



ACTU Further Reply Submission – Delegate’s Rights

AM2024/6 Variation of modern awards to include a
delegate’s rights term.

ACTU Submission, 22 May 2024
ACTU D. No 43/2024

Contents

Contents	0
Introduction	1
Definitions	1
Notice.....	5
Right of representation.....	6
Entitlement to reasonable communication.....	7
Entitlement to reasonable access to the workplace and workplace facilities.....	8
Entitlement to reasonable access to training	9
Exercise of entitlements under clause X.9.....	12
Attachment A– ACTU amended term of FWC’s draft modern award delegates’ rights term	16

Introduction

1. The FWC issued a Statement of 10 May 2024 inviting interested parties to file submissions concerning its “Draft modern award delegate’s rights term” (**FWC Draft Term**) included as Attachment A to that Statement.
2. The ACTU has previously filed four submissions in this matter (AM2024/6) as follows:
 - a. [ACTU Initial Submission of 1 March 2024](#);
 - b. [ACTU Reply Submission of 28 March 2024](#);
 - c. [ACTU Further Reply Submission of 17 April 2024](#); and
 - d. [ACTU Further Reply Submission of 19 April 2024](#).
3. The ACTU response to the FWC Draft Term is structured according to the subheadings of term itself. We also provide a version of the draft term with our proposed tracked changes as Attachment A to this submission (**ACTU Amended Term**).
4. We make 21 recommendations to improve the draft term, but highlight here the four priority areas of greatest concern for the ACTU and its affiliated unions:
 - a. Very limited access to paid time off to attend training (See “Entitlement to Reasonable Access to Training”);
 - b. The creation of binding obligations on employees (in their capacity as delegates) in awards, which is highly unusual, unwelcome in the context of the legislature granting delegate’s beneficial rights to enable to them to perform their duties and a significant restriction on those rights which may leave them exposed to civil penalties (See “Exercise of Entitlements under Clause X.9”); and
 - c. The introduction of the concept and definition of “eligible employees” which narrows the scope of who a delegate can represent and is inconsistent with s.350C of the Fair Work Act (**FW Act**) (See “Definitions”); and
 - d. A complex formula for determining and restricting the number of delegates eligible to attend training which would require the employer examining union eligibility rules (See “Entitlement to Reasonable Access to Training”).

Definitions

5. Under X.2 the ACTU raises three issues.
6. Firstly, X.2 provides a definition of employer, but employer is already defined in the FW Act at s.15(2). We suggest deleting the definition in the FWC’s Draft Term and instead relying on a reference to the FW Act definition of employer in awards.
7. **Recommendation 1:** Delete X.2 (a).
8. Secondly, “delegate’s organisation” is defined at X.2 (b) as:

“the employee organisation under the rules of which the workplace delegate was appointed or elected”.

9. The language here differs from the definition of “workplace delegate” in the *Fair Work Act 2009 (Cth)* (**FW Act**) (as s 350C(1)) which is defines as:

“a person appointed or elected, **in accordance with** the rules of an employee organisation”.

10. Whilst on face value this might appear to be a slight departure only, it is potentially of significant consequence.

11. The phrase “under the rules” is ambiguous and capable of a narrow construction to the effect that the organisation’s rules themselves must provide the mechanism of appointment or election. Such a construction could potentially exclude a workplace delegate who is appointed or elected in accordance with, for example, a resolution by the union’s governing body or committee of management, even if that resolution was validly made in accordance with the rules and the appointment or election was consistent with that resolution and therefore also *in accordance with* the rules.

12. We are of the view that the term consistent with the legislation: “in accordance with”; is sufficiently broad to capture the above scenario, and therefore urge its adoption. Even if this is not correct, using the language in the FW Act in the FWC Draft Term itself would avoid all doubt.

13. **Recommendation 2:** Amend X.2(b) to as follows:

“**delegate’s organisation** means the employee organisation ~~whose under the rules of which~~ the workplace delegate was appointed or elected in accordance with”;

14. Thirdly, the proposed definition of “eligible employees” in the FWC Draft Term would provide a narrower scope of who the delegate can represent than is provided for in the new provisions of the FW Act.

15. The FWC Draft Term introduces the concept of “eligible employees” who are defined at X.2(c) as:

“...members and persons eligible to be members of the delegate’s organisation who **are employed by the employer in the enterprise**”.

16. However the new provisions in the FW Act provide that a workplace delegate is a (at s.350C(1):

“...delegate or representative (however described) of members of the organisation **who work in a particular enterprise**”.

17. Further, under the FW Act provision, the delegate is entitled to represent those members and ‘any other person eligible to be such members’ (s.350C(2)).

