MINERALS COUNCIL OF AUSTRALIA

AM2024/6

VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES' RIGHTS TERM

SUBMISSION IN REPLY

MARCH 2024

TABLE OF CONTENTS

1. Introduction 3
2. General principles 4
3. Comments on the Mining and Energy Union's proposed delegates' rights term 7

1. INTRODUCTION

1. This is the submission of the Minerals Council of Australia (the '**MCA**') in response to the President's Statement of 18 January 2024 requesting submissions in reply by 28 March 2024.[1]

2. This submission provides general comments on relevant principles regarding the Fair Work Commission's consultation to create delegates' rights terms in modern awards (AM2024/06) and responds to specific proposals in the submission of the Mining and Energy Union (the '**MEU**').

3. The MCA acknowledges the Commission's statement that the process to create a delegates' rights term will require significant consultation and engagement with stakeholders, and that the process includes provision for consultation with peak councils.[2]

4. The MCA is the leading advocate for Australia's minerals industry representing companies that produce most of Australia's minerals output. The MCA's objects include making representations to public authorities on matters concerning the exploration, mining, metallurgical and allied industries. The creation of delegates' rights terms is of direct concern to MCA members and the minerals industry, as the implementation of such terms could significantly and adversely impact workplace harmony and the productivity and profitability of the industry.

5. The minerals industry is the cornerstone of the Australian economy. Over the past decade, mining has contributed $2.4 trillion to national GDP, paid $258 billion in wages, contributed $295 billion in taxes and royalties, and earned 66 per cent of the nation's export earnings.[3]

6. The minerals industry, and most other industries in the Australian economy, are facing multiple challenges with high inflation, high interest rates, flagging productivity and increasing overseas competition for investment. Current events in the lithium and nickel markets, including significant job losses, project delays and cancellations, highlight the exposure of the industry to global market forces and volatility in market circumstances. There is a real risk that cost increases and rigidity imposed by the workplace relations system will translate to additional job losses and a hit on the economy.

[1] Justice Hatcher, Fair Work Commission, President's Statement, 18 January 2024, para. 14.
[2] Justice Hatcher, Fair Work Commission, President's Statement, 20 December 2023, para. 32.
[3] Australian Bureau of Statistics, *Australian System of National Accounts*, Table 6, Gross Value Added by Industry, Chain volume measures, cat. No.5206, released 6 Mar 2024 (decade to 2022-23); Australian Bureau of Statistics, *Business Indicators, Australia*, Table 17, Wages and salaries, current prices, cat. No. 5676, released 4 Mar 2024 (decade to 2022-23); EY, *Royalty and Company Tax Payments*, Table 3 Royalty and company tax payments, minerals sector, May 2023 (decade to 2021-22); Australian Bureau of Statistics, *International Trade in Goods and Services, Australia,* Table 3, cat. No. 5368, released 5 Feb 2024 (decade to 2022-23).

2. GENERAL PRINCIPLES

2.1 The requirements of the legislation

7. Under the relevant legislative amendments, the Commission's task is to develop delegates' rights terms that *'provide at least for the exercise of'* the rights set out in the new section 350C of the *Fair Work Act 2009* ('The **Act**').

8. The rights to be provided for are:

    a. The right to represent the industrial interests of members or persons eligible to be members including in disputes with their employer

    b. The right to reasonable access to the workplace and workplace facilities where the enterprise is being carried on

    c. The right to reasonable communication with members or persons eligible to be members, and

    d. Access to related training during paid time within normal working hours (except if the employer is small business).[4]

