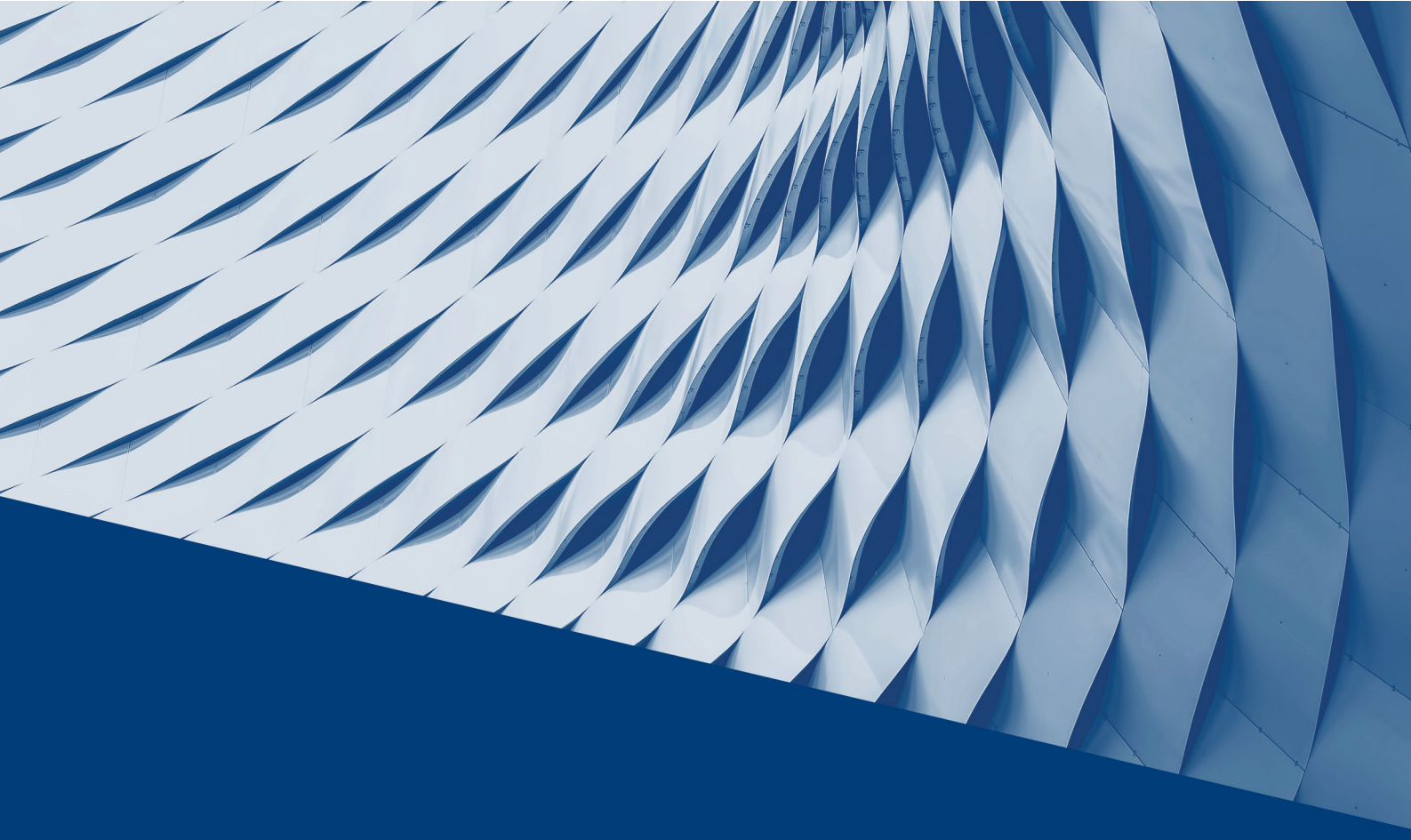

ACTU Reply Submission – Delegates Rights Term

AM2024/6 – Variation of Modern Awards to insert a Delegates' Rights Term

ACTU Submission, 28 March 2024
ACTU D. No 23/2024

ACTU
australian council of trade unions

Contents

Introduction

Delegates Rights

1. The FWC has commenced a process to vary modern award terms to include a delegates rights term, and has received initial submissions as part of the process.
2. The ACTU refers to its earlier substantive submission, filed on 1 March 2024, which included a draft delegates' rights clause prepared by the ACTU (**ACTU draft model clause**).
3. The following is the ACTU's submission in reply to the submissions filed by other parties in this process.

