

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

Variation of Modern Awards to Include a Delegates' Rights Term

(AM2024/26)

NTEU SUBMISSIONS ON DRAFT TERM

Background

1. The NTEU has previously provided written submissions in relation to this Award review dated 6 and 28 March 2024, and oral submissions on 12 April 2024. We continue to rely on those submissions and adopt the defined terms therein.
2. NTEU provides these further submissions in response to the **draft delegates' rights term** included at Attachment A of the President's Statement dated 10 May 2024.
3. NTEU generally welcomes the approach taken by the Full Bench in relation to the draft term and commends it on the balance that it has struck between the rights of delegates and the interests of employers conducting an enterprise.
4. We provide these submissions on the basis of NTEU's concern about some aspects of the draft term may operate in practice in the Higher Education sector. These submissions do not seek additional rights over what has been provided in the draft term, however seek instead to clarify some aspects of the draft term in order to reduce the likelihood of disputation.
5. We have read a draft copy of the ACTU's submission in response to the draft term and adopt them as our own but do not repeat them here.
6. We provide submissions on specific aspects of the draft term below and an amended draft term including NTEU's proposed amendments is included at **Attachment A**. We note that while we support ACTU's submissions in relation to the draft term, we include only the amendments about which we make specific submissions in that attachment.

X.6 Entitlement to reasonable communication

7. NTEU is concerned that the right to reasonable communication is narrower than the right contained in s 350C of the FW Act. That is so because cl X.6 provides a right to communicate with eligible employees for the purpose of 'representing the industrial

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interests of employees', which is narrower than the right to communicate with employees *in relation to* their industrial interests contained in s 350C.

8. As outlined in our oral submissions,¹ this right is very broad and goes beyond the right to merely represent the industrial interests of employees to their employer, and includes the right to communicate with any eligible employees about any matter that has a direct or indirect relationship with their industrial interests.
9. Further, while we commend the Full Bench for clearly signposting the right for delegates to discuss membership of the delegate's organisation with eligible employees, we are concerned that such signposting could inadvertently lead to the general right being read down by operation of the *ejusdem generis* principle – that is, by expressly mentioning the right to discuss membership of the organisation, a reader may understand that the broad right is limited to matters that are in the same class as membership of an organisation in circumstances where the Act does not so limit the right.
10. However, given the employer submissions to the contrary, NTEU submits that the general approach of including reference to that right is the correct approach in order to ensure that there is no ambiguity as to that right. We therefore recommend retaining that explicit right, with only minor amendment.
11. In light of the above we recommend that the draft term be amended in the following way:

A workplace delegate may communicate with eligible employees for the purpose of representing the industrial interests of the employees under clause X.5 and in relation to their industrial interests. Without limiting this right, this includes discussing membership of the delegate's organisation with the employees and consulting the delegate's organisation in relation to matters in which the workplace delegate is representing employees.

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

12. NTEU welcomes the approach of the Full Bench in relation to clause X.7. However, we note that there is somewhat different treatment between right to communicate with employees physically and electronically in that while physical space must be provided in order for employees and delegates to communicate in private, no such entitlement exists for electronic communication.

¹ Transcript of Proceedings, *Variation of modern awards to include a delegates' rights term* (Fair Work Commission, AM2024/26, Asbury VP, Binet DP, Lim C, Friday 12 April 2024) PN832-PN841.

13. The privacy of communication is as important in electronic communication as it is in physical communication, and similar privacy requirements should apply. Such a requirement would not prevent an employee with a complaint about the content of such communication from forwarding on any communication about which they had an objection to any appropriate person within the organisation, just as an employee could report perceived problematic communications held in person to an employer.
14. However, the first principles position should be that delegates are entitled to private electronic communications in the same way that they are entitled to private physical communications.
15. Therefore, NTEU submits that X.7(c) should be amended as follows:

Private electronic means of communication that are ordinarily used by the employer to communicate with eligible employees in the workplace;

and an additional subclause be added to X.6 in the following terms:

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

16. Consistently with the proposed amendment above, clause X.9(b) should be amended as follows:

(b) Clause X does not require the employer to provide a workplace delegate with access to electronic means of communication in a way that provides personal individual contact details for eligible employees. 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.

17. Such a provision is consistent with the work practices in Higher Education, where, particularly for academic staff, the work email addresses and phone numbers of employees are advertised to the public on the internet,² and general staff email addresses are accessible on employer intranet (where they are not also publicly available on the internet). A prohibition on providing work email addresses to delegates would mean that the delegate has fewer rights than the general public to easily communicate with eligible workers. Requiring the employer to provide this

² See for example <https://www.acu.edu.au/research-and-enterprise/our-people/leah-kaufmann>; <https://researchers.mq.edu.au/en/persons/alison-barnes>; <https://hpi.uq.edu.au/profile/389/andrew-bonnell>; <https://staffprofile.unisq.edu.au/Profile/Andrea-Lamont-Mills>.

information (as opposed to requiring the delegate to manually search for and record each staff members' email address for the purpose of communicating with them) is consistent with the right contained in s 350C.

