IN THE FAIR WORK COMMISSION

Matter No: AM2024/6

Variation of modern awards to include a delegates' rights term

UNITED WORKERS UNION'S REPLY SUBMISSIONS

1. A number of submissions from Unions, employer groups and other parties have been made about the variation of modern awards to include a delegates' rights term.

2. The United Workers Union (**UWU**) supports the reply submission made by the Australian Council of Trade Unions (**ACTU**). In addition UWU makes the following submissions by way of reply. Broadly, any proposal that suggests the award term confine or fetter the rights that arise from s 350C should not be accepted. We deal with these proposals in the following areas:

   (a) Informing the employer of delegate appointment;

   (b) Definitions of industrial interests;

   (c) Paid time for training;

   (d) Notice for training;

   (e) Restrictions on training content

   (f) Limits on who may deliver training including Registered Training Organisation status;

   (g) Limits on the amount of training a delegate may receive; and

Should the award term require a workplace delegate to inform their employer of their appointment?

3. Sections 350A and 350C of the *Fair Work Act 2009* (***FW Act***) provide that a person who is a "workplace delegate" is afforded certain rights and protections and defines

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that term as being those persons appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise[1]. Thus, under the *FW Act*, a workplace delegate can access the rights and protections afforded to them whether they inform their employer of their appointment, upon their appointment, or not.

4. Several employer group submissions propose that the award term include a requirement which would mean workplace delegates are not afforded the rights and protections that will be contained in the term unless they inform their employer of their appointment[2].

5. This requirement would have the effect of limiting the rights and protections contained in the award term to a group of persons more confined than is contemplated by the Act – to only those delegates who have informed their employer of their appointment. It should not be included in the award term.

Should "industrial interests" be defined?

6. Section 350C provides that workplace delegates are entitled to represent the interests of members and persons eligible to be members, and to have reasonable communication with such persons in relation to their industrial interests, and, for the purpose of representing those interests, to have reasonable access to the workplace, workplace facilities and paid time for the purposes of related training.

7. Some employer group submissions propose that the model clause include definitional sub-clauses in relation to the term "industrial interests". For example, AI Group urges the Commission to include "guidance" in relation to activities that are *not* encompassed by term, *"including organising industrial campaigns and industrial action; attending rallies; engaging in community activism; attending party political or union conferences."*[3] ACCI suggests the Commission should adopt a definition of the term limiting it to four matters: disputes involving an employee of the enterprise under an

[1] *FW Act* s 350C(1)
[2] Australian Industry Group, *Delegates Rights Term Submission (AM 2024/6)*, 4 March 2024, (**AI Group Submission**) [49]; Australian Chamber of Commerce and Industry, *Submission variation of Modern Awards to Include a Delegates Rights Term,* 1 March 2024, (**ACCI Submission**) [41, 1.3]
[3] AI Group Submission, [51 – [54]; [83 X.13]

"industrial law", consultation about major workplace change, bargaining and matters relating to discipline and performance[4].

8. The *FW Act* does not define the term "industrial interests". The term is used throughout the Act and is the subject of extensive judicial consideration in a range of contexts[5]. There is no basis in the Act or in the authorities to confine it to a limited set of activities. On its plain meaning, "industrial interests" is a term of broad compass.

9. The definitional approach to the term "industrial interests" proposed by AI Group and ACCI would have the effect of creating a lesser standard of rights than is afforded by the *FW Act*, where the undefined term will be interpreted consistent with the well established principles of statutory construction, giving the term its plain meaning, read in the context of the Act, which uses it in a range of circumstances. In both cases, whether by specifically excluding certain activities (as AI Group does) or by limiting the activities encompassed (as ACCI does), the term is reduced to less than what is contemplated by its plain meaning.

10. For example, some activities engaged in by UWU workplace delegates described in our initial submissions may fall outside the scope of what might be associated with the concept of industrial interests proposed by the employer groups' definitions, but which, would plainly be encompassed by the term if it is interpreted consistent with its plain, unconstrained meaning.

