

Australian Industry Group

Delegates' Rights Term

Submission
(AM2024/6)

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AM2024/6 DELEGATES' RIGHTS TERM

	Section	Page
1	Introduction	3
2	Relevant legislative provisions	4
3	History of delegates' rights terms in federal awards	9
4	Key observations about the current legislative provisions and the Commission's task	13
5	Proposed delegates' rights term for modern awards	24

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is made in response to the Statements issued by Justice Hatcher, President of the Fair Work Commission (**Commission**), on 18 January 2024¹ and 30 January 2024² in relation to the variation of modern awards to include a delegates' rights term.
2. As a result of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), the *Fair Work Act 2009* (**FW Act**) was varied to require that the Commission make determinations varying modern awards so that they include a delegates' rights term by 30 June 2024.
3. Ai Group welcomes the acknowledgement in the Commission's Statement of 18 January 2024 that the process to create a delegates' rights term will require significant consultation and engagement with stakeholders, including employer representatives.

2. RELEVANT LEGISLATIVE PROVISIONS

4. The following legislative provisions are of relevance to the delegates' rights term that the Commission is required to include in modern awards.
5. Section 149E of the FW Act states:

149E Workplace delegates' rights

A modern award must include a delegates' rights term for workplace delegates covered by the award.

Note: **Delegates' rights term** is defined in section 12.

6. Section 12 (The Dictionary) of the FW Act includes the following relevant provisions:

rights term means a term in a fair work instrument that provides for the exercise of the rights of workplace delegates.

¹ [2024] FWC 150.

² [2024] FWC 241.

Note: The rights of workplace delegates are set out in section 350C, and a delegates' rights term must provide at least for the exercise of those rights.

...

workplace delegate: see subsection 350C(1).

7. Section 350C of the FW Act states:

350C Workplace delegates and their rights

Meaning of workplace delegate

- (1) A **workplace delegate** is a person 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.

Rights of workplace delegates

- (2) The workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer.

Note: This section does not create any obligation on a person to be represented by a workplace delegate.

- (3) The workplace delegate is entitled to:
- (a) reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and
 - (b) for the purpose of representing those interests:
 - (i) reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and
 - (ii) unless the employer of the workplace delegate is a small business employer—reasonable access to paid time, during normal working hours, for the purposes of related training.
- (4) The employer of the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate.
- (5) Otherwise, in determining what is reasonable for the purposes of subsection (3), regard must be had to the following:
- (a) the size and nature of the enterprise;
 - (b) the resources of the employer of the workplace delegate;
 - (c) the facilities available at the enterprise.

8. Section 149E falls within Part 2-3 (Modern Awards) of the FW Act. Accordingly, when the Commission is exercising its powers to vary modern award terms to include a delegates rights' term, the following matters are important:
- (a) The Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the considerations set out in s.134(1) of the FW Act.
 - (b) When taking those considerations into account, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.³
 - (c) The Commission must ensure that modern awards *'include terms that it is required to include, only to the extent necessary to achieve the modern awards objective'* (s 138).
9. Section 578 of the FW Act requires that the Commission, when performing functions and exercising powers in relation to a matter under Part 2-3 of the FW Act, must take into account:
- (a) The objects in s 3 of the FW Act; and
 - (b) The objects in Part 2-3 of the FW Act.
10. The Revised Explanatory Memorandum (**EM**) for the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) relevantly states:

Part 7—Workplace delegates' rights

Amendments to the Fair Work Act 2009

791. Part 7 would introduce new workplace rights and protections for workplace delegates, who are employees or workers, appointed or elected under the rules of their employee organisation, to represent members in a particular enterprise. These new rights and protections would support their role in representing employees and regulated workers in workplaces. It would provide for modern awards and future enterprise agreements to provide more detailed rights for specific industries, occupations and workplaces. It

³ 4 Yearly Review of Modern Awards – Penalty Rates Decision [2017] FWCFB 1001, [116] – [117]

would also provide a new general protection for workplace delegates to facilitate the exercise of these rights.

...

797. When the FWC varies a modern award, it would be required to include a new delegates' rights term or to vary an existing delegates' rights term in a modern award, and it must be satisfied that making the variation would be necessary to achieve the modern awards objective in section 134 of the FW Act. This obligation (to be satisfied it is necessary to achieve the modern awards objective in section 134 of the FW Act) also applies to the FWC making a new modern award.

...

