Australian Industry Group

Delegates' Rights Term

Submissions in Reply
(AM2024/6)

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AM2024/6 DELEGATES' RIGHTS TERM

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1. INTRODUCTION

1. This reply 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 2024[1] and 30 January 2024[2] in relation to the variation of modern awards to include a delegates' rights term and in reply to the submissions of the other parties, including in particular the Australian Council of Trade Unions (**ACTU Submission**).

2. We have also filed a detailed submission dated 4 March 2024 (**Ai Group 4 March Submission**).

3. Whilst this reply is focussed on the ACTU Submission. However, the absence of response to a particular contention by the ACTU, its affiliates or another interested party should not be taken by the Commission as indicating our agreement acceptance of the submission.

2. RESPONSE TO THE ACTU SUBMISSION REGARDING THE ROLE OF DELEGATES

4. The ACTU provides an outline of its views as to the purported role and positive impact of delegates. The ACTU also makes various factual assertions about the purported mistreatment of delegates.

5. The ACTU, as well as its affiliates, are unsurprisingly advocates for the role of delegates and the merit of the activities of delegates. While some delegates of course play a constructive role, unfortunately, Ai Group is also aware of many instances where union delegates have not acted in such a manner. Indeed, it is trite to observe that in some instances, particularly in the context of industrial disputation or heated negotiations over enterprise bargaining, some delegates engage in conduct which is inappropriate and damaging to the interest of their employers and co-workers.

[1] [2024] FWC 150.

[2] [2024] FWC 241.

6. Ai Group respects the role of unions (and delegates) and does not seek to advance a submission that is antagonistic towards the union movement. Nor do we condone any unlawful conduct towards delegates.

7. It is not feasible, or fair, for the Commission in the current proceedings to make factual determinations as to the merits or otherwise of the role that union delegates play. Nor is it appropriate to make any broad assessment of the extent to which awards should be amended to provide entitlements or protections for union delegates beyond those that are mandated by the new statutory provisions. The task before the Commission is much more confined and it should reject union calls for the development of provisions that do no more than establish a delegates' rights term as contemplated by s.12 of the *Fair Work Act 2009* (Cth) (**Act**).

8. Instead of adopting the broad assertions in the ACTU Submission regarding the role of delegates, the Commission should adopt the following basic propositions in considering the task before it:

   i. There are already powerful protections for delegates, both through the new statutory provisions and pre-existing provisions of the Act.

   ii. The principle of 'freedom of association' underpins the operation of the legislative scheme.

   iii. Although the level of union membership differs between industries, relatively few private sector employees elect to join a union. Some employees will not wish to be represented by a union and may prefer to be represented by another party in matters related to their industrial interests.

   iv. The extent to which union representation (through a delegate or otherwise) could be said to have a positive (or negative) impact on an employer (or on matters such as productivity) is contested.

   v. Delegates may not be experts in workplace law (as acknowledged by the ACTU) and it is not feasible to expect that they operate as a substitute for professional advisors (be they lawyers or union officials), given the notorious complexity of the workplace relations system.

vi. Delegates may perform many activities in their capacity as a delegate. Not all such activities could sensibly be regarded as work which provides an entitlement for the delegate to be paid under current award terms, an applicable fair work instrument or any arrangement between the delegate and their employer.

vii. Awards already provide significant rights for union representation. This includes model or standard terms dealing with

- Consultation about major workplace change;
- Consultation about changes to rosters or hours or work; and
- Dispute resolution.

viii. Some awards provide entitlements beyond those set out in standard award terms, such as dispute resolution training leave. There does not, however, appear to have been any significant arbitral consideration of the merit of these provisions subsequent to the making of modern awards. As such, the inclusion of such provisions in modern awards largely reflect the historical position in relevant predecessor instruments.

ix. Some employers provide delegates with additional benefits beyond those mandated by the Act or awards. Sometimes this is pursuant to formal arrangements, such an enterprise agreement. In other instances it is a product of less formal agreements with a union or simply provided at the discretion of an employer. These matters are frequently successfully negotiated or otherwise dealt with at the workplace level.

x. The role of a delegate is, as the ACTU acknowledges, a voluntary one. The new statutory provisions only dictate payment in connection with training and only in the context of employers other than small business employers.

xi. The new statutory provisions do not provide delegates an unfettered right to ignore their own employment commitments when elected to pursue their role as a delegate.

3. THE WEIGHT THAT CAN BE GIVEN TO EVIDENTIARY MATERIAL FILED IN THE PROCEEDINGS

9. The relevant Statements[3] issued by Justice Hatcher in relation to this matter only invited submissions from the parties. The Statements did not invite the filing of evidence. Given the legislative timeframe imposed on the Commission to determine the content of the delegates rights' term, it has elected, appropriately, not to approach the task of developing appropriate award terms through the prism of typical award variation proceedings.

10. The consequence of this approach is, predictably and appropriately, that parties have not sought to advance any evidentiary material. This will have a bearing on the nature of the factual or discretionary determinations that can fairly or safely be made by the Commission in the proceedings and, ultimately, on the nature of any variation that should be made.

11. The ACTU Submission is accompanied by, and relies upon, an expert report by Professor David Peetz[4] (**Expert Report**). The United Workers' Union (**UWU**) supports the submissions of the ACTU and has also filed witness statements of a number of members that relate to the role and rights of workplace delegates.

12. In broad terms, we do not accept various factual propositions in the Expert Report or the witness statements filed by the ACTU and UWU. Given the manner in which these proceedings are being conducted, it would not be appropriate for the Commission to accept the veracity of any factual propositions or expert opinion contained in such material. Such material could be given no more weight than its logical force of the submissions advanced by other parties.

[3] [2024] FWC 150; [2024] FWC 241.

[4] 'Report on Academic Research on Union Delegates and Worker Voice, Professor David Peetz, dated 29 February 2024.