18. The departure here is clear. Under the FWC Draft Term, the workplace delegate and the “eligible employee” must be employees of the same employer. Under the FW Act provision, the workplace delegate could represent workers across employers (but they both must work “at a particular enterprise”).¹
19. This definition in the FWC Draft Term is arguably inconsistent with the provisions of the FW Act by confining the scope of the workplace delegates’ rights from those conferred by ss.350C(1)&(2).
20. As the ACTU’s Further Reply Submission of 17 April 2024 outlined, these provisions in the Act recognise and enable, for example, the common practice whereby a delegate of a lead contractor on a construction site represents members working for a sub-contractor.² In contrast, the proposed draft term limits the rights of the delegate to only be able to represent employees of the same employer – potentially undermining those existing arrangements.
21. More specifically, this narrower definition within the FWC Draft Term presents the following problems:
- a. It will provide the workplace delegate with lesser rights of representation (compared to the FW Act provision) by not conferring a right to represent workers in their enterprise (instead restricting such representation to only those workers within the same employer);
 - b. Secondly, it will further restrict the scope of the workplace delegates rights to *employees*, rather than *workers*. This will mean that a workplace delegate cannot represent an independent contractor under the FWC Draft Term, but could under the FW Act provision.
 - c. Thirdly, it will remove their right to even communicate with such members as a workplace delegate. This would mean that a workplace delegate would not be able to answer simple questions, or discuss union matters etc. with that worker; and

¹ This is the same conclusion reached by the NSW Business Chamber and Australian Business Industrial in its [Further Reply Submission of 17 April 2024](#). The only employer group to challenge this interpretation is the Coal Mining Industry Employer Group (CMIEG) in its [Further Reply Submission of 16 April 2024](#).

² See further examples and discussion at paragraph 11 of the ACTU Further Reply Submission of 17 April 2024

- d. Fourthly, it would restrict the subject matter of workplace delegate training – for example, if a union delegate worked for a host employer, they might be precluded from participating in training on the subject of insecure work or on matters relevant to labour hire workers, even if such workers were present in the workplace and eligible to be members;

All of the above would be the case even if there were no other delegate for the workers excluded from representation etc. to turn to.

22. Not only is this diminution of rights that would otherwise be provided for under the FW Act unsatisfactory, it opens the possibility of jurisdictional error. The FW Act s 149E requires a modern award to include a delegates rights term. The FW Act s 12 defines a “delegates rights term” as one which “provides for the exercise of the rights of workplace delegates”. The note to this definition that those rights are the rights set out in s 350C. The setting of a term which provides for rights lesser than those in s 350C might fall short of the definition of “delegates’ rights term” in s 12 and therefore be attended by error in that it fails to meet the requirement in s 149E.

23. **Recommendation 3:** To correct this issue, the ACTU is proposing that the definition of “eligible employee” be amended to be “eligible workers”, and then defined consistently with the Act as follows:

- a. “X.2(b) eligible ~~workers employees~~ means members or persons who are eligible to be members who ~~work in a particular enterprise are employed by the employer.~~

24. The Bench may be concerned that this proposed amendment would create an obligation on an employer that extends to employees or workers it does not employ or engage. It does not. The only obligations on employers in the ACTU proposal relate to the rights of *the delegate* they employ.

25. This proposed change requires consequential amendments throughout the FWC Draft Term which appear in the ACTU Amended Term. This however raises two consequential issues for the Bench to consider:

- a. Firstly, an employer’s ability to provide a workplace delegate with access to a workplace or workplace facility (as at X.7) at a particular enterprise may depend on the cooperation of another business or person. To address such a scenario X.7 could include language that requires the employer to take all reasonable steps to provide such access, including seeking to secure the consent of the other business or person (See proposed X.7(b) in the ACTU Amended Term).
- b. Secondly, we also accept that the formula for determining the quantum of training should rest on a headcount of employees employed by the employer. This

is a simple test that avoid problems of counting workers across different employers or businesses in a particular enterprise or requiring an employer to delve into the complicated eligibility rules of relevant unions. (See proposed language at X.8(a) in the ACTU Amended Term).

26. Recommendation 4: Amend X.2(c) of the FWC Draft Term (and make consequential amendments) as follows:

“(c) Eligible ~~worker employees~~ means members and persons eligible to be members of the delegate’s organisation who work in the ~~are employed by the employer in the~~ enterprise.”