New section 350C - Workplace delegates and their rights

818. **Definition of 'workplace delegate':** New subsection 350C(1) would define the term 'workplace delegate'.
819. Section 12 of the FW Act provides that the term 'officers of industrial associations' can include 'delegates', but does not specify who would be a workplace delegate.
820. This new definition is intended to be sufficiently broad to capture workplace delegates across a range of employee organisations, regardless of the language used to describe the role in each organisation's rules. The definition of 'workplace delegate' would recognise the role of workplace delegates in representing the interests of all workers, not just employees, who work at the relevant enterprise and who are eligible to be a member of the relevant employee organisation. The definition would not include employees of the employee organisations in workplaces generally, as a person can only be a workplace delegate in respect of the enterprise or part of an enterprise where they work, either as an employee or as a regulated worker (see new section 15G).
821. 'Employee organisation' is defined in section 12 of the FW Act as an organisation of employees that is registered under the RO Act. Almost all large trade unions are registered as employee organisations under the RO Act. Limiting the definition of workplace delegate to representatives of such organisations enables the new provisions to rely on the existing regulatory framework established around registered organisations, and is consistent with the approach taken in the FW Act regarding the application of the right of entry provisions in Part 3-4.
822. **Workplace delegates' rights:** New subsections 350C(2) and (3) would provide rights for workplace delegates.
823. There is currently limited legislative protection for workplace delegates performing their roles within a workplace. The FW Act does not contain any positive rights specific to workplace delegates.
824. New subsection 350C(2) would provide a key right for workplace delegates to represent the industrial interests of members, and other persons eligible to be a member, of the relevant employee organisation, including in a dispute with their employer. If reasonable opportunities to undertake representation are provided, but not taken up, there will be no breach of the right.

825. The proposed note to subsection 350C(2) clarifies that new subsection 350C(2) would not require a worker to accept representation from a workplace delegate or create any obligation on a worker. It would not infringe on a workers' right to choose their own representative in a dispute with their employer or relevant regulated business (if they choose to be represented) and does not affect the relationship between workplace delegates and their members. Rather, new subsection 350C(2) would create an enforceable right between a workplace delegate and their employer or relevant regulated business.
826. New subsection 350C(3) would facilitate the exercise of the representational rights in new subsection 350C(2) by providing that workplace delegates are entitled to:
- reasonable communication with members, and any other persons eligible to be members, in relation to their industrial interests ;
 - reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and
 - reasonable access to paid time, during normal working hours, for the purposes of related training.
827. These rights are specified at the level of principle, with the expectation that for most employees, modern awards and enterprise agreements would provide greater detail for particular industries, occupations, or enterprises. In relation to communication and access, in many cases this may require nothing more than the general access to communications or premises that an employee would normally have by virtue of working for an enterprise.
828. All of the rights in new subsection 350C(3) are subject to a requirement of reasonableness, that is, an employer would only be required to provide facilities to the extent that this would be reasonable. To recognise the diversity of Australian workplaces and their available facilities and resources, new subsection 350C(5) would provide that in determining what is reasonable for the purposes of new subsection 350C(3), regard must be had to the size and nature of the relevant enterprise, the resources of the employer at the enterprise and the facilities available at the relevant enterprise.
829. Further, an exemption for small business employers would be provided by new subparagraph 350C(3)(b)(ii). Small business employers would be exempt from the obligation to provide workplace delegates paid time for the purpose of undertaking training for their role as a workplace delegate due to the amendments. This exemption would alleviate the cost burden of the amendments on small businesses. Small businesses could still elect to provide workplace delegates with paid time for training, or may otherwise have obligations to do so, for example under an enterprise agreement. For the purposes of this provision, small business has the meaning given by existing section 23 of the FW Act.
830. Subsection 350C(4) would provide that where an employer complies with a delegates' rights term in a fair work instrument, the employer is taken to have complied with the rights as set out in subsection 350C(3). This would ensure that, where a fair work instrument provides more detailed information about the rights of workplace delegates, employers can rely on that term as a complete statement of their obligations under new subsection 350C(3).

11. The Commission's Statement of 18 January 2023 summarises the key changes as follows:

[5] The key changes relating to modern awards can be summarised as follows:

- A new definition of delegates' rights term has been inserted at s 12 of the FW Act. The definition provides that a delegates' rights term means a term in a fair work instrument that provides for the exercise of the rights of workplace delegates. A legislative note to the definition points to the rights of workplace delegates as being set out in s 350C of the FW Act, and also provides that a delegates' rights term must provide at least for the exercise of those rights.
- A new s 149E requires that a modern award must include a delegates' rights term for workplace delegates covered by the award. The new s 149E applies in relation to a modern award that is in operation on or after 1 July 2024, whether or not the award was made before that day. The application and transitional provisions clarify that a modern award is not invalid on or after 1 July 2024 only because it does not include a delegates' rights term.

12. The Full Bench should also be mindful that the FW Act protects freedom of association in the workplace by ensuring that persons are free to become, or not become, members of industrial associations, are free to be represented, or not represented, by industrial associations, and are free to participate, or not participate, in lawful industrial activities.

13. Specifically, s.346 of the FW Act states:

346 Protection

A person must not take adverse action against another person because the other person:

- (a) is or is not, or was or was not, an officer or member of an industrial association; or
- (b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or
- (c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

14. Relevantly, s.347 of the FW Act provides:

347 Meaning of engaging in industrial activity

A person **engages in industrial activity** if the person:

...

