awards objective. It is simply not fair or reasonable to argue that an employer should not have an avenue to reject paid training leave due to reasonable operational requirements or if, for example, an employer deems the training curriculum to be irrelevant. By omitting such matters, the MEU proposal effectively prevents an employer from rejecting paid training leave. It is therefore unworkable and should not be accepted.
122. The MEU also omits a requirement for the employee to show proof of attendance or for the training to have been conducted by an RTO whose scope of registration includes industrial relations training. Further, the MEU model clause does not articulate that the employer is not liable for any additional expenses associated with the employee's attendance, which ACCI does not believe is appropriate. These are essential safeguards to ensure that the right to paid training leave is not abused and that where paid training leave is taken, the training is of benefit to the employee and the employer.

#### ***MEU proposal – '4 Right to reasonable communications'***

123. This particular subclause is similar to the ACTU's in respect of communications rights of delegates. ACCI will address them in the same terms.
124. Concerningly, after the title of the subclause the MEU completely abandons its use of the word 'reasonable'. One can only assume, given its absence throughout the rest of the clause, that its inclusion in this subheading was merely a mistake.
125. From the outset the MEU proposal at 4.1 seeks to embolden the rights of workplace delegates beyond the clear intent of the legislation by proposing the wording that a delegate has the right to "have communications (including discussions)... in relation to any matter or subject". This is contradictory to section 350C(3), which clearly states that the workplace delegate is to have the right to reasonable communication about industrial interests only. This proposal should be rejected.
126. 4.2 is unnecessary and again contradictory. The clause seeks to list a range of matters about which the delegate is to have the right to reasonably communicate with union members or eligible employees who wish the workplace delegate to represent them. Again, the legislation is clear, a delegate is to only have the right to reasonable communication about industrial interests. The MEU's decision to not grapple with a proper construction of industrial interests in the model clause means, in ACCI's view, that this clause too cannot be accepted.

127. At 4.4, the MEU seeks to have any communication during work time to be treated as work time. ACCI advances the notion that workplace delegates are first and foremost an employee. Where possible, their voluntary duties as a delegate should not impede their regular duties. Hence, reasonable communications should occur during breaks. When viewed in combination with the MEU’s proposal to have the delegates provided with the right to ask employees to join unions covered under reasonable communication, this proposal becomes particularly inappropriate.

***MEU proposal – ‘5 Right to use facilities’***

128. As ACCI advanced in its own submission it is critical that reasonable access is couched in the employer’s ability to determine when and how the access to, and use of facilities is conducted. This is particularly relevant in the context of smaller employers, where office space may be limited, and the primary use of that space is to carry out work. Workplace delegates should not be provided free reign to access the workplace or workplace facilities whenever they choose, this would not be reasonable.

129. To the extent that the MEU fails to identify or address this issue, their model clause is entirely unworkable at a practical level.

130. Additionally, the notion that a delegate should be afforded the right to transport around the workplace to provide access, as the MEU calls for at 5.2h) of their model clause, cannot be accepted. It should not be the duty of the employer to facilitate transport of the delegate for a role which they have undertaken voluntarily, and which was not part of the costing calculation an employer would have pursued when hiring that employee. The modern awards objective states that the purpose of modern awards is to provide a “fair and relevant minimum safety net of terms and conditions”.<sup>25</sup> The word fair in this context is inextricable from a need to balance the perspectives of employers and employees fairly. This has been explored at length by the Expert Panel undertaking the Annual Wage Review.<sup>26</sup> This proposal is patently unfair to employers and is therefore not consistent with the modern awards objective.

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<sup>25</sup> Fair Work Act 2009, section 134.

<sup>26</sup> [2022] FWCFB 3500 at [18].

## CFMMEU Construction Division Submission

131. The Construction Division's (**CD**) model clause should not be accepted. The CD attempts to secure several new rights for workplace delegates and new obligations for employers through their model clause. In ACCI's view these are not matters which are in scope, they go beyond the modern awards objective, which clearly outlines that the purpose of modern awards is to provide a fair and minimum safety net.
132. As section 138 of the Act later mandates, "A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective" (emphasis added).
133. This is meant to emphasise the purpose of modern awards to simply provide a minimum safety net.<sup>27</sup>
134. The unions, by seeking rights far beyond the clear minimum provided under the legislation, have lodged model clauses which are inconsistent with the modern awards objective and therefore cannot be accepted.
135. The word fair in this context is inextricable from a need to balance the perspectives of employers and employees fairly. This has been explored at length by the Expert Panel undertaking the Annual Wage Review.<sup>28</sup>
136. Many of the CD's proposals are neither fair nor minimum. This will be explored in greater detail below.