4. KEY OBSERVATIONS ABOUT THE UNIONS SUBMISSIONS REGARDING THE SCOPE OF A DELEGATES' RIGHTS TERM

13. The submissions of the ACTU and various unions (and their draft delegates' rights terms) propose a wide range of entitlements for workers or obligations upon employers. This appears to reflect an erroneous understanding of the scope and purpose of a delegates' rights term, as contemplated by the Act, and of the Commission's task under clause 95 of Schedule 1 to the Act; as well as, by extension, the purpose of these proceedings.

14. In many instances the unions are seeking terms that deal with subject matter that is beyond the scope of the kinds of issues that should be considered in the current proceedings. We understand the current proceedings are directed at the specific and relatively narrow purpose of satisfying the Commission's obligations under clause 95 of Division 4 of new Part 15 in Schedule 1 to the Act. The union parties are, instead, inappropriately seeking a raft of new obligations related to delegates or union representation. It would be deeply unfair for the Commission to consider varying awards in a manner beyond that required by clause 95 of Schedule 1 to the Act given the truncated nature of these proceedings.

15. In contrast, Ai Group has proposed a clause that is intended to be targeted at satisfying the requirements of clause 95 of Schedule 1. We acknowledge that there may be some consequential amendments that should be made to existing award clauses (such as the potential removal of existing clauses dealing with dispute resolution training leave). However, we contend that to the extent that these are contentious, this should only occur through these proceedings where there is a compelling reason to do so, such as obvious and potentially problematic overlap of matters dealt with in these provisions and any new delegates' rights clause. Given the short time frame the Commission has to finalise these proceedings , it may be necessary for some of these matters to be dealt with after the form of a new delegates' rights term is determined.

16. We are also concerned that many of the provisions proposed by unions would not constitute terms that could be included in modern awards, given the nature of their content. That is, they are not terms that would be permissible pursuant to s.136 of

the Act. In most instances the unions have not identified the section of the Act that would permit the inclusion of their proposed provisions in an award.

17. Certainly, many of the provisions could not constitute 'delegates' rights terms' as contemplated by s.12 and s.149E of the Act and accordingly should not be inserted into awards as part of these proceedings. In this regard we observe that the scope of delegates' rights term is significant, given the broader legislative scheme in the Act dealing with delegates' rights. Relevantly, a delegates' rights term in an enterprise agreement must be compared to a delegates' rights term in an award. An award term that is more favourable will, in effect, prevail over the relevant agreement term, and even be taken to be a term of the agreement.[5] The entitlements created by such a term will also be 'workplace rights' for the purposes of the general protections provisions of the Act[6]. Given the significance of the delegates' rights term in the broader scheme of the Act, the Commission should not vary awards to include a delegates' rights term containing elements beyond those that are mandated by s.12 and s.149E of the Act.

18. It is also not apparent that all elements of the proposals advanced by unions could otherwise be included on the basis of the operation of another part of Act (such as s.139 or s.142).

19. More broadly, many of the proposals contain provisions that the Commission could not be satisfied are 'necessary' in the sense contemplated by s.138.

20. To fully explain our concerns, below we below further address the relevant sections of the Act.

21. Clause 95 of Division 4 of the new Part 15 in Schedule 1 to the Act sets a narrow task for the Commission. As noted by the President, the provision provides:

> "…that the Commission must, by 30 June 2024, make a determination varying modern awards that are, or will be, in operation on 1 July 2024 to include a delegates' rights term. This means that that all current modern awards must be varied to include a delegates' rights term…."[7]

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[5] See section 205A of the Act.

[6] Fair Work Act 2009, section 341.

[7] [2024] FWC 150 at [8].

22. A delegates' rights term is narrowly defined as follows in s.12 of the Act:

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

23. It is important to appreciate that the delegates right term must '*provide for*' the '*exercise*' of the rights of workplace delegates. Put another way, the clause must make available for use such rights.

24. The relevant '*rights*' are those contemplated by s.350C. This interpretation is supported by the use of the words '*the rights of workplace delegates*' in s.12 which reflects an assumption in the legislation that the rights are known matters (as they are set out in s.350C). Any doubt about this is removed by the statutory note. It is, consequently r important to appreciate that the statute does not provide for an open-ended capacity to provide rights to delegates or obligations upon employers.

25. The rights or entitlements of a workplace delegate that must be provided are those contemplated by s.350C. In effect, they are:

    (a) An entitlement to represent industrial interests of members of a union, or persons eligible to be such members;

    (b) Reasonable communication with relevant members and eligible members in relation to their industrial interests;

    (c) Reasonable access to the workplace and facilities for the purpose of representing these industrial interests; and

    (d) Unless the employer is a small business employer, reasonable access to paid time to attend training for the purpose of representing members' industrial interests.

26. We make submissions regarding each component in the sections that follow.

An entitlement to represent industrial interests of members of a union, or persons eligible to be such members

27. Relevantly, it appears that when s.350C(2) is read in the context of s.350C(1), which defines who is a workplace delegate, the clause does not constitute an entitlement to represent persons who do not work at a particular enterprise. It would not, for example, provide a right to represent persons whose employment has terminated. Nor would it constitute a right for a delegate to represent the industrial interests of other members or eligible members of a union who work in a particular enterprise. A similar observation could be made about s.350C(3).

28. It also appears that there is significant dispute between parties who have advanced submissions in these proceedings as to precisely what constitutes '*industrial interests*' or '*representing*' those interests as contemplated under the Act. We do not, for example, accept that it could capture the broad range of matters contemplated by the UWU.[8]

Reasonable communication with relevant members and eligible members in relation to their industrial interests

29. This is not an entitlement to communication 'at large' with members or eligible members. The communication must relate to their industrial interests. It could not be about recruitment of members or other causes or outcomes that a union is advocating for beyond the industrial interests of the relevant person who is being communicated with.

For the purpose of representing industrial interests of a relevant person, reasonable access to the workplace / facilities, and (unless the employer is a small business employer) reasonable access to paid time during working hours for related training

30. It is important to recognise that it is only *reasonable* access to a workplace and workplace facilities that must be provided. It is not unfettered access.