(b) does, or does not:

...

(vii) seek to be represented by an industrial association;

15. The significant protections already afforded under the above provisions should be considered by the Full Bench when determining content of the new delegate's rights term and what is necessary, in the sense contemplated by s.138. Also relevant is the legislation's emphasis on the right for employees to elect not to be represented by an industrial association, and by extension a delegate.

3. HISTORY OF DELEGATES' RIGHTS TERMS IN FEDERAL AWARDS

3.1 Delegates' rights terms in awards prior to the 1996-98 award simplification process

16. Clauses providing protection for union delegates were commonly included in federal awards from the 1920s until the late 1990s. For example, the following clause appeared in the [Metal Trades Award 1952](#):

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SHOP STEWARDS.

24. An employee appointed shop steward in the shop or department in which he is employed shall upon notification thereof to his employer, be recognised as the accredited representative of the Union to which he belongs, and he shall be allowed the necessary time during working hours to interview the employer or his representative on matters affecting employees whom he represents.

17. The clause remained largely unchanged up until 1998 when the clause was removed during the 1996-1998 award simplification process. The clause in the *Metal Industry Award 1984* (that was operative until 1998) was:

(a) An employee appointed shop steward in the shop or department in which he is employed shall, upon notification thereof to his employer, be recognised as the accredited representative of the Union to which he belongs. An accredited shop steward shall be allowed the necessary time during working hours to interview the employer or his representative on matters affecting employees whom he represents.

(b) Subject to the prior approval of the employer an accredited shop steward shall be allowed at a place designated by the employer a reasonable period of time during working hours to interview a duly accredited Union official of the Union to which he belongs on legitimate union business.

3.2 The 1996-98 award simplification process

18. As a result of the 1996-1998 award simplification process, awards were simplified to remove unnecessary content, such as matters that were dealt with in legislation. The *Workplace Relations Act 1996 (WR Act)* contained a list of 20 'allowable award matters'⁴, with other matters generally not allowed to be included in awards.
19. Shop stewards' clauses were removed from awards during the award simplification process, along with union right of entry clauses. The WR Act included comprehensive freedom of association and right of entry provisions and therefore there was no longer a need for these topics to be dealt with in awards. The freedom of association provisions in the WR Act were replaced by the general protections in the FW Act from 2009, which provide even more protection for union members and delegates.⁵
20. Until the conclusion of the award simplification process, some awards included Trade Union Training Leave clauses, which gave union delegates a right to attend union training courses. See for example, the 1987 decision of Deputy President Riordan of the Australian Industrial Relations Commission (**AIRC**) varying the *Clothing Trades Award 1982* to insert a Trade Union Training Leave clause ([Print](#)

⁴ Section 89A of the WR Act.

⁵ For example, sections 346 and 347 of the FW Act protect delegates and past delegates from adverse action being taken against them: because they are or were an officer or member of a union (s 346(a)); because they are engaging, have engaged, or propose to engage in any industrial activity that is lawful (s 346(b) and s 347(a) and (b)); or because they are not engaging, have not engaged, and are not proposing to engage in any unlawful industrial activity (s 346(c) and s 347 (c) to (g)). Heavy civil penalties apply for employers and others who take adverse action against delegates in breach of ss 346 and 347 of the Act.

[G8949 \[1987\] AIRC 277](#)). This decision was cited in many subsequent AIRC decisions granting applications by unions to insert similar clauses in other awards.

21. During the award simplification process, the AIRC decided that awards could continue to deal with trade union training leave provided that the relevant clauses were directed at training undertaken for the purposes of preventing and resolving industrial disputes. This ensured that the content of the courses which employers were giving union delegates time off to attend was directed at avoiding and resolving industrial disputes, and not at topics such as organising industrial campaigns and industrial action.

22. In [Re Australian Public Service, General Employment Conditions Award 1995 and Other Awards \(No 2\) \("Leave Allowability Decision"\)](#)⁶, a Full Bench of the AIRC determined that dispute resolution training leave was incidental to an allowable award matter (i.e. dispute settling procedures) and necessary for the effective operation of the avoidance of disputes procedures in the relevant awards. The Full Bench also noted that there had never been a test case on this form of leave:

26. Leave to attend trade union training courses is also a distinct form of leave. As already noted many awards contain provision for it. The Commission has not laid down a standard trade union training leave clause and there has never been a test case on this form of leave. Some of the history of the development of trade union training provisions can be found in *Re Business Equipment Industry (Technical Service) Award 1978* [(1988) 26 IR 52]; *Australian Timber Workers Union v. Australian Forest Products and Ors* [(1989) 35 IR 106]; and *Re Various Northern Territory Awards* [Print J8371; 1991/8 CAR 49]. We agree with the Commonwealth, ACCI and those supporting them that leave of this kind is quite distinct from that covered by paragraph (g).