### ***CD proposal – 'X.2 Rights of a Union Delegate'***

137. The CD seeks to enshrine the following new rights for workplace delegates into modern awards:
  - the right to place information related to permitted matters in prominent locations in the workplace except that the material must not breach freedom of association, privacy and other applicable laws;
  - the right to paid time to attend industrial tribunals and/or courts where they have been requested to do so by an Employee (which may include themselves) whom they represent in a particular dispute in their workplace;
  - the right to represent the interests of members in their workplace to the Union, the Employer and industrial tribunals/courts;
  - the right to represent the interests of Employees who request their assistance in their workplace to the Employer and industrial tribunals/courts;
  - the right to take reasonable leave to work with the Union;
  - the right to have reasonable time off to participate in the operation of the Union;

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<sup>27</sup> [2017] FCAFC 123.

<sup>28</sup> [2022] FWCFB 3500 at [18].

- the right to address new Employees about the benefits of union membership at the time that they enter employment or on their first day on site;
  - the right to paid time during working hours to consult and confer with Employees, Union members and officials;
  - the right to represent Union members employed by the Employer in the consultation, disciplinary and dispute resolution arrangements in this award, where they so choose.
138. Workplace delegates are not provided a right to paid time to undertake union work outside their rostered hours except in instances where they are on paid training leave. The CD submission, by attempting to insert such rights in this respect, represents a significant overreach and is inconsistent with the modern awards objective.
139. The CD, in this model clause, attempts to create a new form of leave for delegates, provide the right to paid time for many additional reasons, and to speak to members about joining the union. There is not even an attempt to provide a construction in the clause as to how these matters are essential to representing the 'industrial interests' of the union members, which the delegate is entitled to represent.
140. This is therefore, beyond the scope of the minimum safety net which modern awards are to prescribe. To that extent, the CD's proposals are inconsistent with the modern awards objectives and should not be accepted.
141. More broadly the CD proposal can easily be construed as an attempt to outsource responsibilities to workplace delegates that are the responsibility of full-time union officials paid by the union and have them covered at the expense of the employer. ACCI opposes this.

### ***CD proposal – 'X.3 Union Delegate Facilities'***

142. The CD proposal seeks to create a new duty on an employer to provide an agreed facility for union delegates.<sup>29</sup>
143. The CD calls for the facilities are to include:
- a telephone
  - an iPad equipped with mobile Internet access
  - a table and chairs
  - a filing cabinet
  - air-conditioning/heating
  - access to stationery and other administrative facilities, including use of a photocopier, facsimile, use of email (if available on site), following consultation between the Union Delegate and Site Management

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<sup>29</sup> CFMMEU CD Submission to the FWC's Variation of modern awards to include a delegates' rights term, page 11.

- a private lockable area.
  - a suitable workplace location to conduct confidential discussions with those Employees who chose to be represented by the Union Delegate. The Employer will respect the privacy of the Union Delegates use of these facilities and will not monitor communications using those facilities.
144. With respect to industrial interests, the CD does not provide any reasoning, as clearly required under the legislation, as to how access to the above facilities is ‘for the purpose of representing those interests’.<sup>30</sup>
145. ACCI asserts that this proposal should not be accepted is out of scope because it creates an additional obligation on employers not provided for under the legislation. Additionally, the employer must seek the permission of the delegate before providing certain facilities, as evidenced by the use of the word ‘agreed’ at X.3(1). This creates an imbalance between the employer and the employee. To that end, ACCI asserts this subclause is incompatible with fairness principle in the modern awards objective.
146. This part is also not compatible with providing a ‘minimum’ safety net as developed in the modern awards objective as it seeks to create a new obligation which have not been expressed in legislation previously.
147. As canvassed earlier, it is inappropriate to suggest that as part of the minimum safety net, which modern awards should provide, that a workplace delegate should be entitled to an iPad, for example.

#### ***CD proposal – ‘X.4 Union Delegate Training Leave’***

148. Firstly, the model clause must include a reference to the exemption for small businesses from providing paid training leave to workplace delegates as provided for under the legislation. Asserting that delegates’ rights clauses should not include such exemptions is inherently unfair to employers and is inconsistent with the modern awards objective.
149. Additionally, the CD’s model clause does not include that an employer is provided the ability under X.4(4) to refuse leave due to reasonable operational requirements or if the curriculum, as assessed by the employer, is irrelevant to the delegate’s workplace or that the training is not fit for purpose. This will be important to ensuring that the model clause is fair to employers who will be paying for the employee to attend, and they should be able to establish that the training will benefit the delegate, other employees, and the business.
150. Furthermore, the clause does not include that the training must be provided by an RTO whose scope of registration includes industrial relations training. This is an important safeguard. It would, for example, be inappropriate for a union to nominate a training course which might profit that union.
151. Finally, as ACCI advanced on page 12 of its initial submission, the model clause should place limitations on the number of delegates who can access paid training leave by reference to the size of the enterprise.

