Australian Nursing and Midwifery Federation

Variation of Modern Awards to Include a Delegates' Rights Term

(AM2024/6)

Further Reply

1. The Australian Nursing and Midwifery Federation ('**ANMF**') welcomes the opportunity to provide comment on the Fair Work Commission's ('**FWC**') draft modern award delegates' rights term ('**the draft term**'). These comments should be read in conjunction with the ANMF's submission filed on 1 March 2024, the submission in reply filed on 28 March 2024, and oral submissions made in the consultation conference before the Full Bench of the FWC on 12 April 2024.

2. The ANMF has also had the opportunity to view the further reply provided by the Australian Council of Trade Unions ('**ACTU**') on the draft term and broadly supports the changes sought.

Definition of 'Eligible Employees'

3. The ANMF agrees with the ACTU that the definition set out at clause X.2(c) of the draft term is inconsistent with the provisions of the *Fair Work Act 2009* (Cth) ('**the Act**').[1]

4. 'Workers' versus 'Employees':

    a. The ANMF notes that under section 350C(1) of the Act, a delegate serves as a representative 'for members of the organisation [union] who work at a particular enterprise [emphasis added].' The subsequent language in the Act about the relationship between a delegate and non-members refers to "persons eligible to be such members".

    b. The wording of the legislation allows a delegate to represent union members who work at a particular enterprise, which includes employees, but may extend to others, such as independent contractors who perform work for an enterprise. By contrast, the draft clause refers to eligible employees thereby excluding non-employees.

    c. The way in which this definition would interact with other clauses creates an unnecessary rupture with the legislation. For example, under clause

[1] ACTU Further Reply at [13-24].

X.6(a) of the draft term, a delegate would be permitted to communicate with employees of their employer only, whereas section 350C(3)(a) of the Act permits communication with persons eligible to be members, which would extend to non-employee workers.

d. The ANMF would suggest that the FWC take a more expansive view of 'worker' that is more aligned with the meaning set out in section 7 of the *Work Health and Safety Act 2011* (Cth) and its state and territory counterparts.

5. 'Enterprise' versus 'employer':

    a. The ANMF again notes that section 350C(1) of the Act allows a delegate to represent 'members of the organisation who work at a particular enterprise [emphasis added].'

    b. The relationship between the delegate and potential members is one that encapsulates the entire enterprise, not just those who are directly employed by the same employer. We note that 'enterprise' is defined to mean 'a business, activity, project or undertaking.'[2]

    c. The FWC would be aware of the legislative history behind the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth). The same legislation that facilitated the regulation of labour hire arrangements was closely tied to the creation of delegates' rights, which occasioned these proceedings. Part 2-7A of the Act now permits workers and their unions to advocate for the equalisation of pay and conditions between host and labour hire companies. These changes to the Act envisage union activities that extend beyond the employer and into the enterprise level. It follows that a delegate must be able to represent not only employees of their employer but workers across the enterprise. To do otherwise would be inconsistent with the new labour hire provisions.

6. Recommendation: That clause X.2(c) be reworded as follows:

    a. 'eligible workers' means persons who are members or who are eligible to be members of the delegate's organisation who work in a particular enterprise.

Notice of Appointment or Election

[2] Section 12 of the Act.

7. The ANMF maintains its opposition to any delegates' rights term requiring a written notification for the valid appointment or election of a delegate. The ANMF set out its position on this matter in its submission in reply.[3]

8. The ANMF is concerned that the FWC in setting its draft term has formed a preliminary view to require a delegate to write to their employer to confirm their appointment or election. The ANMF invites the FWC to reconsider its position for the following reasons:

    a. That the rights of the delegate were intentionally placed within the general protections provisions of the Act. Clearly, the legislature wanted delegates to receive the same legal protections as those afforded to other cohorts under Part 3-1 of the Act. The Act offers protection to workers against adverse action (as defined)[4] based on certain rights, attributes and activities. No other rights, attributes or activities require written notice as a strict pre-condition to the protections being enlivened, so this draft term sits at odds with the historical operation of the general protections framework.