23. Subsequently the following decisions of Justice Munro in relation to the *Metal, Engineering and Associated Industries Award 1998*, comprehensively dealt with the relevant issues relating to trade union training leave:

(a) [PR903193 \[2001\] AIRC 337; \(6 April 2001\)](#)

(b) [PR906393 \[2001\] AIRC 705; \(13 July 2001\)](#)

⁶ Print Q9399, (1998) 85 IR 361

24. In addition to trade union training leave, union delegates continued to have various rights under other award clauses, either due to their status as employee representatives, or specifically due to their status as union representatives.
25. For example, subclause 3.2.1 in the *Metal, Engineering and Associated Industries Award 1998* stated: (emphasis added)

3.2.1 A procedure for the avoidance or resolution of disputes will apply in all enterprises covered by this Award. The mechanism and procedures for resolving industrial disputes will include, but not be limited to, the following:

3.2.1(a) The employee/s concerned will first meet and confer with their immediate supervisor. The employee/s may appoint another person to act on their behalf including a shop steward or delegate of their union.

Subject to 3.2.2 and 3.2.3 where the shop steward or delegate is involved he/she shall be allowed the necessary time during working hours to interview the employee(s) and the supervisor.

3.2.1(b) If the matter is not resolved at such a meeting the parties will arrange further discussions involving more senior management as appropriate. The employee may invite a union official to be involved in the discussions. The employer may also invite into the discussions an officer of the employer organisation to which the employer belongs.

The shop steward or delegate shall be allowed at a place designated by the employer, a reasonable period of time during working hours to interview the duly accredited Union Officials of the Union to which they belong.

3.2.1(c) If the matter remains unresolved, the employer may refer it to a more senior level of management or to a more senior national officer within the employer organisation. The employee may invite a more senior union official to be involved in the discussions. In the event there is no agreement to refer the matter to a more senior level or it is agreed that such a reference would not resolve the matter the parties shall jointly or individually refer the matter to the Australian Industrial Relations Commission for assistance in resolving the matter.

3.3 The 2008-09 award modernisation process

26. During the 2008-09 award modernisation process, the AIRC recognised the role of unions and union delegates through the inclusion of the following provision in the model dispute resolution term in modern awards:

A party to the dispute may appoint a person, organisation or association to support and/or represent them in any discussion or process under clause X.

27. The AIRC also decided to include dispute resolution training leave clauses in modern awards in circumstances where there was a prevailing industry standard. The issue was addressed in the *Priority Stage Award Modernisation Decision*:⁷

Dispute resolution

...

[46] The Minister and a number of parties made submissions concerning dispute resolution training leave. This type of leave was found to be incidental to an allowable award matter and necessary for its effective operation pursuant to s.89A of the WR Act, as it stood at that time, by a Full Bench of the Commission in 1998. 10 Dispute resolution training leave, although quite common in pre-reform awards prior to the Work Choices amendments, has never been a test case provision.¹¹ We have decided to maintain dispute resolution training leave where it is a prevailing industry standard.

28. Dispute resolution training leave clauses are included in various modern awards as set out in Attachment B of the Commission's Statement of 18 January 2024.

4. KEY OBSERVATIONS ABOUT THE CURRENT LEGISLATIVE PROVISIONS AND THE COMMISSION'S TASK

29. As noted earlier, the Commission must vary all modern awards to include a new delegates' right term and it must do this by 30 June 2024. The Commission is directed to do this by way of a legislative instruction.
30. In fulfilling this requirement, Ai Group submits that there are a number of important considerations which warrant the Commission adopting a cautious and conservative approach towards its task.
31. *First*, the Full Bench of the Commission has only limited time available to carry out the legislative requirement. As such, the present proceedings do not lend themselves to the parties filing extensive evidentiary material in support of their respective positions.
32. *Second*, the legislative instruction applies in respect of all modern awards and therefore across all different sectors, industries and occupations covered by

⁷ [Award Modernisation - \[2008\] AIRCFB 1000](#).

awards. Within the limited time available before 30 June 2024, there is simply an insufficient opportunity for the Commission to consider in any extensive detail the circumstances relating to particular industries or occupations. Put simply, the Full Bench will not have enough time to consider any individual variations from the new modern award term.

33. Rather the Full Bench's task should be directed at the development of a new delegates' right term which must be capable of applying across all different industries and occupations.
34. The importance of this factor is underlined by the historical development of delegates' rights clauses in federal awards. The Commission has traditionally approached the insertion of delegates' rights clauses in awards on an industry-by-industry basis. Different terms have been developed to suit the characteristics of different industries and occupations. These matters reflect the fact there are significant differences in existing delegates' rights terms found within modern awards.
35. In the present proceedings, both the parties and the Commission will not have the time available before 30 June 2024 to develop a new delegates' rights term that accounts for all of the differences between industries, occupations and businesses. This factor again calls for a conservative approach.
36. Following the conclusion of these proceedings, it will remain open for employee representatives to bring further applications to vary particular modern awards in respect of existing delegates' rights. This would allow for a more robust examination of the delegates' right terms suitable to particular industries and occupations. It is clearly not intended that the Commission's determination in the present proceedings will necessarily be the 'final word' on the topic, and therefore the Commission is entitled to be somewhat circumspect in its approach to the present task.
37. *Third*, the Commission must be conscious that the new delegates' rights term to be included in all modern award must be capable of application to a very broad range of situations.