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[8] See United Workers Union submissions dated 1 March 2024.

31. Also, it is only access that must be provided, not the ability to utilise such access. That is, the employer must, to the extent that it is reasonable, provide an opportunity to enter a site or facility. An employer is not required to provide a delegate with, for example, transportation to enable them to easily make use of such access to a workplace or to do so without incurring their own costs. The legislation also does not require that the employer obtain particular facilities (or equipment). For example, it does not contemplate that an employer must purchase IT equipment to make available for a delegate or put up a notice board where one does not exist.

32. We have addressed the entitlement that is created by the Act in relation to paid time in our previous submissions. Having regard to the submissions of various unions and their proposed clauses, we seek to clarify the following matters in relation to the nature of the entitlement contemplated by s.350C(3)(ii):

    (a) The entitlement is to access to paid time during normal working hours for the purpose of related training. It is not an entitlement to be paid when attending such training regardless of *when* it occurs.

    (b) The paid time must be for training related to representing the interests of relevant employees. It is not training for other activities that a union may wish a delegate to undertake (such as training about matters related to the operation of the union, recruitment of members, or campaigns that the union may be pursuing).

    (c) There is no entitlement to be paid for time spent at training if it occurs outside of normal working hours.

    (d) The Act does not contemplate the establishment of any right to be paid for time that an employee may take to travel to the training.

    (e) The Act does not create an obligation to alter rosters or working arrangements to accommodate attendance at training beyond merely providing for paid time off during normal working hours.

    (f) The Act does not stipulate the rate at which the paid time must be provided. This is a matter that can and should be dealt with in a delegates' rights term.

There is a need for precise guidance to be provided about such a matter to avoid a potential underpayment and foreseeable disputation.

(g) The Act does not prescriptively identify the amount of paid time that must be provided. This is also matter about which a clause can and should set prescriptive parameters.

33. Having regard to the requirement that any term must be *reasonable* we have identified relevant considerations that should be taken into account in making such a determination and only proposed outer limits on the amount of training time that could, in our view, potentially be regarded as reasonable in all circumstances.

34. We note that various parties have proposed different periods of leave and / or caps on the number of delegates that should be able to access the leave. There has however been little material or cogent reasoning to substantiate the adoption of such proposals. Relevantly, the material provided by the ACTU provides little more than a rough outline of matters purportedly dealt with through some union training courses and it reveals that the training would cover subject matters beyond that contemplated by s.350C(3)(ii) of the Act.

35. We also here emphasise that limited guidance can be taken from current content of awards dealing with dispute resolution training leave given they reflect the historical development and content of such provisions prior to the award modernisation process, rather than the requirement of the current legislative scheme and the circumstances of particular industries. Similarly, approaches commonly adopted in enterprise agreements should not hold much weight in any assessment of what should constitute an appropriate safety net of minimum entitlements.

36. We will return to this matter later in these submissions.

The limitation of ‘reasonableness’ and s.138 of the Act

37. It is convenient to here emphasise that the rights contemplated by s.350C(2) and s350C(3) are subject to the limitation of ‘reasonableness’. A delegates’ rights clause in an award could therefore not validly establish entitlements related to

communication, access to a workplace or workplace facility or access to paid time for training that is not reasonable.

38. There are many aspects of the union proposals that could not be viewed as reasonable. This may be because they would be unreasonable in all circumstances, or because of their potential to operate unreasonably in the context of a particular enterprise or employment arrangement.

39. A challenging aspect of the task before the Commission is that it must develop a clause that creates the substantive rights contemplated by s.350C(2) and s.350C(3) but does so in a manner that, in all circumstances, only provides *reasonable* entitlements.

40. It must also ensure that a delegates' rights term only includes provisions that are necessary in the sense contemplated by s.138 of the Act. This focusses the Commission's attention on the need to ensure awards constitute part of a fair and relevant *minimum* safety net of terms and conditions and the requirement that the perspectives of both employers and employees is weighed. It also necessitates a consideration of the need to ensure an award system that is '*simple and easy to understand*.' In determining the content of a delegates' rights term the Commission must, in essence, strike a balance between providing further detail or prescription as to how any new entitlement operates and merely replicating the provisions of the Act in order not to either fail to provide for the entitlements contemplated by s.350C or create entitlements beyond those contemplated the new provisions. It must also only develop terms that would be *necessary* to achieve the modern awards objective. Having regard to the above, we have, unlike the unions, proposed a clause that is tightly directed towards the matters identified in s.350C. We have also proposed an approach of identifying factors that should be considered in deciding what is reasonable when determining the entitlement to paid time contemplated by s.350C(3)(ii). It is however open to the Commission to place some restrictions on the operation of the new entitlements that would be reasonable in all circumstances (and we have proposed some). To the extent that it does, an employer can rely on the protection afforded by s.350C(4) in response to any contention that it has breached s.350C of the Act when acting pursuant to a relevant

delegates' rights clause in an award. We have proposed various specific requirements in this regard in clause X.6 of our draft clause.

41. We accept that any restrictions must be consistent with the scope or nature of the entitlement afforded under s.350C of the Act and have accordingly proposed an approach that leaves some room for individual circumstances to be considered. For example, we have proposed a cap on the amount of paid time that must be provided for paid absences for relevant training, but have not suggested that such time must be provided in all circumstances. This would leave scope for an employer to refuse to provide access to such time if it is unjustified in particular circumstances. To the extent that we have placed broader restrictions on the operation of the various entitlements we maintain that they are all reasonable[9] and necessary[10].

Overarching observation about the scope of the delegates' rights term and its relevance to these proceedings

42. The significance of the points raised above is that a delegates' rights term created through this process should be confined in its scope to a term that provides for the exercise of the rights contemplated by s.12 and by extension s.350C of the Act. A delegates' rights term cannot be used as a vehicle to provide broader entitlements. Nor can it impose obligations on employers that are not a product of a clause that provides for the exercise of those rights.