    b. By compelling a delegate to notify the employer of their status, the FWC may be unwittingly creating a disincentive for lawful union activities in the workplace. There may be instances where workers wish to, at least initially, collectivise and organise in secret without their employer's knowledge, perhaps due to particular hostility towards unionism in their workplace. Strictly requiring a delegate to disclose their identity, or be at risk of breaching an award term may have a chilling effect on union activities in workplaces where certain workers may feel the need to wait for a moment where members and their delegate feel safe to disclose their activities. The FWC should give consideration to the effect that the current draft term would acutely have in industries characterised by vulnerability, such as those employing migrants or young workers.

9. The ANMF reiterates that it accepts that employers have a legitimate interest in wanting to be able to confirm a delegate's status where that delegate has indicated an intention to exercise various rights under the draft term, such as communicating with employees about their industrial interests or attending delegate training.[5]

10. It would seem that the more logical approach would be to allow an employer to seek verification about an employee of theirs claiming to be a delegate, and that

[3] ANMF Submission in Reply at [4-12].
[4] Section 342 of the Act.
[5] Clause X.6 and X.8 of the draft term.

verification should logically come from a third party able to confirm this: the delegate's union. Importantly, such a right could be exercised by an employer at any time and on multiple occasions, negating the need for a delegate to provide written notification upon stepping down from that role, as contemplated by clause X.4 of the draft term.

11. Recommendation: That clause X.3 and X.4 of the draft term be deleted and replaced with the following:

    a. A workplace delegate may notify the employer of their appointment or election, verbally or in writing.

    b. The employer may request the delegate's organisation [as defined][6] to confirm the workplace delegate's appointment or election.

    c. Upon receiving a request under clause [b], the delegate's organisation must respond in writing to confirm the workplace delegate's appointment or election.

    d. For the avoidance of doubt, a failure of a workplace delegate to give notice in accordance with this clause will not invalidate their rights as a workplace delegate.

The Right of Representation

12. The ANMF welcomes the preliminary view of the FWC to adopt an expansive approach to listing a delegate's right to represent workers at clause X.5 of the draft term. The ANMF urges the FWC to exercise caution in response to any calls from other parties for clause X.5 of the draft term to be narrowed ahead of any final determination.

13. The ANMF is aware that the ACTU and its affiliates may seek for further items to be listed explicitly as areas in which a delegate has a right to represent. The ANMF is supportive of any additional representation right afforded to delegates, provided that this is not seen as exhaustive. In other words, any additional rights set out in clause X.5 of the draft term should not be at the expense of the words: 'including but not limited to'.

Surveillance of Delegate Communications

14. The ANMF would encourage the FWC to reconsider how the right to reasonable communication and the right to reasonable access to the workplace and its facilities are framed to take into account the need for communications to be confidential. This should include communications not only between the

[6] Clause X.2(b) of the draft term.

delegate's organisation and the delegate, but also communications between the delegate and eligible employees where union matters are being discussed.

15. To the extent that the FWC allows a delegate to use their employer's communication channels such as their work email account, which is permitted under clause X.7(c) of the draft term, there should be a reciprocal obligation on the employer to not monitor communications that were not intended for the employer's eyes.

16. Union members will often approach their delegate to discuss highly sensitive matters. The member or members will only do so if they can trust that the discussion will not be conveyed to the employer until a time of their choosing.

17. The ability for an employer to gain access to such confidential communications would have a chilling effect on the delegate being able to effectively carry out their duties. This is because members and potential members will only speak candidly about their concerns if they know that the employer is not privy to those communications.