Notice

27. Clause X.3 requires that a workplace delegate must give the employer written notification of their election or appointment as a delegate. While clarity over who is a delegate may be helpful, the imposition of this procedural requirement could have the following consequences:

- a. Where there is a failure to give notice, or defective notice is given, or notice is late, it could, on the present drafting of the clause, be used as grounds to deny a delegate their rights. This would potentially produce a fair harsher outcome for the delegate and the people they are representing than should be warranted by a simple procedural failure, or the delay caused by a union’s own internal administrative processes – for example, it could mean that the delegate isn’t protected by the general protections, or that the workers don’t receive representation in a timely way (or at all).
- b. It could disturb the burden of proof on the employer established by s350A(3) if the delegate must first prove that notice was given. Effectively requiring a workplace delegate to prove that they have given effective notice could be practically difficult, particularly where delegates have been delegates for a longer period of time and proving that they have given notice relies on the employer’s record keeping.
- c. As currently drafted, a delegate who failed to give notice would contravene the modern award. The significance of exposing an individual worker to a contravention of a modern award is such that in the ACTU’s submission this requirement should not be included. It is particularly unwelcome given that the legislature has sought fit to introduce beneficial rights for delegates, to overcome limitations on their ability to perform their roles. Effectively setting up a civil

penalty provision in that context is, in our submission, against the intention of the legislature.

28. To resolve this issue the ACTU is proposing that the first sentence of X.3 be deleted. This still leaves an obligation on the delegate (and their employer) to provide evidence of their appointment or election that would satisfy a reasonable person if the employer requests.

29. **Recommendation 5:** Delete the first sentence of X.3:

30. If the Bench does not agree with this recommendation, we submit in the alternative that an additional sentence should be added to the clause to ensure that a workplace delegate is not denied their rights, or found to be in breach of an Award, particularly due to a simple administrative issue. That sentence could say: “For the avoidance of doubt, a failure of a workplace delegate to give notice in accordance with this clause will not invalidate their rights as a delegate.”

Right of representation

31. The ACTU welcomes the approach in the FWC’s Draft Term of providing a practical and non-exhaustive list of matters that constitute representing industrial interests for the reasons put in our Initial Submission.

32. The ACTU only seeks minor additions to the clause as follows:

33. Firstly the inclusion of the word “or matters” at the end of clause X.(c) in the FWC’s Draft Term (new X.5(a)(iii) in the ACTU Amended Term) to cover issues beyond just grievances and disputes.

34. Secondly, workplace delegates can play a key role in matters beyond just workplace grievances and disputes, particularly if they reach the Fair Work Commission. the ACTU is seeking the inclusion of attendance at

35. **Recommendation 6:** Include at the end of new X.5(a)(iii) in the ACTU Amended Term:

“including at the workplace level and in courts or tribunals including the Fair Work Commission”

36. As put in our Initial Submission, for delegate’s rights to be meaningful and effective they must be able to be exercised during paid time. We further expand on this issue in relation to Clause X.9 below.

37. A necessary corollary of this requirement is of the ability to represent is an ability for there to be reasonable accommodations to enable the right to be exercised. For example, it would be unreasonable and impractical for a workplace delegate who works a 12-hour night shift to perform their duties as a delegate during their time off before then

returning for their shift that night. This would be, among other things, a clear WHS concern.

38. Recommendation 7: Add a new X.5(c):

“A workplace delegate should get access to shift, roster or other flexible work changes if they request, and where necessary to facilitate the exercise of their rights under this clause.”

Entitlement to reasonable communication

39. The ACTU generally welcomes the wording in X.6. WE seek a series of minor changes to better clarify the meaning in the clause bring it into clear alignment with the FW provisions as follows:

- a. Firstly in the first sentence of X.6, the phrase “for the purpose of” should be replaced with “in relation to” to reflect the actual language in the FW Act provisions.
- b. Secondly, to avoid the interpretation that the matters in the clause are an exhaustive list of matters that relate to reasonable communication, we seek the addition of the phrase “but is not limited to” in the second sentence.
- c. Thirdly, “addressing new workers at an induction meeting” should be added as a new X.6(a)(i). Several indicators in the FW Act recognise that the commencement of a working relationship is a critical moment for the worker to receive relevant information – for example, the FW Act requires the provision of the Fair Work Information Statement for all employees as well as the Casual Employment Information Statement for new casual employees. It is equally important that new workers are advised of their ability to be represented by a workplace delegate if they choose to at the outset of their working arrangement.
- d. Fourthly, the ACTU seeks clarifying language that communication can take place “at meetings” (in proposed X.6(b) in the ACTU Amended Term) which is clearly implied by ss.X.6(b) and X.7(a) but would benefit from being explicit.