43. Put another way, s.149 does not permit awards to simply include terms about delegates. The content of any term must be capable of being included in a modern award. Pursuant to s.136, a modern award can only include terms that are permitted or required by provisions of the Act listed in that section. Most relevantly for these proceedings, s.149E provides:

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

44. When regard is had to the various statements issued by the Commission in relation to these proceedings it is clear that they are directed at fulfilling the Commission's

[9] In the sense contemplated by s.350C of the Fair Work Act.

[10] In the sense contemplated by s.138 of the Fair Work Act.

task contemplated by clause 95.[11] The Commission has not invited parties to propose clauses that deal with what rights or entitlements delegates should have beyond those contemplated by the meaning of a delegates' rights term under the Act.

45. These proceedings are not a broad inquiry into matters such as the benefit of delegates, what measures of support should be provided to them in order to assist them to perform their role, or what procedures for representation should be included in awards. Accordingly, as a matter of procedural fairness, and independent of any technical restrictions on the context of awards, we submit that these proceedings should not be used as a vehicle for the development of provisions that are broader in nature than those which *must* be included in awards pursuant to the task given to the Commission under clause 95 of Schedule 1 to the Act

Responses to union submissions effectively urging an expansion of delegates' rights beyond those contemplated s.350C

46. The ACTU appears to contend, erroneously in our view, that the legislation affords the Commission a broad capacity to deliver various rights to delegates and also deal with "any incidental or facilitative provision". The ACTU Submission states (emphasis added):

> 45. Returning now to the meaning of 'delegates rights term' as being a term which provides for the exercise of the rights of a workplace delegate, it is readily apparent that such a term is envisioned as going beyond the mere expression of the rights themselves (which it must also necessarily do) to also articulate, the extent that may be possible, the manner in which the rights might find expression as any incidental or facilitative provision upon which the exercise of the rights might depend.
>
> 46. In keeping with the broad nature of the rights conferred by the legislation, it is submitted that the present exercise should not be one of seeking to confine delegates rights, or read them down by providing safe harbour upon compliance with a bare set of rules. Rather, it is submitted that the FWC ought to adopt an expansive conception of delegates rights, to ensure that Parliament's intention in legislating for delegates' rights flows through to delegates in workplaces.
>
> 47. This is supported by the Explanatory Memorandum, which makes clear that the intention is for the delegates rights in modern awards to be "more detailed" and at least" provide for the content of the new stator rights."

[11] Of Schedule 1 to the Fair Work Act

> 49. It will inevitably be submitted that this established a need to establish the perimeter of delegates' rights. We make a different submission.

47. The Mining and Energy Union (**MEU**) goes further, submitting that:

> The amendments introduced into the FW Act by the Closing Loopholes Bill set a minimum standard for the delegates' rights term but no maximum standard. In doing so, the legislature has entrusted the Commission with a broad discretion to go beyond the rights outlined in s.350C of the FW Act.[12]

48. We disagree with the unions' views and, as it appears was anticipated by the ACTU, urge the Commission to provide sensible and reasonable parameters around the operation of the new entitlements. That is, in essence, a core part of the reason the Commission has been afforded the power to develop delegates' rights terms instead of entitlements being set out comprehensively in the legislation.

49. We however accept that the intention was that the delegates' rights terms must provide for *at least* the content of the statutory rights. In this respect, it was intended that the clauses could not derogate from the provision of such rights. They must provide for the entitlements contemplated by the Act but may do so with greater specificity as to how such entitlements operate or may be exercised than is provided through the legislation. In advancing this view, we do not contend that it will be possible to comprehensively or prescriptively regulate the precise manner in which the new entitlements can be exercised but, it is appropriate to provide guidance beyond the vague articulation of the new entitlements contained in s.350C of the Act. As indicated in the explanatory memorandum, such provisions were only intended to operate at the level of principle and award terms were intended to provide greater detail.[13]

50. The amendments to the Act do not however require (or themselves permit) the development of a delegates' rights clause that does more than provide for the exercise of the rights contemplated by s.350C. It cannot create additional or different rights. Nor can it circumvent the limitation imposed on such rights (such as the limitation related to reasonableness or the exemption for small business employers contemplated in s.350C(3)(ii)). .

[12] Mining and Energy Union submissions dated 1 March 2024 at paragraph 7.

[13] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* at [827].

51. The scheme of the Act was intended to provide general default entitlements that would operate until such time as a relevant Award term was created that could was create consistent entitlements, albeit in terms that provided greater prescription or clarity as to how the new entitlements may be exercised (this may reflect the circumstances of a particular industry / occupation but need not). We accept that the delegates rights term inserted into awards must actually afford the relevant entitlement. However, once a delegates' rights term is in force in an award, an employer to whom the award applies, can then rely on compliance with such a term as constituting compliance with the requirements of s.350C.

52. The intent is reflected in the operation of s.350C(4). It is also reflected in the Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) (**EM***)*, the EM states (Emphasis added):

> 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. <u>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</u>. 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).

53. Turning to the specific proposal of the unions, we contend that various elements of the ACTU proposal would be beyond the scope of what could validly constitute a delegates' rights term pursuant to s.149E. This is separate to any broader merit based arguments about whether awards should include the kinds of proposals advanced by the unions, or whether they can, having regarding to what is necessary to achieve the modern awards objective, as contemplated by s.138.

54. In the sections below responding to the various clauses proposed by the unions we have identified elements that are clearly beyond the scope of delegates rights term or these proceedings. We note that we have not had time to set out similar analysis of all of the proposals advanced by affiliates but we observe that many contain similar deficiencies.

The ACTU Proposal

55. The ACTU proposed clause is beyond the scope of the parameters for a delegates' rights term. It is in various respects also either unduly complex and unclear as to

precisely what it would require. It does not represent a 'template' for a delegates' rights term that could be seriously considered by the Commission but instead reflects a union 'wish list' of terms that relate to delegates.