9. The legislation also requires that this be done by 1 July 2024.

2.2 General principles the MCA supports

10. The MCA supports the following general principles, which have been set out in greater detail in the submissions of employer groups including the Australian Industry Group and the Australian Chamber of Commerce and Industry:

    a. A cautious approach must be adopted to develop a single delegates' rights term that applies to all modern Awards. This follows from the limited time the Commission available to complete the legislative task.[5] The Commission can develop industry-specific delegates' rights terms in subsequent proceedings if this is appropriate. The enforceability of delegates' rights terms under the civil penalty regime in the Act reinforces the need for caution.[6]

    b. The delegates' rights term must uphold the principle that a workplace delegate is first and foremost an employee.[7] Delegates should not interfere with the effective working of the employer and should continue to be required to follow the lawful and reasonable directions of their employer.

    c. The delegates' rights term that the Commission develops should be framed to provide for the exercise of the rights set out in section 350C '*only to the extent necessary to achieve the modern awards objective'*.[8] Any rights created or expanded by the Commission must also be limited by a threshold of 'reasonableness', given such a requirement is repeatedly referred to section 350C.

    d. To ensure integrity, the delegates' rights term should include a positive obligation on the delegate to verify to the employer that the delegate has been '*appointed or elected in accordance with the rules of the employee organisation*' they purport to represent.

[4] *Fair Work Act 2009*, s. 350C.
[5] Australian Industry Group, Delegates' rights term submission, 4 March 2024, p. 13-14.
[6] Australian Chamber of Commerce and Industry, Delegates' rights term submission, 1 March 2024, para. 14.
[7] Ibid., paras 5-11.
[8] Australian Industry Group, Delegates' rights term submission, 4 March 2024, paras 39-42.

2.3 The need to close a legislative 'loophole' that allows unlimited numbers of delegates

11. Under the 'Closing Loopholes' amendments to the Act, which introduced new and expanded delegates' rights, a 'workplace delegate' is defined as a person *'appointed or elected, in accordance with the rules*' of the relevant union.[9] This formulation places no limit on the number of delegates a union could appoint, other than if there are limits under the union's rules. Under this loophole, union rules could be utilised to inordinately increase the appointment of workplace delegates, increasing costs and disruption to employers.

12. The absence of any legislative guardrail to limit the potential number of delegates is a clear 'loophole', that is important to bear in mind when developing the delegates' rights term. The more delegates that are appointed, the higher the cost to the employer, and the more significant the impact on productivity. It is not difficult to envisage scenarios, for example, where every union member in a workplace who wants to be is appointed as workplace delegate. All these workplace delegates would be entitled to representational rights that cannot be interfered with, such as paid time to undertake training, and access to facilities to undertake union work. The direct costs, and the productivity costs, could easily add up to create unsustainable costs on businesses. The risk is especially high in highly unionised industries such as the coal industry.

13. Given these circumstances, the delegates' rights term the Commission develops should prioritise the need to ensure business costs and productivity costs are contained. This is consistent with the modern awards objective, which specifically requires consideration of '*the likely impact on business, including on productivity, employment costs and the regulatory burden'*.[10] It is also consistent with the requirement of reasonableness.

14. The delegates' rights terms developed by the Commission should close this loophole created by creating a 'reasonable' limit on the number of delegates, for a given workforce size. In line with the cautious approach the MCA and other employer representatives have recommended, the limit should initially be set low, with the possibility that it could be increased following clear evidence that a higher threshold is necessary in certain industries, if such a case is made. The MCA is willing to contribute to any further consultation with the Commission on setting reasonable limits to numbers of delegates in the mining industry to provide certainty. This should also include recognition that delegates have access to support from the union, including organisers, industrial officers, and legal support.

2.4 Workplace delegates should not interfere with the effective working of the employer

15. The delegates' rights term must be framed to minimise the impact on workplace productivity and disruption in the mining industry, which could be caused by increased disputation, and diversion of employees from their usual work tasks.

16. This is consistent with the modern awards objective, which includes *'the likely impact on business, including on productivity, employment costs and the regulatory burden'*.[11] It is also consistent with the way workplace delegates have traditionally been allowed to operate.