40. Recommendation 8: Add the clarifying language proposed in paragraphs 39(a) to (d) to X.6

41. Finally, the ACTU also submits it is essential that delegate’s communications are protected from employer monitoring, or this right will be easily undermined in practice. While it is good practice for a delegate to protect their communications from an employer, in many cases it may be impossible to do so, or the delegate may otherwise fail to do so. There should therefore also be a prohibition on employers monitoring communications. Further, confidentiality of communications between workers and their union is an important protection (of the right to organise) which is being eroded through

increasingly sophisticated technological applications. For example, large US and European companies have been reported as using artificial intelligence applications to monitor employee communications, scanning communications for employee sentiment and “toxicity”.³ Whether direct, or through indirect applications such as monitoring software, employers should be explicitly prohibited from monitoring sensitive communications between employees and their workplace representatives.

42. **Recommendation 9.** Add to a new X.6(c) as follows:

“(c) The employer must not survey, monitor, record or otherwise infringe upon the privacy of communications between workplaces delegates, their union and eligible members.”

Entitlement to reasonable access to the workplace and workplace facilities

43. Clause X.7 of the FWC Draft Term provides an exhaustive list of workplace facilities the employer must provide the workplace delegate with access to. The ACTU seeks two modest sets of amendments.

44. Firstly, while the employer should strive to find a room or area to hold discussions that is fit for purpose, the absence of having such a room shouldn’t be used as grounds for providing no room at all.

45. **Recommendation 10:** Include the phrase “where possible” to proposed X.7(a)i) of the ACT’s Amended Term.

46. Secondly, the current list does not include access to the workplace beyond “a room or area” referred to in X.7(a). To cover this and any other matters that would constitute “reasonable access to the workplace or workplace facilities” but not presently contemplated in the FWC’s Draft Term.

47. **Recommendation 11:** Include a new X.7(vi) that adds:

³ CNBC, *How Walmart, Delta, Chevron and Starbucks are using AI to monitor employee messages*
<https://www.cnbc.com/2024/02/09/ai-might-be-reading-your-slack-teams-messages-using-tech-from-aware.html>

“any other access to the workplace or workplace facilities that the delegate or eligible members would ordinarily have access to in their capacity as employees or workers.”

48. Finally, as per paragraph 24(a) above, we also seek a consequential amendment to this clause to handle scenarios where there may be more than one employer at a particular enterprise.

Entitlement to reasonable access to training

49. The ACTU supports the inclusion of a clear amount of paid leave for a delegate to attend related training in awards. This will significantly reduce workplace disputes over what “reasonable access” to such training might constitute.

50. However the quantum of paid leave for training provided for under the proposed clause X.8 is seriously restricted in three ways:

- a. Firstly, it is not available to workplace delegates in small businesses (at X.8);
- b. Secondly, it is capped to no more than 1 workplace delegate for each 50 eligible employees (and it is slightly unclear as to whether a delegate at a workplace with less than 50 eligible employees has any entitlement to paid training leave); and
- c. Thirdly, it is restricted up to 5 days in the first year and 1 day per year thereafter for those workplace delegates.

51. After consulting its affiliated unions, the ACTU submits that the restrictions in paragraphs 50(b) and (c) do not provide a workplace delegate with reasonable access to paid training, as required by s.350C(3)(b)(ii) of the FW Act, particularly given both the reasonable training requirements of a delegate and by reference to existing practice.

52. Firstly, while 5 days of paid leave to attend training in a delegate’s first year is adequate, limiting further training to just one day in subsequent years is overly restrictive. This is because a delegate will have training requirements concerning:

- a. A refresher on their role as a delegate;
- b. An overview of any new and relevant legislative or policy change;
- c. Learning about an upcoming bargaining or workplace campaign;
- d. Training on how to respond to major organisational change (e.g. a round of restructuring); and
- e. A deeper dive into particular areas to build their skills and knowledge including e.g. dispute resolution, understanding their Enterprise Agreement, GFB obligations, general protections, preventing workplace sexual harassment or discrimination, among many others.