5. KEY OBSERVATIONS ABOUT ACTU MODEL CLAUSE

Clause 2 – Right to Represent and Paid Time to Represent

56. Looking to the clause provided by the ACTU, clause 2(1) is not a valid part of a delegates' rights term. It does not provide for the exercise of a right under s.350C of the Act but instead creates a new entitlement to payment.

57. The first proposed note deals with matters beyond the rights caught by s.350(c) and should not be included.

58. Clause 2(2) creates a range of rights that extend beyond the rights that are caught by s.350C. As framed, it appears that virtually every sub-clause provides entitlements that extend beyond those contemplated by s.350C. The drafting is also so unclear that, in various respects, it is not apparent what the clause actually requires. The clause should not be entertained.

59. One problematic example of 'overreach' by the ACTU is the proposed right for a workplace delegate to access shift, roster and other flexible work changes where necessary to facilitate the exercise of their right to undertake their entitlement to represent workers during work time. This clause creates preferential access to this flexibility to workplace delegates, which would provide disruption in the workplace not only from a rostering and logistics perspective[14], but arguably disharmony between different cohorts of employees, i.e. workplace delegates and those employees who are not delegates.

60. Another problematic example under clause 2(2) which deals with *reasonable access to the workplace and workplace facilities is the various unjustifiable requirements related to confidentiality.* The inclusion of this entitlement to

[14] It appears there is no notice requirements to utilise this provision.

information and the sharing of information, undermines the widely-held employee expectation that their personal *information* will be kept *confidential*.

61. Clause 2(3) does not appear to be directed at enabling a delegate to represent a relevant member's industrial interests. It is, instead, about permitting attendance at various proceedings to which an employer is a party and the provision of payment (including for travel time) in connection with such attendance.

62. The suggestion that all, or indeed any, workplace delegates be allowed on paid time to travel to the Commission and *observ*e such proceedings is entirely unreasonable and would undoubtedly have an unreasonable adverse impact on employers in many instances. This is not contemplated by s.350C.

63. It is inconceivable that awards could give rights for a workplace delegate to effectively bring disputes against an employer (which may be strongly opposed by the employer and completely lacking in merit) *and* require that the employer pay the delegates to both prepare for this and attend any hearing etc. Such a provision would not be necessitated by the new statutory provisions, nor should it be included based on merit. It is obviously unfair to employers.

64. Clause 2(4) contains a particularly inappropriate and unreasonable prohibition on an employer dealing directly with a person who is represented by a delegate. Section 350C creates various entitlements for delegates. This includes an entitlement to represent workers. It does not however provide a basis for prohibiting employers from speaking to employees who are represented by a union. Employers must be able to engage with their employees even if they are represented by a union delegate. This is important for a raft of practical reasons (such as obtaining information about matters relevant to work – which may, for example, include issues relevant to safety). It is also appropriate that employees answer relevant questions themselves in the context of matters such as performance management or disciplinary action.

65. A clause prohibiting an employer dealing directly with a person who is represented by a delegate, could not be entertained by the Commission. An employer should always have the ability to speak directly with their employees and engage with them

on issues that relate to their employment. It would not be fair for awards to provide otherwise. A clause that purported to restrict such processes would not be consistent with s.138. This is especially so when such discussions are occurring in the course of an employee's work (i.e. during work time).

66. In advancing the above submission we do not seek to preclude a union also speaking with an employer as a representative of an employee. It must also be borne in mind that not all engagement between an employer and worker that are connected to work could be characterised as being about the individual's 'industrial interests' as caught by the new statutory provisions. In some instances, it will simply be part of proactive management of an organisation's operations or indeed constructive engagement with a worker over their performance. The idea that all such engagement could only ever occur with union involvement is entirely unreasonable and impractical (especially given delays and difficulties that often occur with trying to get a delegate to be available at the times such meetings are held). The inclusion of the ACTU proposed clause that restricts this is unjustifiable.

67. Clause 2(5) creates an inappropriate obligation to consult with delegates regardless of whether they are representing anyone. Rather than being directed at providing for the exercise of rights under s.350C, it is an obvious and radical attempt to alter the standard provisions dealing with consultation on major change that reflect a longstanding 'Test Case' standard.[15] It could not be entertained on the strength of the material advanced by the unions and certainly could not be considered in the context of what are necessarily truncated proceedings. Such clauses already require engagement with an employee's representative (which may or may not be a delegate) once a relevant definite decision has been made.

68. In response to the ACTU's proposed clause 2 more broadly, we observe that s.350C of the Act does not create an entitlement to paid work time for a workplace delegate to represent members of their union, or potential members of their union. The ACTU's contention that the legislative provisions create this entitlement is not accurate and overstates the entitlement. Rather, the provisions create an

[15] Termination, Change and Redundancy Test Case - Decision, Print 6230, Moore J, Maddern J and Brown C, 2 August 1984; Termination, Change and Redundancy Test Case - Supplementary Decision, Print F7262, Moore J, Maddern J and Brown C, 14 December 1984, 9 IR 115.

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)). There is no other entitlement to payment afforded under the legislation. We will revisit paid training and also the small business exemption in detail below.

Clause 3 – Paid Training Leave

69. Looking to clause 3, clause 3(1) is not confined to dealing with payment for training related to the purpose of representing the industrial interests of relevant members or eligible members, as contemplated by s.350C. It deals with broader issues such as the role of a workplace delegate (whatever that means) and also covers delegate training related to '*their role in representing their union'*.

70. The clause inappropriately extends the entitlement to paid time to delegates employed by small business employers. This defeats the intended carve out of such employers explicitly contemplated in s.350C(3)(b)(ii). By extension, it also means that the clause does far more than provide for the rights of a workplace delegate set out in s.350C.

71. Clause 3(4) creates a right to attend training related to a role that a delegate may have in the union beyond that of being a delegate. This is obviously well beyond the kind of training that is contemplated by s.350C. The drafting of the ACTU's provision is somewhat unclear, but it appears that it is intended to provide an entitlement to persons who are not even delegates.