38. Indeed, the fact that existing clauses in awards have been developed in the past to reflect the different characteristics of particular industries and occupations tells strongly against an approach in which the Commission simply ‘rolls out’ those existing clauses across the entire modern award system. Thus, it would make no sense for a clause designed for construction workers to apply to clerical workers, and vice versa.
39. *Fourth*, the statutory instruction for the Commission to include a new delegates’ rights term in all awards remains subject to s.138 of the FW Act, in that the Commission must ensure that modern awards ‘*include terms that it is required to include, only to the extent necessary to achieve the modern awards objective*’.
40. It follows from this that the Commission should eschew any approach in which a new delegates’ rights term is included in all modern awards to the extent that it might be viewed as desirable by some, but beyond what is necessary in terms of achieving the modern awards objective. Any terms alternately inserted into each award must be limited to those that are necessary, in the relevant sense.
41. The significance of this factor is reinforced by the history of award clauses dealing with delegates’ rights, as discussed above. As illustrated by that history, the Commission has not previously found it necessary to include in awards generally the term now required to be included by s.149E of the FW Act.
42. This is another reason why the Commission should adopt a careful and cautious approach toward developing a new delegates’ rights term which is to be included in all modern awards, and why the Commission should have particular regard to only including provisions in such a new term that are ‘*necessary to achieve the modern awards objective*’, as that objective is set out in s.134 of the FW Act.
43. *Fifth*, as shown again by the history of award terms discussed above, there are already numerous clauses within modern awards that deal with delegates’ rights. In varying all modern awards to include a new delegates’ right term, there is no automatic or obvious need for the Commission to disturb all of those existing clauses in awards.

44. However, there is a more apparent need for the Full Bench of the Commission to vary or remove those existing clauses in modern awards which may overlap with a new delegates' rights term in a significant way, such as those existing clauses dealing with dispute resolution procedure training leave in particular industries. Indeed, this approach may be necessary to avoid confusion over the delegates' rights applying under a particular award and to avoid other anomalous or unjustified outcomes (such as employees receiving a separate entitlement to multiple types of leave of a similar nature). There will obviously be a need for a reassessment of the fairness of maintaining such award clauses.
45. *Sixth*, the implementation of a standard clause across all or most awards is consistent with the objective of ensuring that the modern awards system is simple and easy understand.

Specific issue to be addressed in the clause

46. In addition to these overarching considerations, Ai Group submits that there are a number of other important factors that are relevant to the conduct of the Commission's task in this matter and to the approach to framing drafting of the new clauses.
47. A balance needs to be struck between generality and prescription in the drafting of the new delegates' rights term for all modern awards. Because the Commission is concerned with a new award term which must be capable of application to a very wide range of circumstances, it is preferable to deal with matters on a somewhat general level. However, the need to provide certainty in award obligations and ensure compliance by employers should involve a higher level of prescription being afforded than the general references to '*reasonable access*' and '*reasonable communication*' found in the relevant legislative provisions.
48. Equally importantly, the new delegates' rights term should not result in undue costs or disruption for employers.

Delegates should be known to an employer

49. Under the legislative provisions, the delegates' rights and entitlements apply to a *'workplace delegate'* meaning *'a person 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'* (s.350C(1)). Consistent with the bona fide exercise of the delegates' rights, Ai Group submits that the entitlements should only be accessible in circumstances where the employer is aware that the employee is a delegate. Thus, it would also be appropriate for entitlements and obligations created by the clause to only apply if an employee has appropriately notified their employer that they are a delegate.
50. It would also be reasonable for an employer to be able to request some form of written evidence that a person has been duly appointed or elected as a delegate. The new modern award term should specify this.

Guidance as to the entitlement to 'represent the industrial interests'

51. The legislative provisions establish that *'the workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer'* (s.350C(2)). The meaning of the phrase *'entitled to represent the industrial interests'* is not plain from the text, or otherwise defined, except that it includes *'disputes with their employer'*.
52. The Commission cannot, of course, alter the meaning of s.350(C) or its practical application. Nonetheless, Ai Group submits that it is open to the Commission to give examples of what does not constitute the representation of industrial interests in the new term, just as the legislation itself provides the non-exhaustive example: *'including in disputes with their employer'*.
53. There are a range of identifiable activities which clearly do not constitute *'representing the industrial interests'* of members (both actual and potential) but which may be sought to be accessed under the delegates' rights provisions. These include:
- (a) organising industrial campaigns and industrial action;
 - (b) attending rallies;

- (c) engaging in community activism;
- (d) attending party political and/or union conferences.

