

IN THE FAIR WORK COMMISSION

Matter No: AM2024/6

Variation of modern awards to include a delegates' rights term

**UNITED WORKERS UNION'S ADDITIONAL SUBMISSIONS ON PROPOSED
DELEGATES RIGHTS CLAUSE**

1. On 10 May 2024, Justice Hatcher issued a Statement (the **May Statement**),¹ proposing a draft modern award delegates' rights term (the **Proposed Term**). These submissions relate to concerns held by the United Workers Union (**UWU**) regarding the Proposed Term.
2. UWU continues to rely on its submissions of [17 April 2024](#), [2 April 2024](#) and [1 March 2024](#), as well as the witness statements filed on behalf of various UWU members on 1 March 2024.
3. At the outset, UWU supports the submissions filed on 21 May 2024 by the Australian Council of Trade Unions (**ACTU**), and the ACTU recommendations to improve the draft term. UWU has had the benefit of reviewing the alternative delegates' rights clause proposed by the ACTU, and supports the adoption of this clause by the Commission.
4. In addition to the priority areas raised by the ACTU in its submissions, UWU holds concerns in 4 broad areas, which we address below:
 - (a) The provision of notice to employer's of a delegate's status as a delegate;
 - (b) Representations made to persons other than the relevant employer of a delegate;
 - (c) The use of ratios to determine a delegate's access to delegate rights; and
 - (d) The broad framing of hindering, obstructing or preventing performance of work.

¹ *Variation of modern awards to include a delegates' rights term [2024] FWC 1214 ("May Statement")*.

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5. We also outline tertiary concerns, in support of the ACTU submissions.

Notice of status as a delegate

6. Clause X.3 of the Proposed Term provides that a workplace delegate must give the employer notice of their appointment or election as a workplace delegate prior to exercising workplace delegates' rights, and requires evidence that would satisfy a reasonable person. UWU holds two concerns regarding cl X.3.
7. The first concern is that the Proposed Term may fetter the operation of s 350A of the *Fair Work Act 2009* (Cth) (**FW Act**) if the delegate is hindered or obstructed, or impact the operation of s 340 if adverse action is taken against the delegate because of the exercise of workplace delegates' rights as a workplace right.
8. Whether or not an individual is workplace delegate is a question of fact, based on the operation of an employee organisation's rules, policy, or decisions of its officials or membership. It operates independently of notice to the employer. The current drafting of clause X.3 invites challenges to the otherwise legitimate and valid exercise of delegates' rights. The current Proposed Term leads to potentially severe consequences for what would be a minor procedural error, such as the denial of rights, potential contraventions by the delegate of the term in the modern award, misrepresentations within the meaning of s 345 by officials and other members about the ability of the delegate to exercise delegates' rights, and the loss of the reverse onus contained in s 350A(3).
9. The Proposed Term's cl X.3 does not reflect the industrial reality of many workplaces. In many workplaces, individuals function as delegates without formal notice to the employer, and are recognised as such by the employer because the employer and its managers can reasonably and pragmatically form a view about the individual holding themselves out as a delegate.
10. Despite the above, if the Commission believes the Proposed Term must include provisions like that contained in cl X.3:
 - (a) the clause should provide that the provision of a notice by a relevant union would satisfy the direct requirement on a delegate to provide any such notice. for provision of notice to the employer by the relevant union.

- (b) the clause should include a clarification that a defective notice, or failure to provide a notice does not invalidate the rights of a delegate or render earlier purported exercises of delegate rights void.

Representations to third parties

11. In its submissions of 3 March 2024,² UWU placed significant emphasis on the representation and advocacy of delegates to persons other than their employers. This is especially true of industries that are significantly reliant on third-party funders, like aged care, early childhood education and care, and disability services. UWU submits this type of representation by delegates is also relevant in any industry where government or other third-parties have a large degree of control over the industrial interests of employees in that industry.
12. The specific examples advanced by UWU were those of Rebecca Stiles, Christopher Murray and Andrew Grant. Rebecca Stiles spent a significant amount of time advocating with government and politicians about rates of pay and systemic issues in the early childhood education and care sector. UWU submits that those representations about the industrial interests of members by Rebecca Stiles and other delegates were integral to the Commonwealth commencing several reviews of the early childhood education and care sector, as well as the Commonwealth's participation in supported bargaining. Similarly, Andrew Grant raised their representations to Ministers and regulators regarding the regulatory environment and how it impacted workers at Crown Casino Perth.³
13. UWU submits that this is a significant aspect of 'representation' that ought to be explicitly listed within cl X.5 and protected as a delegates' right.