17. In the mining industry, it is essential that workforces can remain adaptable and capable of responding to the many risks and circumstances that mining and minerals processing operations face daily. These risks include the high level of volatility in international commodity markets, unexpected weather events and supply chain shocks. In general, disruptions at any part of a mining operation (including beneficiation and transport) can impose large costs on operations, so

[9] MEU Delegates' Rights – Award Clause, clause 1.
[10] *Fair Work Act 2009* (Cth), s. 134(f).
[11] *Fair Work Act 2009* (Cth), s. 134(f).

must be capable of being dealt with quickly and efficiently – primarily through the allocation of workforces. Workforce adaptability has already been dealt a major blow through major amendments to the Act in 2022 and 2023, which have created new disincentives for the engagement of labour hire and contractors and allowed for the imposition of involuntary multi-employer bargaining. If delegates' rights terms allow reasonable and lawful work tasks to be refused by delegates, or otherwise tie up scarce human resources, this will further impact mine productivity and adaptability.

2.5 Verification of delegates

18. It is essential that the delegates' rights term includes a robust requirement on the delegate to verify to the employer that the person has been '*appointed or elected in accordance with the rules of the employee organisation*' they purport to represent. This should be expressed as a positive duty on both the delegate and the organisation. The legislation is silent on this issue – it currently allows for any employee to purport to be a delegate, with no assurance for employers that they are who they purport to be. This is a further loophole that should be addressed by the Commission.

19. Verification is necessary because under the new industrial relations regime ushered in by legislative changes over the past 18 months, it is likely many unions will seek to grow and expand their influence into workplaces where they have not traditionally played a role. For example, coverage of work within the metalliferous mining industry has traditionally been with the Australian Workers Union, whereas the Mining and Energy Union could seek to expand its reach into this industry, including by seeking to represent employees who are not strictly within their coverage. Verification is essential to ensuring that any such changes occur legally and with integrity.

2.5 Representing 'industrial' interests must not include political causes or other non-workplace matters

20. The meaning of 'industrial interests' is not defined in the legislation and the delegates' rights term should provide further guidance on the meaning of this concept. At the very least, the concept of 'industrial interests' must exclude any form of political or social activism or campaigning on policy matters. It is clearly 'reasonable', as contemplated by section 350C, to place employers in a position of being legally required to devote resources to political activity the employer may not support. This would lead to perverse scenarios where, for example, workplace delegates could co-opt the employer's printing equipment to produce campaign material on highly divisive social issues, or which could even attack the employer or its customers on political grounds.

3. COMMENTS ON THE MINING AND ENERGY UNION'S PROPOSED DELEGATES' RIGHTS TERM

21. The Mining and Energy Union submission proposes a delegate's rights term that adopts an incredibly expansive view of the Commission's legislative instruction to vary Awards to provide *'at least for the exercise of'* the rights set out in section 350C of the Act. This term, if implemented, would be devastating to mining industry productivity and does not meet the test of reasonableness required by section 350C.

22. The MCA's analysis of the key flaws in the MEU's proposed term (the 'proposed term') is set out below.

3.1 Proposed right to represent union members and prospective members would subordinate employment duties to union activities

23. The proposed term provides that a workplace delegate is entitled to represent their union, union members and persons eligible to be union members on paid time during normal working hours.[12] The term is supplemented by an expansive 'right to reasonable communications' that authorises the delegate to communicate to any employee at any time about anything, not just workplace matters.[13]

24. The types of representation that would be legally protected would not be confined to 'industrial interests' but would, on the framing of the term, extend to representation on any matter. Such an approach would create a 'loophole' whereby a workplace delegate could claim to be representing someone in the workplace and be legally protected from the consequences of failing to perform their ordinary work duties. It opens the possibility of abuse through collusion, for example with other union members, to claim that 'representation' is being provided between union members in relation to non-workplace matters.

25. Such an approach would create an outcome where a workplace delegate could essentially devote all their paid time towards undertaking tasks that can be described as 'representation', avoiding their work duties. As such, the proposed term effectively turns workplace delegates into full-time union workers, who may perform work exclusively for the union, but who are on the payroll of the employer. Combined with the fact that there are no legal limits to the number of workplace delegates that can be appointed or elected, this outcome would be devastating for workplace productivity.