54. The new award term should make plain that these types of activities do not fall within the concept '*representing the industrial interests*' of members and potential members. Alternatively, there would be practical value in this at least being acknowledged in any decision issued by the Full Bench in these proceedings.
55. The new delegates' rights term should also expressly state that workplace delegates do not have the right to represent anyone who does not wish to be represented by them, or to be involved in disputes in which the employees do not wish them to be involved. This is an important democratic principle that is embedded in numerous provisions in the FW Act, FW Regulations, modern awards and enterprise agreements. In particular, the FW Act protects freedom of association in the workplace by ensuring that employees are free to be represented, or not represented, by industrial associations (ss.346 and 347(b)(vii)).

Ai Group submits that the setting of the new delegates' right term in modern awards should be viewed through the prism of the existing legislative provisions dealing with freedom of association. Thus, the new modern award term should not offend the freedom of association enshrined in the FW Act for an employee not to be represented in the workplace by a union delegate if they so choose.

56. Thus, for example, a delegate should not have the right to attend a meeting to potentially resolve a dispute between the employer and its employees, if the employees do not want the delegate to attend the meeting. This issue should be made explicit in the new award term.

Considerations related to access to paid time for training

57. The legislative provisions dealing with delegates' rights do not create an entitlement to paid training leave for union delegates. Rather, the provisions create an entitlement to '*reasonable access to paid time, during normal working hours, for the purposes of related training*', except where the employer is a small business employer (s.350C(3)(b)(ii)).

58. Thus, the entitlement only applies where the training occurs during normal working hours; it does not arise if the training occurs outside these hours. If the employee does not have normal working hours on the day they attend the training, they are not entitled to any payment under this section.
59. The legislation does not stipulate the rate of pay that delegates are to be paid where they attend training during normal working hours. Awards should do this. A determination of the relevant rate of pay should reflect the fact that no work is being performed by a delegate while they attend such training. It should also reflect the proposition that a delegate who attends such training is not experiencing any of the disutilities associated with undertaking their ordinary duties or working outside normal working hours.
60. The Commission should also take into account that gaining access to paid time, during normal working hours, for the purposes of delegate training is occurring because an employee is *electing* to undertake this time away from his or her normal duties. In other words, the paid time away from normal duties is not something required of the employee by his or her employer.
61. The training may also not be of any benefit to the employer.
62. As part of the modern awards objective, the Commission must take into account the likely impact of the new delegates' right term on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)). The Commission must also take into account the efficient and productive performance of work (s.134(1)(d)). All of these factors serve to moderate the amount of paid time that should be afforded to delegates and rate that they should be paid.
63. Ultimately, the Commission must also confine any provision about payment to a consideration of what is *necessary* to achieve the modern awards objective. Thus, any approach that requires the provision of over-award payments must be avoided. It would not, for example, be appropriate to require that payment be provided at the '*base rate of pay*' given this would require payment of over-award remuneration that an employer will never have contemplated providing to workers accessing any new entitlement to training leave. The merit of this contention is reinforced by what will

be the inevitable absence of any evidentiary material that will enable a proper consideration of the impact and practical ramifications in the context of all industries of a clause that required provision of over-award payments.

64. In these circumstances, Ai Group submits that it would be appropriate for the Commission to stipulate in the new delegates' right term that the entitlement to paid time for the purposes of training is payable only at the minimum rate of pay applicable to the employee under any relevant modern award.

Practical measures to ensure the clause operates appropriately, fairly and without undue disruption to an employer's operations

65. The new delegates' right term should not unduly operate to disrupt an employer's business or otherwise have an adverse impact on the operational requirements of the employer. The wording of the new term should include a stipulation to this effect.
66. Equally, the new delegates' right term should not operate in a way to compromise or undermine the employer's obligation to provide a safe workplace for its employees, including safe systems of work. Again, the wording of the new term should reflect this.
67. Consistent with these general principles concerning an employer's operational requirements and safety obligations, the entitlement to reasonable access to paid time during working hours to attend related training should be conditional upon the provision of reasonable notice to an employer, namely a period of at least 8 weeks' notice. Such reasonable notice should also provide details of the type, content, timing and duration of the training.
68. The entitlement to reasonable access to paid time should also be conditional upon the operational requirements of the employer. Thus, for example, it would not be reasonable for a delegate working in a retail business to seek access to paid time for training purposes during the peak retail trading period (for example, the period leading up to Christmas).
69. It would also be unreasonable for the delegate to access paid time for the purposes of training which is not related to a delegate representing the industrial interests of

members (both actual and potential). For example, it would be unreasonable for a delegate to take paid time away from work to attend training which is directed at the enhancement of political or community objectives. Hence, there is a need for the new delegates' right term to give some guidance to the parties about the purposes of the training which attracts the entitlement to paid time – for example, training which is directed at the enhancement of dispute resolution procedures in modern awards.