53. In recognition of such training requirements, existing entitlements to training for delegates or workplace representatives provide for more paid time off than just one day in subsequent years. Examples of such entitlements include:
- a. Clause 41 of the Textile, Clothing Footwear and Associated Industries Award (2020) provides that an eligible employee representative is entitled to up to 5 days training leave to attend courses on dispute resolution procedure – a larger number of days to cover just one subject.
 - b. The Health Care (NSW Hospitals) EA provides for four days of paid training leave for each delegate each year.
 - c. The Trade Union Training leave entitlement in Clause 29B of the NBCIA in 1990 and other awards provides a sliding scale of days of leave and employees entitled to access those days. For example, 4 employees could share up to 20 days of training in workplace of 75 employees each year (in contrast to one delegate having one day of leave under the FWC Draft Term).
 - d. The Australian Super EA enables each workplace delegate to access up to five days of training leave each year.
 - e. The Medical Scientists, Pharmacists and Psychologists Victorian Public Sector EA 2021-2025 provides an employee selected by their union to take from 5 to 10 days of leave to attend training each year.
 - f. In Victoria a Health and Safety Rep (HSR) is entitled to attend an initial training course over five days and then a one-day refresher course. The number of HSR's that have this right is not capped, unlike the FWC Draft Term, and, while the quantum of training is the same, it only covers one topic.

54. Further, the clause proposed by ACCI in its Initial Submission of 1 March 2024 at 4.2(j) also provides more days of paid training leave than the FWC's Draft Term in most possible scenarios.⁴ For example, in a workplace of 90 employees, three delegates would each receive 5 days of training per year under the ACCI clause, yet under the FWC's Draft Term, only one of them would receive one day a year (after initial training). This is a stark difference.

⁴ [ACCI Variation of Modern Awards to include a Delegate's Rights Term - Initial Submission of 1 March 2024](#)

55. Considering both the training needs of delegates and existing entitlements for similar or the same training, the ACTU submits that reasonable access to paid training leave in subsequent years should be at least three days of paid time off.
56. Secondly, access to training is significantly limited by X.8(a) which only requires an employer to provide the training entitlement to not more than one workplace delegate per 50 eligible employees. This proposed ratio in the FWC Draft Term either assumes that a delegate typically represents about 50 people, or that it is otherwise a reasonable cap on the number of delegates able to access to training. We disagree on both counts.
57. The ACTU has surveyed its affiliated unions in the limited time available and found that delegates typically represent members at a ratio of between 1:10 up to 1:30. Examples of employers and those ratios are provided below:

Table 1: Delegates per eligible employers by selected employers

Employer	Ratio of delegates to eligible employees
Coca Cola	1 to 12
Chevron WA	1 to 15
Australian Mutual Bank	1 to 36
Sydney Trains	1 to 16
Transgrid	1 to 32
Ausgrid	1 to 20
TasIVF	1 to 17

The ratio of delegates for any employer is strongly influenced by whether or not the workplace has (i) shifts, (ii) multiple worksites, (iii) multiple work groups, and (iv) multiple occupational groups. This makes sense because a delegate needs to be in contact with their fellow workers to be able to represent them. Limiting access to training at a ratio of 1:50 would see the majority of delegates in many workplaces where unions are active miss out of any training in any particular year. We submit that this is not what the legislature intended, nor what the Act requires when requiring “reasonable access” for paid leave to attend training.

58. Arguably the FWC Draft Term also only grants access to an extra delegate for every complete block of 50 eligible employees. This means, for example, that a workplace of 90 eligible employees would still only be allowed to send one delegate on training each year. There’s is also an arguable case that a workplace of less than 50 employees would receive no training at all which would clearly be inconsistent with the FW Act. A formation

that counted “part therefore” would be more sensitive to businesses size, especially for medium size employers.

59. **Recommendation 12:** To overcome these restrictions, the ACTU is proposing that:

- a. Paid training leave in subsequent years be at least three days;
- b. One delegate for every 25 eligible employees - or part thereof - should have access to training in each year;

60. Further, the parties should be able to agree a shorter period of notice of taking paid training leave. This would be particularly helpful where relevant training has been scheduled at short notice through no fault of the delegates.

61. **Recommend 13:** Add after the word “notice” in X.8(c): “..., unless the parties agree to a shorter period of notice...”.

62. Where there is more than one union with delegates in the workplace, complications may arise as to how paid leave is allocated between delegates. The ACTU is proposing a simple formula that at least one delegate from each relevant delegate’s organisation should be entitled to access paid training each year.

63. **Recommendation 14:** Insert a new X.8(f)

“Irrespective of the entitlements to paid leave under X.8, where more than one delegate’s organisation has a workplace delegate that works for the employer, the employer shall provide at least one of those delegate for each delegate’s organisation with either up to 5 days or 3 days of paid time during normal working hours each year.”

64. Many awards provide for paid leave for representatives to attend training, typically on dispute resolution. This draft term should clarify that such entitlements are preserved and operate concurrently as the ACTU submitted in some detail in our Further Reply Submission of 19 Paril 2024

65. **Recommendation 15:** Add a new X.8(g):

“This entitlement in X.8 operates concurrently with, and does not override, any other existing award entitlement to training leave, including for dispute resolution.”