18. The ANMF reminds the FWC that section 350A(1)(c) of the Act prohibits an employer from unreasonably hindering, obstructing or preventing the delegate exercising their rights. The ANMF would encourage the FWC to consider the surveillance of confidential communications as an act of disruption by an employer that ought to be curtailed in the setting of the draft term.

19. If the FWC were not minded to create a total prohibition on confidential delegate communications, the ANMF submits in the alternative that an employer should be obligated to take reasonable steps to ensure the confidentiality of delegate communications, and that the employer would need to inform the delegate, members, and potential members of those steps. This would create a less onerous obligation, particularly for small business employers with fewer resources available to them.

20. Recommendation: That clause X.6 of the draft term be amended to include an additional subclause as follows:

    a. The employer must not survey, monitor, record or otherwise infringe the privacy of communications between workplace delegates and their union, and eligible employees.

Reasonable Access to Training

21. The ANMF notes that clause X.7 of the draft term is silent on whether reasonable access to a workplace and its facilities both during and outside of working hours. By contrast, the provision around the right to reasonable communication is

unambiguous that the right may exercised: 'during working hours or work breaks, or before the start or after the end of work.'[7]

22. In the absence of any such clarifying provision, the ANMF is concerned that an employer may capriciously restrict a delegate's access to the workplace and its facilities outside of their own working hours. Noting that section 350C(3)(b)(i) of the Act makes no statement on this matter, the FWC should insert an expansive provision similar to clause X.6(b) of the draft term.

23. Recommendation: That the FWC insert a clarifying provision into clause X.7 as follows:

    a. A workplace delegate may access the workplace and its facilities during working hours or work breaks, or before the start or after the end of work.

Delegate Training

24. Note: The submissions below concerning delegate training refers to 'eligible employees', however the ANMF reiterates that it is seeking for this definition to be amended to 'eligible workers' in accordance with paragraph 6 of this submission. Any reference to 'eligible employees' should not be taken to indicate that the that the ANMF wishes to preserve this definition purely for the purposes of the delegate training provisions. As currently framed in clause X.8 of the draft term, this definition is highly relevant to the number of delegates who get access to training.

25. Number of training days:

    a. Section 350C(3)(b)(ii) of the Act entitles a delegate to reasonable access to paid time during working hours to attend training, with an exemption for small business employers. The Act does not prescribe the number of days to be afforded to delegates for the purpose of training.

    b. In seeking to quantify the number of days available, the FWC seems to have found favour in the Australian Industry Group's ('**AiG**') submission where it is suggested that: 'a delegate of 20 years' standing and experience will obviously not need to attend training courses for numerous days each year.'[8] Clause X.8 of the draft term reflects this by providing five days for initial training and one day for each subsequent year.

    c. The ANMF disagrees with this assertion. Its position is that the amount training available to each delegate should be five days per annum,

[7] Clause X.6(b) of the draft term.
[8] AiG Submission at 75.

irrespective of whether that delegate has been recently appointed/elected or has been in their role for a longer period. The practical reality is that a delegate who does not need to use all five days of training will not exhaust the entitlement, whereas a delegate requiring more than one day of training to move beyond the mere fundamentals of being a delegate will effectively be hampered by a lack of access to training.

d. To the extent that the FWC may remain in favour of drawing a distinction in the number of training days offered to new versus continuing delegates in the draft term, the ANMF proposes in the alternative that the number of training days for continuing delegates be increased to three days per annum. The ANMF considers any lesser amount to be unreasonable within the context of the Act. The five days available to new delegates would remain unchanged under this alternate proposal.

26. Delegate to employee ratios:

a. The FWC has further sought to limit the number of delegates who have access to training by reference to the number of eligible employees,[9] as outlined in clause X.8(a) of the draft term. The ANMF remains steadfastly opposed to any restrictions on the number of delegates who can have access to training.

b. The ANMF notes that unions have their own rules around the appointment or election of delegates and that where those rules permit having more than one delegate per 50 employees, this may create a situation whereby a delegate has been validly appointed or elected but is denied access to training entirely due to the framing of this provision.

c. It is unclear how competing claims would be resolved where more than one delegate is simultaneously seeking access to training, but only one is notionally eligible due to the operation of clause X.8(a) of the draft term. To deny a delegate access to training in such circumstances would be unreasonable.

d. The ANMF submits that the limitation placed on the number of delegates per 50 eligible employees should be removed in favour of there being no upper limit.