70. Any requirement to provide payment should also be conditional on the provision to the employer of evidence that would satisfy a reasonable person of the attendance at the training and the nature of the training undertaken.

Guidance as to what is reasonable

71. The legislation provides an entitlement to *'reasonable communication'* with members (both actual and potential) in relation to their industrial interest. There is a further entitlement to *'reasonable access to the workplace and workplace facilities'*, presumably in order to provide the means of *'reasonable communication'* with members.
72. Ai Group submits that it would be appropriate for the Commission to include in the new award term some guidance to the parties on the matters which should be taken into account in deciding what is *'reasonable'* for the purposes of *'reasonable communication'*, *'reasonable access to the workplace and workplace facilities'* and *'reasonable access to paid time'*. Consistent with the approach in the legislation, the clause should provide that regard is had to the following in considering what is reasonable:
- (a) the size and nature of the enterprise;
 - (b) the resources of the employer of the workplace delegate;
 - (c) the facilities available at the enterprise.
73. These are the same criteria specified in s.350C(5) of the FW Act.

74. Ai Group further submits that it would be appropriate for the Commission to include in the new modern award term some guidance to the parties on broader matters to be taken into account in deciding what is *'reasonable'* for the purpose of accessing paid time for training purposes, namely:
- (a) Whether the union delegate has given the employer a reasonable amount of notice of the related training.
 - (b) Whether the union delegate's attendance at the related training has been arranged having regard to the operational requirements of the employer so as to mitigate any adverse effect on those requirements and the impact that the absence will have on the employer.
 - (c) The number of workplace delegates of the employer who have already attended related training in the past 12 month period.
 - (d) The number of days that the workplace delegate will be absent to attend the training.
 - (e) The number of days that the workplace delegate has already been absent in the past 12 month period undertaking related training and the extent to which they have previously undertaken the training.
 - (f) The extent to which attendance at such training is necessary having regard to whether similar training has been attended in the past and/or whether other delegates working in the enterprise have already attended such training.
 - (g) The content of the training.
75. These criteria or considerations are essentially matters of common sense. For example, someone who is a delegate of 20 years' standing and experience will obviously not need to attend training courses for numerous days each year. Equally, someone who has attended training for delegates in the preceding 12 month period will not typically need to attend another round of training in the coming year.

76. While these criteria are relatively simple and straightforward, there are a number of advantages of specifying them in the new modern award clause. By identifying these criteria, this affords both employers and employees a firmer basis on which an entitlement to paid time based on *'reasonableness'* may be legitimately accessed. This approach also provides greater clarity and affords the potential for greater certainty for both employers and employees.
77. Returning to the entitlement to *'reasonable communication'* with existing and potential members; it would plainly be unreasonable for such communication to occur in a manner which is contrary to an employer's IT policies and procedures. Those policies and procedures will typically set out how the employer expects its employees to use their work email, the employer's IT systems, the internet and social media. These policies are intended to protect the reputation of the business, its intellectual property, and the safety and security of the employer's information, its customers and its employees. The new modern award clause should stipulate that access to reasonable communication with members by delegates or workplace facilities (to the extent that this captures access to IT systems) should comply with the employer's IT policies and procedures.
78. It is also necessary to clarify that *'reasonable communication'* is not intended to disrupt or hinder the performance of work within the relevant workplace or enterprise.
79. The new modern award clause should certainly not give a union delegate the right to talk with employees while they are working; it is reasonable that they speak with employees during non-working time (for example, during breaks). The clause should also make clear that a delegate does not have the right to hold a meeting with a group of employees during working hours, without the agreement of the employer.
80. It is also important that the privacy of employees' personal information is not infringed through the entitlement to *'reasonable communication'* and *'reasonable access to the workplace and workplace facilities'*. The modern award clause should spell out clearly to employers, employees and delegates that the clause does not prevent an employer from ensuring that an employee's personal information

remains protected, and that this information is to be dealt with in accordance with the *Privacy Act 1988* (Cth).

81. With all of the above factors and considerations in mind, Ai Group proposes a delegates' rights term for modern award which strikes a reasonable balance between the interests of employers and employees, including those who are delegates, and which we reflects a proper consideration of the modern awards objective as well as the relevant recent legislative changes.
82. Ai Group's proposed clause has been advanced without the benefit of knowing the details of any proposed term the ACTU and its affiliates are advancing. Ai Group reserves all of its rights in this regard. We would also welcome the opportunity to further engage in consultation over the development of a potential clause once the submissions of other parties are made public.