26. Clearly, such an approach fails to meet the test of reasonableness under section 350C. A workplace delegate's performance of their work as an employee of the business must come before their duties as a workplace delegate, and the delegates' rights term must be subordinate to this priority.

3.2 Proposed right to be provided with information would be open to abuse

27. The proposed term would create a right for a workplace delegate to be provided with 'information relevant to their right to represent', with immunity from any confidentiality obligations.[14] Under the proposed term, the right to represent encompasses not just the representation of employees of the business, but of the union on any matter. The delegate would also have an unfettered power to then pass on such information to the union.[15]

[12] MEU Delegates' rights – Award Clause, clause 2.1, 2.4.
[13] Ibid., clause 4.
[14] Ibid., clause 2.2(a).
[15] Ibid., clause 8(a)(i).

28. This proposed term is so broad that it would, for example, allow a workplace delegate to request from an employer the personal contact details and home address of every union and non-union employee of the employer, for the purpose of allowing the union to contact those employees in pursuit of a political campaign the union is pursuing. The employer would be forced to comply with the term, overriding employee consent, and any protections afforded by contracts of employment, company policies or the *Privacy Act 1988*. Employees' information could then make its way into a permanent database managed by the union, with immunity from breaches of confidentiality obligations extending to any subsequent use of that information.

29. Clearly, this approach must be rejected, as it does not meet the test of reasonableness. Any information required to be provided by an employee to a union must be subject to employee consent and expressly subject to obligations provided by the *Privacy Act 1988*. It should not be permissible for personal employee information to be provided to a union without each employee's informed consent, or for purposes that the individual does not agree to.

3.3 Proposed preferential access to working arrangements would create disharmony and is unfair

30. The proposed term envisages preferential access to shifts, rosters, or flexible work arrangements for workplace delegates, as follows:

    d. 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;

    e. be released from normal duties for the purpose of the workplace delegate participating in bona fide union business;[16]

31. In the way the proposed term is constructed, this would apply to representation of the union and the conduct of union business that may have no relationship to the workplace. This term would allow a workplace delegate to override rostering decisions made by management to accommodate any number of activities that fall within the ambit of 'representation'. A union delegate could, in effect, choose to work or not work at any time they choose, yet still be paid. The employer would have no power to refuse.

32. Such an approach would be disruptive to workplaces on multiple levels. First, it creates workplace disharmony because it establishes workplace delegates as a privileged class of employee with special access to shifts of their choosing, where non-delegate employees do not have this right. Second, it could directly disrupt operations, given there is no requirement to give notice when electing shifts. Clearly, this approach must be rejected as not reasonable.

3.4 Proposed allowance for paid leave for training is not reasonable

33. The proposed term creates an obligation to provide a *minimum* of 5 days paid training leave to attend training courses approved by the delegate's union, agreed in writing. Such leave can be taken with four weeks' notice.

34. There is no justification for a minimum number of paid training leave days per year to be provided for in Awards. Indeed, in many cases it may not be reasonable to provide a delegate with any training leave in a particular year – for example if they are an experienced delegate who has a thorough understanding of their role.

35. Even if the Commission does decide to provide a minimum amount of paid training leave, five days would be excessive. It is not commensurate to other professionalised industries such as law

[16] Ibid., clause 2.2(d)-(e).

and accounting, which generally only require 10 professional development points (10 hours) per year to retain professional qualifications necessary to perform the inherent requirements of the role.

36. The proposed term also takes no account of the possibility that the operational needs of the business may outweigh the need for training. For example, if a mining operation has been subjected to a serious weather event that threatens production, or a pandemic, it could become critical to have key personnel on site. It should be open to an employer to refuse paid training leave in such circumstances and the delegates' rights term should reflect this.