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<sup>30</sup> Fair Work Act 2009, section 350C(3)(b).



## Other Employer Groups

### **Support for ACCI**

152. ACCI notes the support of the Housing Industry Association, the Victorian Automotive Chamber of Commerce, Clubs Australia, and Live Performance Australia for ACCI's proposed model clause.
153. ACCI thanks the above organisations for their support.

### **The Australian Industry Group (AiG)**

154. ACCI would note that it does not believe the AiG clause to be entirely inconsistent with its own, however ACCI would seek to make some commentary about the AiG submission and certain deficiencies present in their model clause.
155. At the outset, ACCI asserts that AiG's submission is not in keeping with the EM, which was also referenced by the President in his statement, which states "... for most employees, modern awards and enterprise agreements would provide greater detail for particular industries, occupations and enterprises", and that s 350C(4) would ensure, where this is the case,  
  
"employers can rely on [the award or agreement term] as a complete statement of their obligations under new subsection 350C(3)."
156. ACCI fails to see how AiG's model clause provides greater clarity or detail to employers about their obligations with respect to delegates' rights regarding reasonable access to facilities and reasonable communication with union members and employees eligible to be union members who wish the workplace delegate to represent them.
157. AiG's clause with respect to those rights is, fundamentally, a copy and paste of the legislative provisions.<sup>31</sup> ACCI is concerned that such a proposal may not assist employers to understand how workplace delegates' new rights are to be practically and reasonably expressed in the workplace.
158. No doubt AiG's reluctance to engage with this practical exercise is a reflection of their overall opposition to the intent of the legislative provisions. While ACCI also opposed the intent of these legislative changes, now that they are law we seek to provide greater clarity to employers.
159. ACCI therefore reasserts its definition of industrial interests with respect to AiG's submission. Section 350C of the Act contemplates on no less than three occasions that the rights of delegates are only afforded in the context of industrial interests. It is essential that employers have a clear statement of those interests on behalf of which a delegate's rights are performed. AiG's model clause does not even begin to grapple with the term.

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<sup>31</sup> AiG Submission to the FWC's Variation of modern awards to include a delegates' rights term process, pages 24-25; Fair Work Act 2009, section 350C.

160. In this sense, the AiG clause may not provide significant practical value for employers – all of the rights to which this new modern award term relates are specifically couched in industrial interests, it is a key concept to which greater detail should be provided.
161. As put forward in our initial submission, workplace delegates should only be entitled to the rights of communication, access, paid training, and representation in the context of industrial interests, as required by the legislation, and those interests should be limited to disputes, consultation about major workplace change or changes to rosters or hours of work, bargaining, and performance and disciplinary matters.
162. Although AiG’s model clause as it relates to training is broadly consistent with ACCI’s own submission, ACCI would draw attention to a key difference. Although ACCI suggests that delegates should have reasonable paid training leave for a maximum of 5 days per delegate,<sup>32</sup> AiG suggests no more than 2 days.<sup>33</sup>
163. ACCI’s proposal is consistent with existing terms in modern awards providing paid time off for a maximum of 5 days for training purposes. Those awards are:
- *Victorian Local Government Award 2015*;
  - *Waste Management Award 2020*;
  - *Road Transport and Distribution Award 2020*;
  - *Graphic Arts, Printing and Publishing Award 2020*; and
  - *Fire Fighting Industry Award 2020*.
164. ACCI considers the amount reasonable in light of its proposal to limit the number of workplace delegates by reference to the employer’s size and the number of delegates eligible to attend training per year.<sup>34</sup>
165. AiG does not explicitly seek to limit the total number of delegates on each worksite, or the number of delegates eligible to attend training per year, risking an unquantifiable number of days off across a particular workforce and significantly more costs for employers than ACCI’s.
166. If workplace delegate numbers are not capped, as AiG proposes, then of course ACCI would support a reduced number of paid days off for training as AiG has done. ACCI’s position to allow a maximum of 5 days is conditional on the number of delegates eligible to attend training being restricted per year.

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<sup>32</sup> ACCI Submission to the FWC’s Variation of modern awards to include a delegates’ rights term process, page 12.

<sup>33</sup> AiG Submission to the FWC’s Variation of modern awards to include a delegates’ rights term process, page 26.

<sup>34</sup> ACCI Submission to the FWC’s Variation of modern awards to include a delegates’ rights term process, pages 10 and 12.

## About ACCI

The Australian Chamber of Commerce and Industry represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

ACCI strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth, and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education, and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.



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