[9] As defined by clause X.2(c) of the draft term.

e. If the FWC remains persuaded that a delegate to employee ratio is necessary, then the ANMF presents an alternative position that the number be reduced to 25 eligible employees.

f. The ANMF additionally submits in the alternative that whatever number of eligible employees the FWC lands on, that every delegate per [X] eligible employees or part thereof will be entitled to access training. This would ensure that a single delegate is not expected to shoulder the load of needing to liaise with up to 99 members and eligible employees without assistance from a second delegate.

27. Number of delegates per year:

    a. Without a statement setting out the rationale behind the FWC's preliminary view to capping the number of delegates at one per 50 eligible employees, it is assumed that this was done to moderate the level of disruption to an employer's enterprise due to potentially multiple employees being absent to attend delegate training in one year.

    b. Further to paragraph 25.d. above, if the FWC were minded to retain a distinction in the number of training days available to new delegates versus existing ones, then perhaps the more reasonable position would be to limit any restriction to only new delegates per [X] number of eligible employees. Under the current draft term, the cumulative impact of four continuing delegates attending training over four days would still be less disruptive to an employer's enterprise than a new delegate attending training over five days each year.

28. Recommendation: That the first paragraph of clause X.8 and X.8(a) of the draft term be deleted and replaced with the following:

    a. Unless the employer is a small business employer, the employer must provide a workplace delegate with access to up to 5 days of paid time during normal working hours for initial training and 3 days each subsequent year, to attend training related to representation of the industrial interests of eligible employees, subject to the following conditions:

    b. The employer is not required to provide the 5 days paid time per annum during normal working hours for initial training, to more than one workplace delegate per 25 eligible employees or part thereof.

29. Content of training:

    a. The ANMF notes that the clause X.8(c) of the draft term requires a delegate to disclose the 'subject matter… of the training' when giving

notice of their intention to attend training. Clause X.8(d) of the draft term separately requires a delegate following an employer request to provide 'an outline of the training content.'

b. The ANMF has reservations about the framing of this provision:

    i. Firstly, it is unclear what the difference is between 'training subject matter' and 'training content', other than the former must be disclosed upon notifying the employer of the training while the latter need only be provided upon employer request. One could be forgiven for assuming that the terms were synonymous and interchangeable.

    ii. More significantly, the ANMF is deeply concerned that delegates might be unfairly pressured or forced to disclose details about training that would expose confidential union strategy. For example, if a delegate seeks training from their union to cover the topic of taking protected industrial action around enterprise bargaining, it may be the case that the delegate does not wish for the employer to have insight into such planning. The FWC should be mindful of such sensitivities when setting the draft term.

    iii. Furthermore, the ANMF submits that an employer's approval for a delegate to attend training would be regulated by clause X.8(e) of the draft term. Provided that the delegate gave sufficient notice, an employer must not unreasonably withhold approval (presumably, this would operate in a similar manner to ordinary leave approval processes). The problem with requiring a delegate to disclose the content of training is that it opens the possibility for employers to weigh in on whether they are willing to permit such training to proceed based on the content, which a cunning employer would be cautious not to reveal. At its most insidious level, this provision could be used to allow employers to decide what rights a delegate (and by extension the members they represent) might wish to exercise, or even be educated about.

c. Disclosure of training content is simply not necessary for an employer, given their only obligation here is to not unreasonably withhold approval. To the extent that the FWC believes it necessary that a verification process occur to confirm that training being sought is for the purpose of delegate training, the ANMF puts forward an alternative position that a union must provide such confirmation following a request from an employer.