About the ACTU

4. Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.
5. The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 36 ACTU affiliates. They have more than 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

ACTU Submissions In Response

The effective sum total of the employer's responses

6. If the FWC agreed to all of the various demands put by employers in this present matter, we would see an award delegates' rights term which:
    a. Limited the number of workplace delegates;
    b. Imposed excessive limits on the range of issues that workers could be represented by a delegate on;
    c. Further restricted the delegates' right to represent on those confined matters to circumstances where there was proof of a request for representation;
    d. Meant that delegates would have to choose between being trained as a delegate and paying their bills;
    e. Place unrealistic administrative hurdles in the way of delegates' training; and
    f. Gave employers greater rights to thwart the exercise of a delegates' rights than it gave to the delegate to access those statutory rights;

7. It is submitted that this was not the intention of Parliament in determining to legislate delegates' rights. Rather, Parliament has decided to enact delegates rights to support freedom of association and the right to organise. Seen in this light, it is submitted that the FWC should determine an expansive delegates' rights clause, rather than a narrow or constrained one.

Interpretive Matters

Modern Awards Objective

8. ABI/NSWBC, at paragraphs 1.1(b) and 11, and AiG at paragraph 8 of their submissions say that the new term needs to meet the modern awards objective.
9. Whilst we submit that on a strict reading, the modern awards objective does not apply to the FWC's exercise of powers in this review, we note that it is a practically relevant consideration.[1]
10. AiG, at paragraph 41 of their submission, argues that delegates' rights have not been necessary in the past. This submission is both unfounded and irrelevant. The Parliament has determined that they are necessary. Further, this submission wilfully ignores the changed context created by the enactment of delegates' rights provisions which has brought about this very review.
11. The positive impacts of workplace delegates – for workers and for businesses – are outlined in the initial submission of the ACTU and the expert statement of Professor David Peetz filed with that submission.
12. These positive impacts of having workplace delegates are relevant to the majority of the items that make up the modern awards objective. For example, workplace delegates: assist in addressing relative living standards and the needs of the low paid, can encourage collective bargaining, can advocate in the workplace for secure employment and gender equality and, are vital to genuine consultative processes which can promote flexible and modern work practices and increase productivity.

Industrial Interests

13. ACCI, at paragraph 20 of their submission, submit that the phrase "industrial interests" should be defined. Further, at paragraph 24 of their submission, ACCI suggest that the term should clearly not extend to social or political purposes. ACCI's proposed definition of the phrase "industrial interests" at paragraph 27 of their submission, lists 4 types of

[1] See [2021] FWCFB 3555 at [290] (1)

matter which, in the submission of the ACTU, do not fully capture the extent of the phrase "industrial interests".

14. There does not appear to be consensus amongst employer groups as to the best approach in this regard.
15. At paragraph 7.3 of their submission, ABI/NSWBC put a submission with an effect that the term "industrial interests" should not be defined.
16. AiG, at paragraph 52 of their submission, acknowledge that the award term cannot limit the FW Act s 350C but nevertheless suggest that practical examples of what industrial interests *doesn't* include should be given.
17. We submit that the preferable approach is to provide examples in the delegates' rights term of what the exercise of such rights might include, without seeking to be limiting. This is in line with a beneficial construction of the legislation.
18. It is not open to the FWC to read down the provision of the Act or to limit the scope of the legislation.
19. To the extent that the FWC is minded to define the term "industrial interests" or seek to confine it, we say as follows:
    a. The term, industrial interests, has a very broad meaning.
    b. 'The expression "entitled to represent the industrial interests of the person" does not have a plain and ordinary meaning which in and of itself reveals the criterion of entitlement.'[2]
    c. Existence of an industrial interest does not depend on a contractual interest;[3]
    d. The term, or similar terms, appear elsewhere in the FW Act and should be given consistent meaning;
    e. An entitlement to represent a workers' industrial interests may exist by way of that workers' union membership or otherwise (for instance by way of their eligibility for membership);[4]
    f. The term 'industrial interests' is collective by its very nature – it refers to the broad interest of a changing cohort of workers, as opposed to the individual interests of an ascertainable group.[5]
    g. Organisation is an essential component of industrial interests;[6]