18. We acknowledge that this submission departs slightly from our alternative oral submission regarding provision of email lists.³ However, on reflection we are concerned that de-identified distribution lists create an unacceptable risk that delegate communications will accidentally include inappropriate recipients, and a delegate would never know whether they are sending communications directly to their supervisor or another inappropriate recipient, or that an unscrupulous employer may include a Human Resources employee in any requested anonymous list in circumstances where a delegate would never be able to determine whether that had occurred.
19. Such an explicit entitlement is necessary to ensure that union communications are received by their intended recipients only, subject to the right of any recipient to forward such communications with others as outlined above. This is particularly important given the current drafting of clause X.9(b), which may not allow a delegate to know who is included in any anonymous distribution list provided by an employer. This current position can be contrasted to the right provided in clause X.7(a), where a delegate exercising their right to hold physical discussions in a private room would be aware of the identities of those with whom they are speaking.

X.9 Exercise of entitlements under clause X

20. NTEU is concerned that the conditions placed on the rights of delegates provide for in the draft term may be significantly undermined by the way in which the conditions in clause X.9(a) are drafted.
21. For example, a delegate's right to represent the industrial interests of employees in enterprise bargaining naturally includes that ability to communicate with both employees and their Union about planning for industrial action. That right may conflict with their obligations as employees, such as a duty of fidelity owed to their employer.⁴
22. Similarly, the condition that a delegate not exercise their rights in ways that 'hinder, obstruct or prevent the normal performance of work' is inconsistent with the right to reasonable communication during working hours. Time is a finite resource, and any

³ Above n1, PN856.

⁴ For an example of that conflict, see *DHL Supply Chain (Australia) Pty Ltd Limited v United Workers' Union* [2021] FCA 707 at [20].

time speaking with employees during working hours necessarily means less time for the normal performance of work, even if that is only by a few minutes. Therefore there must be an unreasonableness qualification on the condition found in subclause (a)(iii) to ensure that the right to communicate during working hours be rendered nugatory or subject to significant disputation.

23. Further, we are concerned about the condition that delegates must exercise their rights subject to any reasonable policies and procedures of their employer, particularly the requirement to comply with acceptable use of ICT resources.

24. In our reply submissions we gave a number of examples of university ICT policies that are directly inconsistent with the rights contained in the draft term.⁵ Those policies may be reasonable for regular use of employer ICT resources, but would significantly and unreasonably restrict the right to reasonable communication provided in both s 350C and the draft term. Therefore it is essential that any award term ensure that the right to communicate not be restricted by application of otherwise reasonable employer ICT policies.

25. In light of the above, NTEU submits that clause X.9 should be amended in the following way which protects the rights provided by the draft term while also providing appropriate safeguards for employer interests:

(a) *A workplace 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 that are not inconsistent with the rights provided for in this clause;*

(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 that are not inconsistent with the rights under this clause;*

(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.*

Conclusion

⁵ NTEU Reply Submissions dated 28 March 2024 [34]-[36].

26. NTEU reiterate that it welcomes the approach taken by the Full Bench in this matter and believes that the draft term strikes an appropriate balance between the interests of delegates and their employers.

27. We submit that the proposals outlined above do not provide additional rights above those provided for in the draft term, but are necessary to ensure that all parties clearly understand their rights and obligations in order to ensure that unnecessary resources are not expended on disputation and industrial disharmony where there is disagreement about those rights and obligations.

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22 May 2024

Attachment A— NTEU 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) **delegate’s organisation** means the employee organisation under the rules of which the workplace delegate was appointed or elected; and
- (c) **eligible employees** means members and persons eligible to be members of the delegate’s organisation who are employed by the employer in the enterprise.

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.

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 workplace delegate may represent the industrial interests of eligible employees in matters including but not limited to:

- (a) consultation about major workplace change;
- (b) consultation about changes to rosters or hours of work;
- (c) resolution of individual or collective grievances or disputes;
- (d) performance management and disciplinary processes;
- (e) enterprise bargaining; and
- (f) any process or procedure in which the employees are entitled to be represented.

X.6 Entitlement to reasonable communication

- (a) A workplace delegate may communicate with eligible employees for the purpose of representing the industrial interests of the employees under clause **X.5** and in relation to their industrial interests. Without limiting this right, ~~T~~this includes discussing membership of the delegate’s organisation with the

employees and consulting the delegate's organisation in relation to matters in which the workplace delegate is representing employees.

- (b) A workplace delegate may communicate with eligible employees individually or collectively, 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

The employer must provide a workplace delegate with access to or use of the following workplace facilities, unless the employer does not have them:

- (a) a room or area to hold discussions which is fit for purpose, private and accessible by the workplace delegate and eligible employees;
- (b) a physical or electronic noticeboard;
- (c) private electronic means of communication that are ordinarily used by the employer to communicate with eligible employees in the workplace;
- (d) a lockable filing cabinet or other secure document storage area; and
- (e) office facilities and equipment including printers, scanners, photocopiers and wi-fi.

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 1 day each subsequent year, to attend training related to representation of the industrial interests of eligible employees, subject to the following conditions:

- (a) The employer is not required to provide the 5 days or 1 day of paid time during normal working hours, to more than one workplace delegate per 50 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, 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) The employer must advise the workplace delegate as soon as is practicable, and not less than 2 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.
- (f) 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.

X.9 Exercise of entitlements under clause X

- (a) A workplace 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 that are not inconsistent with the rights provided for in this clause;
 - (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 that are not inconsistent with the rights provided for in this clause;
 - (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) Clause **X** does not require the employer to provide a workplace delegate with access to electronic means of communication in a way that provides personal individual contact details for eligible employees. 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.
- (c) Clause **X** does not 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 2: 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.

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.