30. Recommendation: That the reference to 'subject matter' be deleted from clause X.8(c) of the draft term, and that clause X.8(d) of the draft term be deleted.

31. Proof of training:

    a. The ANMF is of the view that any strict requirement on a delegate to provide proof that they attended delegate training is unnecessarily onerous. A delegate who merely forgot to provide proof, or did so outside of the stipulated seven day period would be unwittingly in breach of clause X.8(f) of the draft term.

    b. Moreover, an employer may trust that the training time was used for its intended purpose and have no desire for separate confirmation. To use an analogy, not every employer on every occasion that an employee takes a day off sick insists that a medical certificate be provided.

    c. A more suitable provision would be that a delegate be only required to provide proof of training following a request from an employer.

32. Recommendation: That clause X.8(f) of the draft term be deleted and replaced with the following:

    a. Within 7 days after the day on which the training ends, the employer may request in writing from the delegate evidence of their attendance at the training.

    b. The delegate will have 7 further days following the employer's request at [a] to provide the employer with evidence that would satisfy a reasonable person of the delegate's attendance at the training.

Exercise of Entitlements

33. The ANMF strongly objects to the restrictions imposed by clause X.9(a)(iii) of the draft term that would not allow a delegate to 'hinder, obstruct or prevent the normal performance of work' in relation to the right of representation and the entitlement to reasonable access to the workplace and workplace facilities.[10] We hasten to add that this need not be the sole focus of a delegate, nor a perpetual state of affairs.

34. Rather, we note that the legislative framing of these rights contemplates some incidental level of disruption to the normal performance of work. The rights created under sections 350C(2) and 350C(3)(b)(i) of the Act cannot function unless some disruption is permitted. The role of the FWC in setting the draft term

[10] Clause X.5 and X.7 of the draft term.

should contemplate the permissible level of disruption, but reject the notion that all disruption must be avoided.

35. Turning first to clause X.5 of the draft term, which reflects section 350C(2) of the Act; this provision relates to right of the delegate to represent the industrial interests of workers. The provision includes a non-exhaustive list of matters in which the right is enlivened. By way of example, a delegate called into a disciplinary meeting at the request of a worker will necessarily need to set aside their own duties in order to attend any meetings. Similarly, a delegate engaged in a consultation process concerning major workplace change or roster changes will need to gauge the views of colleagues, perhaps through the calling of a union meeting or interrupting their work to hold a discussion, which in turn will disrupt the normal performance of work.

36. Clause X.7 of the draft term, which reflects section 350C(3)(b)(i) of the Act, refers to the right of the delegate to have reasonable access to the workplace and its facilities. The use of a conference room to carry out a union meeting is inherently disruptive, as it would prevent others from using that space at the same time. We note that both the Act and the draft term contemplate this right in terms of reasonableness, which must be viewed in the context of the workplace in which the right is being exercised. Such a consideration should weigh in favour of a more nuanced approach to this position that encourages a shared attitude between the delegate and the enterprise towards how and when the workplace and its facilities are accessed.

37. Recommendation: That clause X.9 (a)(iii) be amended as follows:

    a. [the workplace delegate must] not unreasonably hinder, obstruct or prevent the normal performance of work.

38. The ANMF also agrees with the ACTU that clause X.9(a)(iv) of the draft term should be removed.[11] This provision unnecessarily conflates the concept of freedom <u>of</u> association with freedom <u>from</u> association. A workplace delegate by virtue of section 350C(2) of the Act is empowered to represent the industrial interests of: 'members, and any other persons eligible to be such members'. The framing of the legislation does not require unanimity on all matters for the delegate to legitimately represent the industrial interests of members or potential members.

39. Recommendation: That clause X.9(a)(iv) of the draft term be deleted.

[11] ACTU Further Reply at [66-67].