72. Clause 3(6)(b) creates an entitlement which is substantially different from that contemplated s.350C(3)(b)(ii). Relevantly, it appears to require the provision of paid leave unless it would cause unjustifiable hardship to the business to grant the leave at the time. This is inconsistent with the legislature's intended limitation of reasonableness, and instead places the onus on an employer to demonstrate unjustifiable hardship. This is not consistent with s.350C of the Act.

73. Relevantly the legislative provisions dealing with delegates' rights do not go so far as to create an entitlement to training 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)). 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.

74. As such, it is doubtful that the Commission would have power to include any clause[16] that provides for payment for time spent at union conducted training outside of an employee's normal working hours pursuant to the new statutory provisions. In any event, it is not necessary for the Commission to determine this point as the extension of payment to delegates for time spent outside of an employee's normal working hours is not warranted as a matter of merit.

75. The amount of paid training leave, and the number of delegates employed by an individual employer who should be able to access this in any given year, are of course interconnected considerations. While it may be said that the Act does not afford awards an ability to restrict who is a delegate, they can restrict the capacity for a particular delegate to access a relevant entitlement contemplated in either 350C(2) or 350C(3) in circumstances where the restriction is reasonable. In the context of paid absences to attend relevant training, this could take the form of a cap on the number of delegates that can access the leave (as we suggested may be appropriate and ACCI has proposed) or it could take the form of a capacity for an employer to refuse a request in induvial circumstances (as we have proposed). A combination of these approaches may be appropriate. Alternatively, the clause could deal with the interconnected issue of the amount of leave that individuals should receive, as well as question of the cumulative impact on employers that flows from the number of delegates operating at a particular employer, by taking the form of a provision that provides a reasonable pool of entitlements that workplace delegates could take (perhaps on a sliding scale based on employer size).

76. On any sensible assessment any delegates rights clause must however provide tangible limitations on the extent to which an employer is exposed to additional costs

[16] Like that proposed by the ACTU.

and disruption from needing to release people to attend such training and pay them in connection with it.

77. Further, the ACTU's model clause includes an entitlement that where a workplace delegate is an officer of a union or who holds some other elected position in their union beyond that of a workplace delegate, they shall be entitled to an additional 3 days per annuum of paid time to attend training for their related role. This appears to be entirely unrelated to matters that should be dealt with under the new delegates' right term pursuant to the Act. It is not about an employee's activities.

78. Concerning the notice period that a workplace delegate must provide their employer of a request to attend training, the ACTU proposes that this should be 4 weeks. Taking into consideration rostering provisions in a number of modern awards and enterprise agreements, as well as the raft of staffing challenges faced by many sectors and enterprises, 4 weeks is not a reasonable amount of notice. Nor is it clear why a worker shouldn't be able to provide a much greater period of notice without too much difficulty.

Rate of Pay for Paid Training Leave

79. The ACTU proposes that a union delegate undertaking training on paid time should be paid at their full rate of pay, as taken from section 18 of the Act. 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 disutility associated with undertaking their ordinary duties or actually attending the workplace, meaning they should not be entitled to any allowances etc that they would generally be entitled to in connection with the performance of work.

80. This must also be considered in light of the fact that a workplace delegate is electing to undertake their role as a delegate. The paid time away from normal duties is not something required of the employee by his or her employer. Further, in our view, the general benefit of this training is to the workplace delegate, (perhaps to other workers) and to the union. It cannot be accepted that an employer will necessarily or even generally receive a benefit from the training or desire that it be undertaken.

Accordingly, it is not appropriate that any penalty or premium be paid to the employee.

Clause 4 – Right to Communication

81. The ACTU in their submissions correctly points out that section 350C(3)(a) entitles a workplace delegate to reasonable communication with union members and persons eligible to be members[17]. What the ACTU does not consider is that section 350C(3)(a) stipulates that this only relates to 'industrial interests". The ACTU in their model clause, at 4, instead sets out that this relates to "any matter or subject".

82. It is also significant that s.350C(3)(a) has been drafted in such terms as to only deal with communication between the workplace delegate with members of the relevant union, or persons eligible to be such members. It does not deal with the workplace delegate having a right to reasonable communication during work with their union. Nor does it include the right of a workplace delegate to invite an employee or official of their union to the workplace.[18] The inclusion of such entitlements in the ACTU's model clause is clearly an overreach.

83. The ACTU clause also inappropriately appears intended to provide an entitlement to payment. As a matter of merit, we strongly oppose this provision for reasons set out earlier in this submission. A delegate's activities, including having discussions with members or eligible members, will frequently not constitute the performance of work for an employer attracting payment. It is accepted that delegates must be provided with an entitlement to represent relevant members or eligible, and to communication with them, but it does not follow that an award clause should require that an employer must pay them for the time they spend performing such activities. It is certainly not appropriate that a delegates' rights term provide for this.

84. We also reiterate that it will not always be reasonable for a delegate to communicate with relevant persons in either the person's or the delegate's paid work time if it disrupts such work (given they are being paid to perform this work). Our previous

[17] ACTU Submissions at 72.

[18] See subclause 4(2)(b) of the ACTU's model clause.

submissions proposed sub-clauses that would assist in ensuring that the entitlement to communication is reasonable. We maintain our view that such provisions are warranted.

85. Clause 4(2) frames a right to reasonable communication in a way that inappropriately captures a range of entitlements beyond those contemplated by s.350C(3)(a). The provision should not be adopted. Our concerns include that it is not confined to communicating with members or eligible members who work in the particular enterprise; is not confined to communication about a relevant person's industrial interest; inappropriately gives a delegate a capacity to invite an official or employee of the union to attend the workplace.

86. The ACTU proposal in clause 4 that the delegate be afforded a blanket entitled to address employees in paid time at an induction or commencement of their employment is not reasonable. It is obvious that such meeting may be used for union membership recruitment rather than discussion over a relevant individual's industrial interest. The proposed clause both unreasonable and beyond the scope of entitlements contemplated by s.350C.