11. Rebecca Stiles, an early education and care professional who works at the Hillbank Community Childrens Centre in South Australia, in her Statement filed together with the UWU initial submissions, outlines activities she has engaged in as a workplace delegate as part of a campaign to *"advocate for early childhood educators, raise awareness of the issues confronting the sector, and achieve a significant improvement in the wages, conditions and professional recognition of educators*". Those activities include[6]:

    (a) Travelling to Canberra to meet with Federal members of Parliament, or to meet with State members of Parliament;

    (b) Hosting politicians at her workplace;

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[4] ACCI Submission, [27].
[5] *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55
[6] Witness Statement of Rebecca Stiles, 1 March 2024, [8]

(c) Organising meetings for groups of educators at local politicians' offices or at press conferences to discuss issues in the sector;

(d) Appearing on radio and television media; and

(e) Advocating on social media.

12. Andrew Grant, who works at the Crown Perth Casino says in his Statement[7]:

"As a result of the Royal Commission into Crown, there has been an uptick in audits across Crown. The increased audits have impacted workers. This has led to real life impacts including threats of fines or non-compliance and detrimental impacts on mental health. As a delegate, I have met with several Ministers of Gaming and Racing and other regulators to give workers' perspective on changes occurring at Crown."

13. Matters such as improved wages or employment conditions are plainly associated with the "industrial interests" of Union members or persons eligible to be Union members. In a funded sector, like early education and care, where the "capacity to pay" higher wages or to provide improved employment conditions is heavily dependent on Government policy and funding arrangements, advocacy aimed at improving funding through activities such as those described by Ms Stiles are plainly within the remit of "representing" those industrial interests.

14. The example provide by Mr Grant demonstrates how even in sectors which are not dependent on Government funding, Government approaches to regulation or industry policy often have a direct impact on the matters including the manner in which work is performed, workload, work value, employees' rights and entitlements or workplace health and safety.

15. UWU supports the proposition put by ACTU , that if the Commission is minded to include in the model term a definition of "industrial interests" it should be a broad definition.

16. Alternatively, the model term could not define the term "industrial interests" leaving it to be interpreted consistent in accordance with the well established principles as to the

[7] Witness Statement of Andrew Grant, 1 March 2024, [34]

construction of terms of an industrial instrument (and thus consistent with how it will be approached in relation to the interpretation of the Act itself).

What should a workplace delegate be paid while undertaking training?

17. Several employer groups propose the model clause provide that while undertaking training, a workplace delegate should be paid the “minimum” rate available in the relevant modern award[8].

18. There is no justification to approach the entitlement to be provided with reasonable access to paid time for the purposes of undertaking training differently than other “leave” entitlements under the Act.

19. A preferable approach would be that the clause provides that while undertaking training, a workplace delegate is entitled to their “base rate of pay” – a term which is defined by s 16 of the Act. This would align the entitlement with:

    (a) Paid no safe job leave, s 81A(2)

    (b) Annual leave, s 90

    (c) Personal/carer’s leave, s 99

    (d) Compassionate leave, s 106

    (e) Jury service, s 111(2)

    (f) Payment for absence on public holiday, s 116

What notice should be provided by a workplace delegate proposing to access paid time to attend training?

20. UWU does not cavil with the proposition that in order to access paid time to undertake training, an appropriate amount of notice should be given by an employee to their employer. In our submission, a consideration of common approaches to this question in enterprise agreements weigh in favour of the ACTU’s proposition that the amount of notice should be not more than 4 weeks. For example, in order to access Union delegate training leave (variously described), in the following enterprise agreements, the period of notice required is:

[8] AI Group Submissions, [64]; ACCI Submission [41 4.2(k)]

(a) *Professional Community Standard 2021* (early education and care sector) – 4 weeks[9].

(b) *Melbourne Liquor Distribution Centre Enterprise Agreement 2021-2024* (logistics and distribution industry) – 14 days[10].

(c) *Saputo Dairy Australia and United Workers Union Dairy Beverage Centre Agreement 2021* (food and beverage manufacturing) 2 weeks[11].

(d) *Crown Melbourne Limited Enterprise Agreement 2022* – (hospitality industry) – 4 weeks[12].

(e) *MSS Security Enterprise Agreement (QLD) 2020 - 2024* (security industry) – 2 weeks[13].