Exercise of entitlements under clause X.9

66. Clause X.9 imposes six restrictions on the rights of workplace delegates under Clauses X.5 to X.7. Most of those restrictions are either unnecessary or prevent the proper realisation of delegates rights. On a scan of awards, this may also be the first time, that an Award clause would place obligations on an employee.

67. The law already contains adequate protections for breaches of the employment relationship by employees. The crudest of these is the employer's ability to sanction employees, up to and including by terminating the employment contract. In addition to this, employers have many measures in contract and tort law available to them to protect their legitimate interests. The current state of law is sufficient in this regard, insofar as it already protects the interests of employers. The FWC's proposed X.9 would elevate these protections for employers to being statutory protections in the form of an Award. This would mean that a workplace delegate found not to comply with X.9 could be exposed to civil penalties as well as any other remedies in contract or tort law which would continue to be available.
68. In circumstances where the legislature has created beneficial rights to support delegates, potentially exposing them to civil penalties is a highly disappointing, unwelcome and counter-intuitive outcome.
69. The ACTU and its affiliated unions strongly oppose the entire clause X.9 and call for its removal. Nevertheless, in the event that the Bench is not minded to delete the Clause, we put forward the following suggestions to improve it.
70. Firstly, the clause is badly unbalanced towards the rights of employers. To correct this the ACTU is proposing that:
- a. the protections currently in Note 1 of the FWC's Draft Term be elevated to be the opening new clause X.9(a); and
 - b. A new Clause X.9(b) includes an introductory test that the workplace delegate must adhere to the restrictions below "as far as is reasonably practicable (and to the extent that it does not impinge upon their rights as a delegate)". This better enables a fair balancing between the rights of a delegate and their obligations to their employer.
71. **Recommendation 16:** Include the protections in Note 1 as the new opening clause in X.9 and introduce the qualification of "as far as is reasonably practicable (and to the extent that it does not impinge upon their rights as a delegate.)"
72. On the specific restrictions in the clause, Clause X.9(a)(i) of the FWC's Draft Term states that a workplace delegate must comply with their duties and obligations as an employee. To the extent that this is read as a general exhortation, it is not necessary – there already exist means for employers to address non-compliance with such duties and obligations within the rubrik of the employment relationship. However, to the extent that the term seeks to sub-ordinate the exercise of functions as a workplace delegate to first having to comply with duties as an employee could mean that a workplace delegate could be effectively sidelined. For example, an employer could direct a union delegate to perform

work or carry out a task when a consultation or disciplinary meeting is occurring, thereby preventing their involvement.

73. Clause X.9(a)(ii) requires a delegate to comply with the “reasonable policies and procedures of the employer...”. Rather than leave the determination of what is reasonable solely to the workplace, it would be help if the clause described some key limits to the application of such policies and procedures.

74. **Recommend 17:** Add to X.9(a)(ii) after the word “resources”:

“...to the extent that they do not impinge upon the rights of a delegate and are not applied in a discriminatory manner.”.

75. Clause X.9(a)(iii) is the most problematic. The proposed obligation on a delegate not to “hinder, obstruct or prevent the normal performance of work” would effectively prevent them from performing her role during working hours. Many activities of a delegate will need to be performed during working hours. This includes, for example, representing a member at a disciplinary meeting, or participating in a bargaining meeting. Even if an employer consented to the attendance of a delegate at such meetings, on a literal reading of the clause the delegate might still be in breach of it.

76. While proposed clause X.5(b) enables a delegate to exercise their right to communicate “during working hours” that right may not extend to other activities association with representation. Even then, that right to communicate may be in conflict with proposed X.9(a)(iii).

77. The clause would also see a workplace delegate lose their rights to represent workers or to access the workplace and its facilities if they helped to organised protected industrial action during a round of enterprise bargaining.

78. The FWC Draft Term needs to strike a better balance between enabling a delegate to exercise their rights on work time, and to meet their obligations to the employer as an employer.

79. **Recommendation 18:** Add the word “unreasonably” after the word “not” in X.9(a)(iii) of the FWC’s Draft Term.

80. Clause X.9(iv) provides that a delegate must “not hinder, obstruct or prevent employees exercising their rights to freedom of association”. This inclusion is not necessary and unwelcome. Freedom of association is properly seen as the freedom of workers to form, join and participate in their unions. At any rate, workers who elect not to join unions are already protected by the FW Act’s General Protections. Further, the legislature has decided to create beneficial rights for delegates precisely to overcome barriers they face to exercising freedom of association. It would cut against the message if the only

reference to freedom of association in the FWC's Draft Term was used to limit the rights of delegates.