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[2] *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55 at [19]
[3] (1925) 35 CLR 528 at 551 per Starke J
[4] *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55 at [22], [26]
[5] *R v Dunlop Rubber Australia Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1957 97 CLR 71 at [4]
[6] (1925) 35 CLR 528 at 541

h. Job security and methods of termination are clearly contemplated within the term industrial interests.[7]

i. Superannuation matters come within the scope of industrial interests.[8]

j. Industrial interests can stretch beyond the workplace or employer and across an industry: 'there is a community of industrial interest between a farmer who employs an engine-driver to drive a stationary engine in Queensland and a company which employs drivers of locomotive engines in Tasmania';[9]

k. The pursuit of industrial interests may extend to pursuing political aims and goals insofar as these are connected to those industrial interests (for example, the betterment of industrial conditions).[10]

20. The ACTU maintains its submission that the term "industrial interests" should not be defined in the award.

21. Further and in the alternative, if the FWC is minded to define the term "industrial interests" in the present matter it is submitted that this should be done in a manner which takes into account the above, whilst also ensuring that any definition does not affect the term where it might appear elsewhere.

Should we limit rights?

The statutory term is a lower limit, not an upper limit

22. ABI/NSWBC at paragraph 1.10(a) of their submission say that the award term must give effect to the rights in the FW Act. We agree with this submission, but note that this does not mean that this is *all* that the term can do. Giving effect to the rights in the FW Act is the least that an award term must do, but it does not mark the outer limit of such a term.

23. ACCI, at paragraph 13 of their submission, say that the delegates' rights term should be restricted to the subject matters provided for by the new statutory provisions. At paragraphs 15 and 18 of their submission, ACCI also suggest that the FW Act s 350C should only be interpreted as far as is necessary to give effect to the purpose of the FW Act and the Amending Act. The context and purpose of the new provisions is set out in the ACTU's initial submission. In our submission, that context and purpose warrants an expansive, rather than constrictive approach.

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[7] *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 661

[8] *Re Financial Services Union of Australia* (1993) 178 CLR 352

[9] Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd (1911) 12 CLR 398 at 412

[10] *Williams v Hursey* (1959) 103 CLR 30 100

24. Similarly, ABI/NSWBC, at paragraph 1.14(c) urge a cautious approach, ostensibly on the basis of the newness of the provisions. There is no real basis for this – that a provision is newly enacted does not necessitate temperance.
25. AiG, at paragraph 30 of their submissions, similarly urges a cautious and conservative approach.
26. There is no principle of statutory construction which warrants a cautious or conservative approach in this matter. On the contrary, there is authority to the effect that beneficial legislation ought be construed beneficially.[11]
27. The purpose and context of the new provisions, and in particular the manifest intent to codify delegates' rights in furtherance of Australia's international treaty human rights obligations and to ensure that workers and their union delegates have the enjoyment of such rights is set out in the initial submission of the ACTU and the explanatory materials for the legislation.

Stopping People from being Union Delegates?

28. ACCI, at paragraph 11 of the submission, argue that the number of delegates in an enterprise should be limited.
29. There is no support for this in the statute properly interpreted. On the contrary, the intention of Parliament in legislating delegates' rights is to afford those rights to delegates, not to place artificial caps on who can be a workplace leader of their union. Accordingly, it would directly opposite to the legislatures provision of rights to all union delegates to then curtail a worker's very ability to become a delegate.
30. There is not even agreement amongst employer representatives on this point. A more practical submission is made by ABI / NSWBC who note, at paragraphs 2.4-.2.6 of their submission that while the provisions could theoretically be taken advantage of – through the appointment of large numbers of delegates – such a strategy (even if it were likely to occur, which is not admitted) could at any rate by addressed by way of other legislative provisions.