Should further restrictions be placed on what activities can be engaged in during training?

21. Several employer groups propose that in addition to a restrictive definition of "industrial interests", further specific limitations should be placed on what activities can be engaged in during the training contemplated by s 350C(2)(b)(ii)[14].

22. The Commission should not adopt an approach to the model clause which includes additional restrictions on activities which are permitted to be engaged in during training. The Act provides that workplace delegates are entitled to reasonable access to paid time for the purposes of *related* training, where the word "related" confines the nature of the training to "the purposes of representing those interests" – namely – the industrial interests of members and persons eligible to be members. Thus, the activities which may be engaged in during training are already confined – by the term "industrial interests". Taken on its plain meaning, the term industrial interests is likely to have a significantly broader compass than it would if the additional restrictions on training activity proposed by some employer groups were adopted. This being the case, it would be inappropriate for the Commission to adopt such restrictions –

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[9] *Professional Community Standard 2021*,cl.27.1.3
[10] *Melbourne Liquor Distribution Centre Enterprise Agreement 2021-2024*,cl.3.5.3
[11] *Saputo Dairy Australia and United Workers Union Dairy Beverage Centre Agreement 2021* ,cl.12.9
[12] *Crown Melbourne Limited Enterprise Agreement 2022* , Attachment B cl. 3.4.13
[13] *MSS Security Enterprise Agreement (QLD) 2020 - 2024* ,cl. 5.11(c)
[14] *AI Group Submission,* [69].

because the result would be an entitlement inferior to that which is conferred by the Act.

Should the clause require that training may only be accessed if it is training provided by a Registered Training Organisation?

23. Several employer groups propose that the model clause provide that the training contemplated by s 350C(2)(b)(ii) should be provided by a Registered Training Organisation (**RTO**)[15].

24. The Commission should not adopt this proposal in the model clause. The term "training" as it is used in s 350C(3)(b)(ii) should not be given a restrictive or confined meaning. Courses such as the UWU "Core Delegates Skills Course", outlined in the UWU Initial Submissions[16] are well regarded and attended, and include tailored content. For UWU delegates, the training is not delivered by an RTO, but by experienced persons working with the UWU training unit. The imposition of a limit on the training entitlement confining it to RTO delivered training only would impose a significant constraint on access, or an unreasonably costly and bureaucratic imposition on its delivery.

Should the clause impose a limit on the number of training days which might be accessed in respect to a particular employer during a particular time frame, such that some workplace delegates may not be able to have reasonable access to paid time for the purposes of training?

25. Some employer groups propose that the number of delegates who may access paid time to attend training within a time period (usually a year) should be limited or "capped" to a particular number of delegates (some proposals use a "scale" related to the number of employees at the workplace)[17].

26. UWU acknowledges that the entitlement access to paid time for training is limited by the concept of what is "reasonable". However, the entitlement, limited to what is reasonable, is plainly conferred upon each person who meets the relevant eligibility requirement – who is a "workplace delegate" (as defined). It confers an entitlement on *each* workplace delegate.

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[15] National Electrical and Communications Association, *Delegates Rights in Modern Awards Submission*, March 2024, [38(c)] (**NECA Submission**); ACCI Submission, [41 4.2];
[16] UWU Initial Submissions, [25]
[17] ACCI Submission, [41 4.2(j)]; AI Group Submission, [43 *XX*]; NECA Submission, [38(g)]

27. At Crown Casino Melbourne, a workplace of some 5000 employees, UWU has appointed about 100 delegates. If a cap to access to paid time to attend training was adopted with respect to this worksite – such as the four-person cap proposed by ACCI (for example)[18] – 96 UWU delegates, or 96% would be excluded from accessing the entitlement in s 350C(3)(b)(ii) each year. This circumstance cannot possibly have been intended by the legislation and such a clause would be a significant limit to the entitlement apparently created by the Act.

28. The ACTU proposes that each delegate is entitled to access paid time for training, of up to 5 days per year. This is an appropriate expression of the reasonableness limitation but does not derive individual delegates from accessing the entitlement.

Filed on behalf of the

United Workers Union

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[18] ACCI Submission, [41 4.2(j)]