81. Recommendation 19: Delete clause X.9(iv)

82. Subclause X.9(b) states that an employer does not have to provide a delegate with access to electronic means of communication in a way that provides individual contact details for eligible employees. In many scenarios, this will prevent a delegate from having any way to contact members or persons eligible to be members. For example, where members work on different sites, or work remotely. This would inhibit a workplace delegate from, for example, consulting employees on whether or not they want to bargain for the purposes of securing a majority support determination. A balance must therefore be struck between protecting personal contact details such as home phone numbers and addresses and those work-related details such as an email with a work address. To achieve this the ACTU seek a clarifying sentence to this effect.

83. Recommendation 20: Add at the end of X.9(b):

“For the avoidance of doubt, this does not include means of communication that are ordinarily used by the employer to communicate with eligible workers including work-related email addresses.”

84. Finally, clause X.9(c) in the FWC's draft term effectively requires an employee's consent before a workplace delegate can represent them. This is impractical in circumstances where a delegate needs to represent an interest collectively and where securing individual consent is impractical, e.g addressing an urgent WHS concern. The ACTU instead proposes amending this clause to bring it into line with the similar note in the Act which strikes a better balance.

85. Recommendation 21: Replace X.9(c) with:

- a. “Clause X does not create any obligation on a person to be represented by a workplace delegate.

Attachment A— ACTU amended term of FWC’s draft modern award delegates’ rights term

X. Workplace delegates’ rights

X.1 Clause X provides for the exercise of the rights of workplace delegates set out in section 350C of the Act.

X.2 In clause X:

~~(a) — employer means the employer of the workplace delegate;~~

~~(b)(a)~~ **delegate’s organisation** means the employee organisation whose under the rules of which the workplace delegate was appointed or elected in accordance with; and

~~(e)(b)~~ **eligible workers-employees** means members and persons eligible to be members of the delegate’s organisation who work in a particular enterprise~~are employed by the employer.~~

↓

X.3 ~~Before exercising entitlements under clause X, a workplace delegate must give the employer written notice of their appointment or election as a workplace delegate. If requested, the workplace delegate must provide the employer with evidence that would satisfy a reasonable person of their appointment or election as a workplace delegate, if the workplace delegate or delegate’s organisation has not done so already. [IN THE ALTERNATIVE: For the avoidance of doubt, a failure of a workplace delegate to give notice in accordance with this clause will not invalidate their rights as a delegate.]~~

X.4 An employee who ceases to be a workplace delegate must give written notice to the employer as soon as practicable.

X.5 Right of representation

(a) A workplace delegate may represent the industrial interests of eligible workers ~~employees~~ in matters including but not limited to:

(i) consultation about major workplace change;

(ii) consultation about changes to rosters or hours of work;

(iii) resolution of individual or collective grievances, ~~or disputes,~~ or matters

including at the workplace level and in courts or tribunals including the Fair Work Commission;

~~(iii)~~(iv) performance management and disciplinary processes;

~~(iv)~~(v) enterprise bargaining; ~~and~~

(vi) any process or procedure in which the eligible workers employees are entitled to be represented;

.

- (b)** A workplace delegate should get access to shift, roster and other flexible work changes where necessary, and if requested, to facilitate the exercise of their right under this clause.

X.6 Entitlement to reasonable communication

(a) A workplace delegate may communicate with eligible workers employees ~~in relation to for the purpose of~~ representing their industrial interests ~~of the employees~~ under clause X.5. This includes, but is not limited to:

(i) discussing membership of the delegate's organisation with ~~the employees~~ eligible workers, including by addressing induction meetings; and

(ii) consulting the delegate's organisation in relation to matters in which the workplace delegate is representing eligible workers employees

~~(i)~~.

(b) A workplace delegate may communicate with eligible workers employees individually or collectively, including at meetings, during working hours or work breaks, or before the start or after the end of work.

(c) The employer must not survey, monitor, record or otherwise infringe the privacy of communications between workplace delegates and their union, and eligible persons.

X.7 Entitlement to reasonable access to the workplace and workplace facilities

- (a) The employer must provide a workplace delegate with access to or use of the following workplace facilities, unless the employer does not have them:
- (i) a room or area to hold discussions, ~~that, where possible, shall be~~ ~~which is~~ fit for purpose, private and accessible by the workplace delegate and eligible ~~workers~~ ~~employees~~;
 - (ii) a physical or electronic noticeboard;
 - (iii) electronic means of communication that are ordinarily used by the employer to communicate with eligible ~~workers~~ ~~employees~~—in the workplace, ~~and where possible, are private~~;
 - (iv) a lockable filing cabinet or other secure document storage area; and
 - (v) office facilities and equipment including printers, scanners, photocopiers and wi-fi; and
 - (vi) any other access to the workplace or workplace facilities that the workplace delegate or eligible workers would ordinarily have access to in their capacity as employees.
- (b) Where reasonable access to the workplace or workplace facilities requires securing the consent of another person the employer will take all reasonable steps to secure such consent.