87. Clause 4(3) would create a new right for employees to have discussions with a union delegate rather than the exercise of a relevant right by a delegate. That is not the purpose a delegates' rights term which must instead create entitlements for delegates. Alarmingly, there does not appear to be any parameters around the exercise of the right by the person. Given the reference to "a person" It is not even clear that the clause is directed exclusively at the creation of a right for employees (as opposed to contractors).

88. Clause 4(4) would create a new entitlement to payment which is not an entitlement contemplated by s.350C for both the delegate and the person the delegate is communicating with. Again, this not a matter that could (or should) be dealt with through a delegate's rights term. It is particularly inappropriate that the clause proposes to require payment of the person speaking to the delegate. A delegates' rights term should only deal with the provision of entitlements to delegates, not others.

89. Importantly, s.350C(3)(a) is distinct from section 350C(3)(b)(ii) which specifies "paid time" for the purpose of training.[19] The creation of an entitlement for reasonable communication on paid time by a workplace delegate with not only members of the union, or people eligible to be members, but with representatives of their union, is clearly overreach and it not required nor contemplated by s. 350C|(3)(a). Workplace delegates are first and foremost employees employed to perform work by their employer. They should be entitled to perform their role as a workplace delegate, but this should not interfere with their role as an employee that they have agreed to perform.

The Need for Communication to be Confidential

90. Clause 4(6) is a prohibition on employers '*infringing on the privacy*' of communications between a delegate and their union, union members or eligible members. It is a novel provision well outside the scope of a delegates' right term. It is not confined to communications between a delegate and relevant persons or to communications about relevant matters.

91. The ACTU asserts that communication between a workplace delegate and a member of the union, or a person eligible to be a member, must be in confidence and free from monitoring or surveillance be employers[20]. Looking to the merits of this argument, we doubt that there are employers that undertake surveillance of engagement between delegates and other workers, or their union, for the purpose of determining the substances of what is said. In this sense we contend that such a clause is not necessary, as contemplated by s.138. It would certainly not be appropriate for such a clause to be included in awards absent a solid evidentiary foundation establishing the need for it.

92. The ACTU proposal may cause practical problems by potentially capturing and prohibiting broader and entirely legitimate surveillance of employees whilst at the workplace or using computers, phones or similar technology or IT systems. Employers have a legitimate need to manage matters that occur on the worksite or

[19] We deal with this in detail below.

[20] ACTU Submissions at 82.

in a work context. There will be times when the nature of a workers' engagement with others while at a worksite or undertaking activities during the course of their employment will be rightly the subject of employer scrutiny. It is trite to observe that employers have raft of obligations relating to manage risks associated with workplace health and safety and discrimination and harassment. It would be wrong for the Commission to unduly hamper an employer's efforts in this regard.

93. It must also be remembered that surveillance of workers is regulated through State laws in some jurisdictions.[21] These matters are best dealt with through such specialised legislation.

94. Indeed, it is doubtful whether the Commission has power to regulate such matters through modern awards.

95. Instead, as proposed in our model clause, the new modern award clause should stipulate that access to reasonable communication with members by delegates or using workplace facilities (to the extent that this captures access to IT systems) should comply with the employer's IT policies and procedures. As set out in our original submissions, the entitlement to 'reasonable communication' with existing and potential members would plainly not capture communication that occurs in a manner which is contrary to an employer's reasonable IT policies and procedures.

96. Relevantly, these policies and procedures 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. From a practical perspective carving out communications by and employee when they are exercising their role as a workplace delegate would present as a logistical nightmare[22].

97. It is notable that the EM states:

[21] See for example the *Workplace Surveillance Act 2005* (NSW).

[22] This is supported by the modern award objectives, see section 134(f) of the Act.

> 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.[23]

98. The legislature clearly had a more modest expectations of what would constitute reasonable communication and access than is contemplated by the ACTU. The assertion by the ACTU and a number of its affiliates, including the Mining and Energy Union (**MEU**), that the model clause must make this sort of communication confidential and not subject to the employer's applicable policies and procedures is an unjustifiable overreach. [24]

99. The MEU's model clause in relation to reasonable communication largely mirrors that of the ACTU's. The MEU rely upon the Macquire dictionary definition of communication, to assert the proposition that when a workplace delegate would like to impart a message an employer must give relevant employees "the opportunity to listen"[25]. The MEU points out that one such definition of communication means the "imparting, or interchange of thoughts, opinions, or information by speech, writing or signs." The Macquarie dictionary also defines communication as 'a document of message imparting, views, information etc.'.

100. Importantly, neither of these definitions of communication would justify an entitlement for a delegate and members of their union, or potential member to have conversations including discussion during paid work time. Rather communication could include a workplace delegate emailing a member. What is reasonable communication must take into account as a minimum the factors that are set out in section 350(c)(5). The right to reasonable communication is not an unfettered right to any means of communication with a member, or potential member of the relevant union.

101. The new modern award clause should certainly not give a union delegate an absolute right to talk with employees while they are working; it will often be 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

[23] EM at 827.

[24] ACTU Submissions at 82.

[25] MEU Submissions dated 1 March 2024 at 26.

the right to hold a meeting with a group of employees during working hours, without the agreement of the employer.

Clause 5 – Access and Use of Facilities

102. Clause 5 provides for a workplace delegate to have access to and use of the employer's facilities and equipment, or other facilities and equipment where the enterprise is being carried on. The proposed clause is not reasonable. Firstly, generally an employer does not have the ability to provide access to facilities and equipment that are not their own, and are instead those of someone else at a location where work is carried out.

103. Further, clause 5(2) provides that a workplace delegate can make reasonable use of a range of equipment and that a workplace delegate must have reasonable access to transport and freedom of movement to or within the workplace. These inclusions are a further example of unjustified overreach. It cannot be that section 350(c) provides a right for a workplace delegate to be provided with transport by their employer to move between workplaces for the purpose of an employee's role as a workplace delegate.