Ratios of 'eligible employees' and determining reasonable access to training

14. The Proposed Term at cl X.8 provides for 5 days of initial training, and 1 day of further training for each workplace delegate per 50 'eligible workers'.
15. UWU supports the ACTU's submissions regarding the definition of 'eligible workers' and that it may lead to calculations of training entitlements that are less than if the entitlement had been calculated with a view to members and persons eligible to be members who work across the enterprise, rather than with an individual employer.

² See *Submissions of the United Workers Union*, 3 March 2024 [14]-[21].

³ *Statement of Andrew Grant*, [34].

16. The UWU further supports the proposal that workplace delegates are provided to 3 days of paid time leave for each subsequent year.
17. UWU raises a further concern regarding the Proposed Term at cl X.8 in that it would effectively prevent some worksites from being represented by a trained delegate if the rate of 50 employees continues to be used.
18. As an example, UWU represents the industrial interests of security guards. A significant number of our security members are employed at sites operated by the Department of Defence, the Australian military, or sites that require some form of security clearance or have restricted access (for example, hospitals, banks, and airports). Employers in the security industry invariably hold contracts with third parties that cover many other worksites. The proposed cl X.8 will mean some worksites (the **first worksite**) are represented by delegates that will not receive any entitlement to training, because the entitlement is accessed by a delegate at another worksite (the **second worksite**) that has contributed to the calculation of '50 eligible members'. The framing of X.7 then means the delegate who does receive training is incapable of entering the first worksite to represent or communicate with member or persons eligible to be member, because their employer does not control who may access the first worksite.
19. The reduction from 50 to 25 employees, whilst not completely eliminating the concerns in the above example significantly reduces situations where entire worksites would not have a trained delegate.
20. The final concern that the UWU raises in respect of the Proposed Term cl X.8, is in respect of the proposed sub-clause (d) "The workplace delegate must, on request, provide the employer with an outline of the training". The UWU supports the removal of this term. Training of delegates involves the training of delegates to equip them with the skills to deal with issues and matters that arise with their employer, this could be bargaining, it could be the taking of industrial action. The provision of information about what a delegate has been trained in potentially enables their employer to access information regarding union strategy, bargaining strategy and other matters that ought to be confidential between the union and the delegate.

Hindering, obstructing or preventing

21. Clause X.9(a)(iii) creates an obligation on workplace delegates to not hinder, obstruct or prevent the normal performance of work, while sub-clause (iv) requires delegates to not hinder, obstruct or prevent employees exercising their rights to freedom of association.

22. UWU submits that sub-clause X.9(a)(iv) is already adequately addressed by s 346 of the *FW Act*. If Parliament had intended to create an additional set of protections directed towards delegates and freedom of association concerns, they would have introduced legislation to expand the scope of s 342(1), item 7. UWU submits that sub-clause X.9(a)(iv) should be removed from the Proposed Term.

23. Regarding sub-clause X.9(a)(iii), UWU views this restriction as inconsistent with the right to reasonable communication contained in s 350C(3). Any form of discussion on the shop floor that means there is a pause in the performance of work would be captured within the meaning of 'hinder, obstruct or prevent'. The clause as drafted is dangerously broad, and exposes workplace delegates who attempt to exercise delegates' rights in good faith to potential breaches of s 45 of the *FW Act*. The clause effectively confines any discussion to meal or other breaks. UWU submits that sub-clause X.9(a)(iii) is inconsistent with the broad right to reasonable communication granted by s 350C(3)(a), and should be removed from the Proposed Term.

**Filed on behalf of the
United Workers Union**

22 May 2024