Employers should not interfere

31. Employer groups have made submissions to the effect that the needs of the employer should triumph over the rights of delegates:

[11] R v Kearney; Ex parte Jurlama (1984) 158 CLR 426 at [8] per Gibbs CJ, with Brennan, Deane & Dawson JJ agreeing.

a. ACCI, at paragraph 10 of their submission, suggest that the delegates' rights term shouldn't interfere with the ability of the employer to lawfully and reasonably direct employees.
b. ABI/NSWBC, at paragraph 1.14(a) of their submission emphasise the significance of delegates being first and foremost employees.
c. ABI/NSWBC, at paragraph 3.3 of their submission, suggest that the exercise of a delegate's rights shouldn't interfere the running of a business and that the delegate should not be able to leave without permission.
d. AiG, at paragraph 48 of their submission, argue that delegates' rights should not result in undue costs or disruption for the employer.

32. These submissions should carry no weight with respect to measures which are directed protecting delegates from victimisation or are aimed at enabling the exercise of delegates rights.
33. Further, the needs of the employer should not override the very broad and unqualified right of a delegate to represent – an employer should not be permitted to deny a delegates' right to represent simply because they regard it as inconvenient.
34. Moreover, these submissions wilfully ignore the fact that what is lawful and reasonable in terms of an employer's ability to direct is impacted by these changes to the law.
35. As to the rights to facilities and access, these are already qualified by a requirement for reasonableness which in the submission of the ACTU is adequate to balance interests.
36. Not only do employer groups suggest that the enacted delegates' rights should be constrained by the preferences of the employer generally, some further suggest that specific constraints be imposed:
    a. ABI/NSWBC, at paragraph 10.12 of their submission, suggest that the employer should be provided the content of any training to be undertaken by delegates. At paragraph 67 of their submission, AiG suggest that 8 weeks' notice of training should be given, along with detailed information about the nature of the training.
    b. In the ACTU's submission this would be entirely inappropriate and would allow employers to arbitrarily deny delegates their right to training. This would have both the direct effect of denying the right to the delegate as well as the consequential effect of impinging upon freedom of association, on the basis that the workforce would not receive the benefit of a well trained delegate.
    c. AiG, at paragraph 77 of their submission, say that the exercise of delegates' rights should be subject to the employer's IT policies. Again, the potential for employers to misuse such a provision to deny delegates from exercising their rights should not be considered.

d. AiG, from paragraph 57 of their submission, suggest that delegates' training should be paid at the minimum rate and should only occur during existing hours. In the ACTU's submission this would impose a financial cost on union delegates who sought to exercise their rights which would act as a barrier to such exercise. In circumstances where the delegates' rights provisions are workplace rights (and for that matter sit within the general protections) it could well be considered that reducing a delegates' wages for exercising their rights could constitute adverse action. For this reason, the ACTU submits that the provision should explicitly provide for payment without loss of pay, at the full rate of pay. Moreover, true facilitation of the exercise of delegates' rights requires there to be accommodations – such as roster changes – made as necessary. The alternative would be a safety risk. For example, it is unclear when a 12 hour night shift worker who wanted to attend union training during the day would sleep.

37. ABI/NSWBC, at paragraph 8.4 of their submission, point out that there is no correlating right for a member or non-member to leave their workstation to participate in the exercise of a delegate's rights. In the ACTU's submission, this could be cured by the award term containing a clear expression of such a right – not doing so would impinge on the rights of the delegates, or allow employers to deny a delegates' access to the workplace and workers.

Freedom from association?