5. PROPOSED DELEGATES' RIGHTS TERM FOR MODERN AWARDS

83. Ai Group proposes the following delegates rights term for modern awards:

X DELEGATES RIGHTS

- X.1 A **workplace delegate** is a person 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.
- X.3 An employer is only required to afford a workplace delegate a right under this clause if the employee has provided them with notice in writing advising that they are a workplace delegate and, if requested, evidence that would satisfy a reasonable person that they are a workplace delegate. An employee who provides such notice must immediately advise their employer if they cease to be a workplace delegate.
- X.2 The workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer. However, this clause does not create any obligation on a person to be represented by a workplace delegate.
- X.3 The workplace delegate is entitled to:
 - (a) reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and
 - (b) for the purpose of representing those interests:

- (i) reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and
- (ii) unless the employer of the workplace delegate is a small business employer—reasonable access to paid time, during normal working hours, for the purposes of related training.

Note: A 'small business employer' has the meaning given in section 23 of the Act.

- X.4 Clause X.3(b)(ii) will entitle an employee to be paid not less than the applicable minimum rate of pay for the employee's classification under this award for the ordinary hours that the employee would have worked during the time that they participated in training.
- X.5 A delegate is not required to be paid any amount pursuant to this award for any activities they undertake in accordance with this clause apart from participation in training contemplated by X.3.
- x.5 In determining what is reasonable for the purposes of subsection X.3, regard must be had to the following:
 - (a) the size and nature of the enterprise;
 - (b) the resources of the employer of the workplace delegate; and
 - (c) the facilities available at the enterprise.

Specific requirements related to training contemplated under X.3(b)(ii)

- X.6 In determining what is reasonable for the purposes of clause X.3(b)(ii), in addition to those matters specified in clause X.4, regard must also be had to the following issues:
 - (a) whether the union delegate has given the employer a reasonable amount of notice of the related training
 - (b) whether the union delegate's attendance at the training has been arranged having regard to the operational requirements of the employer so as to minimise any adverse effect on those requirements and the extent to which it will adversely impact the employer's operations
 - (c) the number of workplace delegates of the employer who have already attended related training in the past 12-month period.
 - (b) the number of days that the workplace delegate will be absent to attend the training
 - (e) whether the delegate has previously undertaken the training and number of days that the workplace delegate has already been absent in the past 12-month period undertaking training contemplated by X.3(b)(ii); and
 - (f) the content of the training, including whether it is likely to lead to the avoidance of industrial disputes.

- X.7 A delegate is not entitled to be absent on paid time off under this clause in order to undertake training on more than 2 days in any calendar year.
- X.8 A delegate is not entitled to be absent on paid time off under this clause to participate in training unless the following requirements have been met:
- (a) the delegate has provided at least 8 weeks' notice to the employer of the dates and times at which they request access to paid to time-off, unless the employer agrees to a shorter period of notice;
 - (b) an explanation and, if requested, reasonable evidence, of the type, content and duration of the proposed training and its duration
 - (c) evidence of participation in the training has been provided to the employer, unless an employer indicates this is not necessary.

For the purposes of this clause, reasonable evidence is evidence that would satisfy a reasonable person.

X.X Ai Group suggests that there may be merit in also including a clause placing default upper limits (rather than default entitlements) on the number of delegates that an access the leave in a given year and total amount of leave that an employer could reasonably be expected to grant in relation to employees covered by an award. However, limited guidance that can be appropriately taken from existing award clauses dealing with such matters. We accordingly suggest that this is an issue best considered through further consultation between the Full Bench and Peak Councils and in light of any views expressed by the ACTU or relevant union.

Performance of delegate activities

- X.9 A delegate must, as far as reasonably practicable, seek to undertake all activities authorised by this clause outside of working hours and without disrupting an employer's operations.
- X.10 Clause X.2 and X.3 do not give a union delegate the right to hold a meeting with an employee (or group of employees) during the working hours of either the delegate or employee(s), without the authorisation or agreement of the employer.
- Note: Under clause 19 of Act, a failure or refusal of an employee to perform any work is industrial action, except in the limited circumstances identified in subsection 19(2) of the Act.
- X.11 Clauses X.2 and X.3 does not entitle a workplace delegate to fail to undertake any work that they have been engaged to perform, or to disturb other employees in the performance of their work, without first seeking the agreement of their employer.
- X.11 Clause X.3 does not prevent an employer ensuring that an employee's personal information is dealt with in accordance with the *Privacy Act 1988* (Cth). It also does not require an employer to provide a union delegate with access to personal information about other employees, such as their names or contact details.
- X.12 A delegate is only permitted to exercise a right under clause X.3 in a manner that is consistent with any reasonable requirement or policies of the employer that have been communicated to the delegate. This includes a requirement that any rights are

utilised in a manner that is consistent with any reasonable workplace health and safety policy or information and technology policy of the employer.

- X.13 A delegate's entitlement to represent industrial interests of other employees does not include: organising industrial campaigns and industrial action; attending rallies; engaging in community activism; attending party political or union conferences.