X.8 Entitlement to reasonable access to training

Unless the employer is a small business employer, the employer must provide a workplace delegate with access to ~~up to~~ 5 days of paid time during normal working hours for initial training and ~~31~~ 34 days in each subsequent year, to attend training related to representation of the industrial interests of eligible ~~workers~~ ~~employees~~, subject to the following conditions:

- (a) The employer is not required to provide the 5 days or ~~31~~ 34 days of paid time during normal working hours, to more than one workplace delegate per ~~2550~~ employees, or part thereof, employed by the employer ~~eligible employees.~~

- (b) A day of paid time during normal working hours is the number of hours the workplace delegate would normally be rostered or required to work on a day on which the delegate is absent from work to attend the training.
- (c) The workplace delegate must give the employer as much notice as is practicable, and not less than 5 weeks' notice, unless the parties otherwise agree to a shorter period of notice or the delegate's organisation has already provided such notice, of the dates, subject matter and the daily start and finish times of the training.
- ~~(d) The workplace delegate must, on request, provide the employer with an outline of the training content.~~
- ~~(e)~~(d) The employer must advise the workplace delegate and the delegate's organisation as soon as is practicable, and not less than 32 weeks from the day on which the training is scheduled to commence, whether the workplace delegate's access to paid time during normal working hours to attend the training has been approved. Such approval must not be unreasonably withheld.
- (e) ~~If requested, t~~The workplace delegate must provide the employer with evidence that would satisfy a reasonable person of attendance at the training, within 7 days after the day on which the training ends, if the delegate's organisation has not already done this.
- (f) ~~Irrespective of the entitlements to paid leave under X.8, where more than one delegate's organisation has a workplace delegate that works for the employer, the employer shall provide at least one of those delegates for each delegate's organisation with either up to 5 days or 3 days of paid time during normal working hours.~~

This entitlement in X.8 operates concurrently with, and does not override, any other existing award entitlement to training leave, including for dispute resolution.

X.9 Exercise of entitlements under clause X

- (a) Where an employee acts in their capacity as a workplace delegate the employer of the workplace delegate must not:
 - (i) Unreasonably fail or refuse to deal with the workplace delegate; or

~~(ii)~~ Knowingly or recklessly make a false or misleading representation to the workplace delegate; or

~~(iii)~~ Unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under the Act or clause X.

~~(a)(b)~~ In exercising their rights under this clause, A workplace delegate must as far as is reasonably practicable (and to the extent it does not impinge upon their rights as a delegate):'s entitlements under clauses X.5 to X.7 are subject to the conditions that the workplace delegate must:

~~(i)~~ comply with their duties and obligations as an employee; and

~~(ii)~~ comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources; and

~~(iii)~~ not unreasonably hinder, obstruct or prevent the normal performance of work; and

~~(iv)~~ not hinder, obstruct or prevent employees exercising their rights to freedom of association.

~~(b)(c)~~ Clause X does not require the employer to provide a workplace delegate with access to electronic means of communication in a way that provides individual contact details for eligible workeremployees. For the avoidance of doubt, this does not include means of communication that are ordinarily used by the employer to communicate with eligible workers including work-related email addresses.

~~(e)(d)~~ Clause X does not create any obligation on a person require an eligible employee to be represented by a workplace delegate without the employee's agreement.

~~NOTE 1: Under section 350A of the Act, the employer must not:~~

~~(a)~~ unreasonably fail or refuse to deal with a workplace delegate; or

~~(b)~~ knowingly or recklessly make a false or misleading representation to a workplace delegate; or

~~(c) — unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate under the Act or clause X.~~

NOTE 12: Under section 350C(4) of the Act, the employer is taken to have afforded a workplace delegate the rights mentioned in section 350C(3) if the employer has complied with clause X

Definitions to be included in clause 2 of each award

employee organisation has the meaning given by section 12 of Act.

employer has the meaning given by s.15(2) of the Act.

enterprise has the meaning given by section 12 of the Act.

small business employer has the meaning given by section 23 of the Act.

workplace delegate has the meaning given by section 350C(1) of the Act.

address

ACTU
Level 4 / 365 Queen Street
Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au
australianunions.org.au