3.5 Proposed restrictions on employers communicating with their employees are not reasonable

37. Under the proposed term, an employer would not be lawfully allowed to deal directly with any worker who is being 'represented' by the workplace delegate without the agreement of the workplace delegate.[17] This would create an effective veto on the ability of managers to talk to their staff. Workers would also be prevented from talking directly to their employers unless they have had a *'prior opportunity to consult the delegate'*.

38. Such an approach would invite workplace dysfunction and conflict. It would lead to scenarios where, for example, the employer could not communicate with an employee on routine workplace matters, such as performance or safety issues – for example if the relevant delegate was not available due to their attendance at a union conference, or was working on a different shift.

39. Under the proposed term, employers would also be powerless to respond to abuses of union delegates powers, or even determine if the powers are being abused. It would be illegal for an employer to monitor (even inadvertently) any 'communication', or even ask whether it is appropriate:

> *6) An employer must not knowingly or recklessly survey, monitor, record or otherwise infringe the privacy of communications between workplace delegates and their union, union members or persons eligible to be union members.*
>
> *7) An employer must not:*
>
> *a) prevent workers from disclosing information to a workplace delegate or union; or*
>
> *b) require a worker to disclose the contents of any communications with a workplace delegate or union.*
>
> *Any term of an arrangement or contract which provides to the contrary is void and unenforceable.*[18]

40. Such outcomes demonstrate that the proposed term is does not meet the test of reasonableness.

3.6 Proposed requirement to consult on management decisions is unworkable and unreasonable

41. The proposed term includes a requirement to consult with workplace delegates whenever an employer is 'considering' changes of an economic, technological, or structural nature that may significantly impact employees.

42. The effect of this provision is that workplace delegates would by law have to be involved in all significant decisions of a company board or company management and would need to be provided with all relevant information, including commercially sensitive or confidential information – with no corresponding requirement to maintain confidentiality.

[17] Ibid., clause 2.6(c).
[18] Ibid., clause 4(6)-(7).

43. Clearly, this approach must be rejected on the basis it does not meet the test of reasonableness. It also sits at odds with the model consultation term, which only requires consultation with employees and their representatives, which would include delegates, where a 'definite decision' to introduce a major change has been made.[19] There is no case to depart from the model term, which reflects a settled legislative position that in turn reflects the outcome of test cases that have been accepted for many years.

3.7 Proposed access to facilities is excessive and unreasonable

44. The proposed term includes an unfettered right to workplace delegates to access to *'make use of the facilities and equipment where the enterprise is being carried on'*.[20]

45. Access to 'facilities' can include any facility or location in any workplace. It includes no restriction on the type of 'facility' or the nature of the 'access'. This is not reasonable. It could, for example, entitle a delegate to demand flights and accommodation to a remote mine site, at the employer's expense. Once at the mine site it could, for example, entitle the delegate to demand access to all facilities, such as draglines within an open cut mine, or underground 'facilities' deep within a mine, at any time and without regard the cost implications or safety risks.

3.8 Proposed entitlement to be 'released from normal duties' for union business

46. The proposed term includes an entitlement to be released from normal duties for '*bona fide union business'* even where this has no relationship to the employee's employment.[21] This includes collective bargaining meetings, 'any consultative process', travel, union meetings and events, and political lobbying.

47. The term is so broad it would effectively operate as an open right for union delegates to take leave at any time, or to simply decline to undertake their usual work tasks, for almost any reason. Since the proposed term also includes a broad prohibition on employers requiring a workplace delegate to disclose *'information to it, or make any use of such information'* it would in any case be impossible for an employer to verify if the request was for *'bona fide union business'*.[22]

48. Clearly, such a term does not meet the test of reasonableness and would upend the principle that a workplace delegate is first and foremost an employee.

[19] *Fair Work Regulations 2009*, schedule 2.3, r. 2.09.
[20] MEU Delegates' rights – Award Clause, clause 5(1).
[21] Ibid., clause 2.3.
[22] Ibid., clause 4(8).