38. ABI/NSWBC, at paragraph 4.3-4.4 of their submission, observe that freedom of association doesn't mean that people have to join their union or be represented.
39. In the ACTU's submission, this observation is trite. Nowhere in the submissions or positions put in this matter by the ACTU or any trade union is there a suggestion of some form of compulsion for union membership. Nor, as a matter of practicality is it ever likely that a union delegate would insist on representing an unwilling worker.
40. However, notwithstanding that ABI/NSWBC's submission is jumping at a shadow, this does not mean it would be harmless to introduce such a limit.
41. Firstly, the delegate's right to represent in the FW Act is at large – it would not be acted upon by such a limit in an award term. This would mean that if an employer arbitrarily limited the exercise of the right, they would contravene the FW Act even if ostensibly sanction by the modern award.
42. ABI/NSWBC at paragraph 1.14(b) of their submission further develop their argument by suggesting that freedom of association is somehow disturbed by delegates asking non-union members to join their union.

43. The reasons for taking into account Australia's international (ILO convention) treaty obligations in the present matter are set out in the initial submission of the ACTU. Those various obligations are designed to protect freedom *of* association, not freedom *from* association. Indeed the latter appears to be a particular pre-occupation of Australian industrial relations despite it not being the focus of ILO Conventions 87, 98 and others.
44. AiG, at paragraph 55 of their submission, say that the modern award clause should say that a delegate cannot represent someone (or a group) who does not want to be represented.
45. Again, notwithstanding the practical unlikeliness of this occurring, introduction of such a stipulation would be inappropriate for the following reasons:
    a. It would not temper the rights in the FW Act, so would not be of utility (but could be dangerous if relied on, given that an employer relying on a constricted award clause might nevertheless still fall contravene the more expansive FW Act provision);
    b. There might be circumstances, such as during a consultation process, where a delegate may need to make representations on behalf of workers' collective interests, even if an individual worker did not want to be represented;
    c. The potential for abuse of such a restriction by employers is patently obvious.
46. AiG, at paragraph 80 of their submission, cite privacy concerns.
47. It is telling that despite the employee records being exempted from the provisions of privacy legislation, employers routinely cite privacy as a shield against freedom of association.

Factors of Reasonableness

48. ACCI, at paragraph 35 of their submission, suggest factors relating to the employer should form part of the consideration of reasonableness. These factors are outlined at paragraph 36 of their submission. One is:

> **The fact** that work typically undertaken as a delegate might distract from the employee's usual duties as an employee and may require additional resourcing to be put in place if excessive provision is made for delegates activities;

49. Taking this as a fact is a definite overreach. Moreover, including actual words to this effect in each modern award is unwarranted.
50. Similarly, AiG, at paragraphs 72-74 of their submission, suggest additional factors for assessing reasonableness with respect to training, including the content of the training itself. Such a factor would run the risk of handing employer's a veto power over training if they did not like its subject matter.

51. ABI/NSWBC, at paragraph 1.14(d) of their submission, argues that the use of the term "reasonable" suggest that what constitutes the right will be contextual to the workplace.
52. ACCI, at paragraph 37 or their submission, also appear to reach a similar position.
53. Ultimately, this supports a formulation of what is reasonable that replicates the FW Act s 350C(5).

Level of Prescription

54. ABI/NSWBC, from paragraph 6 of their submission onwards, submit that the rights should not be prescriptive.
55. The ACTU agrees with this submission insofar as it is directed at exhaustiveness. For this reason, the ACTU draft model clause is built around general rights (conditioned by reasonableness where this appears in the FW Act) that are exemplified but not defined to exclusion.

Reaching Agreement

56. At paragraph 36 of their submission, ACCI propose that there should be a facility under a modern award for an agreement to be reached in relation to delegates' rights.
57. The ACTU is open to further consideration of such a mechanism, on the basis that any proposed mechanism would require being made with a union and could not result in lesser provisions than the FW Act or baseline award entitlement.

Support for CPSU

58. The ACTU supports the submission of the APSC, to the extent that it is agreed by the CPSU.

Conclusion

59. For the reasons above, the ACTU submits that the ACTU draft model clause should form the basis of a delegates' rights term in modern awards, subject to industry-specific requirements as set out in the submissions of our affiliates.

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