104. We do not support the clause proposed by the ACTU.

105. We deal with the confidential communication aspect of clause 5 above in relation to communication and echo these comments here.

Clause 6 – Right to Attend Union Meetings

106. Clause 6 creates an entitlement that if an employee is an officer of a union or holds another elected/ appointed position in their union they must be allowed paid time for the purpose of carrying out duties/exercising rights as an officer of the union and the right to attend at least 2 union meetings in paid time in each calendar year. As discussed at paragraph 77 above, it is doubtful that a modern award term can include a clause to deal with these matters.

107. There is no justification for the delegates' rights clause to prescribe the rights of workplace delegates beyond their role as employee representatives. The clause

should not prescribe rights that an employee, whether or not a workplace delegate, should have as an office holder in an employee organisation.

Small Business Exemption

108. The ACTU model clause appears to simply omit the legislatures exclusion for small business in section 350C(3)(b)(ii) of the Act. There is no justification for this provided by the ACTU nor their affiliates. Exclusion must be reflected in any delegates' rights clause.

6. RESPONSE TO OTHER PARTIES

Mining and Energy Union

109. The MEU's submissions do not establish a persuasive case for adopting a different approach to the crafting of a delegates' rights clause from that which Ai Group has proposed. Without accepting that any aspect of the approach the MEU has proposed is appropriate, we below respond to a number of particularly problematic aspects of their submissions and proposals.

110. Further as dealt with above, the MEU's submissions in relation to communication do justify creating an unfettered right to communication that was not contemplated by section 350(c).

Submissions Relating to Industry Practice and Enterprise Agreements

111. The union's reference to purported widely accepted and long-standing practices regarding delegates; or the prevalence of such provisions in predecessor awards to relevant modern awards or enterprise agreements, is not a sufficient basis for establishing what is necessary in the context the modern awards that operate as a safety net of minimum conditions or ensuring that awards meet the new requirements related to the content of a delegates' rights term. Such longstanding practices are matters are, appropriately, able to be dealt with through enterprise agreements or other arrangements between employers and employees/unions.

112. The current proceedings are not the appropriate vehicle to consider the kinds of ambitious proposals the MEU have advanced. Such claims should only be

considered in proceedings in which a proper evidentiary case in support (or opposition) to such matters can be mounted.

113. The reliance on content if enterprise agreements is of little assistance to the Commission. What the MEU is asking the Commission to do is, in effect, replicate or reflect entitlements that are found within specific enterprise agreements in modern awards that cover a variety of employers. Such an approach is not consistent with the task before the Commission and ignores the limitations on what awards, as part of the minimum safety net, can properly deal with.

The '*Bona Fide Union Business*' Proposal

114. Clause 2.2.e of the MEU's proposed clause (when read in the context of the clause as a whole) includes a right that on paid time a workplace delegate is entitled to be released from normal duties for the purpose of the delegate participating in bona fide union business.

115. The MEU's proposed clause goes on to state that bona fide union business includes, but is not limited to, preparing for, travelling to, attending or otherwise participating in a range of activities including collective bargaining meetings, any consultation process, any event or meeting acknowledged by the rules of the union, any political lobbying delegation organised by the union, and any other bona fide union business.

116. The proposed clause contains elements that are clearly outside the scope of the matters contemplated under s.350C. Clauses 2.3(e) to (f) are the high points of this deficiency. The proposition that an employer must bear the cost of an employee electing to participate in such a wide range of '*union business*' is not reasonable and without industrial merit.

Access to Facilities and the Workplace

117. The MEU's proposed clause differs from the ACTU model clause in relation to access to facilities and the workplace. It should not be adopted by the Commission.

118. The MEU's proposal, at clause 5, appears to include an unfettered right for a workplace delegate to '*make use of the facilities and equipment where the*

enterprise is being carried on', which includes access to the workplace. There is no attempt to make the provision operate in a manner that is reasonable, as contemplated by s.350C of the Act.

119. The clause further includes transport and freedom of movement to, or within, the workplace, where that is necessary to provide access. This clause does not require that such access must be reasonable. There are salient reasons why an employer should retain some capacity to control or limit access to a workplace or parts of a workplace. In parts of industry where MEU members work, this would include matters such as safety considerations.

120. In the mining sector, this could involve a workplace delegate having a right to access a remote mine and an employer (including a labour hire employer or a small contractor) needing to provide transportation for a workplace delegate to the location. This is not reasonable, and it is not a necessary part of the safety net. It certainly is not the kind of provision that could be inserted into an award absent detailed evidence being before the Commission so as to enable a thorough understanding of the implications of such a requirement for employers.

121. As we have elsewhere submitted, the provision of transport to or from a workplace is not caught by section 350(c). We also doubt that any provision of the Act would enable an award to deal with such matters.

Construction, Forestry and Maritime Employees Union – Construction and General Division

Enterprise agreements

122. Whilst Ai Group agrees with the Construction, Forestry and Maritime Employees Union - Construction and General Division (**CFMEU CG**) submission that the EM stated that '*greater detail for particular industries, occupations and enterprise*'[26] can be included in modern awards and enterprise agreements, we do not agree delegates' rights terms can provide a greater entitlement than contemplated in s.350C of the Act. Regardless of such technicalities, we also reiterate our view that

[26] EM at 827.

it is appropriate for the Commission to take a conservative approach in these proceedings and that there is merit in, as far as possible, adopting a similar (and potentially uniform) approach to the framing of delegates' rights terms in awards.

123. We echo our submissions above in relation to the MEU's submissions concerning enterprise agreements in response to the CFMEU CG's submissions about such matters.

Union Delegate Facilities

124. The CFMEU CG model clause at X.3 provides that an employer shall provide reasonable facilities for the workplace delegate to perform their duties, including a telephone, an iPad with mobile internet access, a private lockable area and a suitable workplace location to conduct confidential discussions.

125. In many circumstances an employer providing these facilities to a workplace delegate would not be reasonable. The clause does not provide any caveat that the requirement would only operate to the extent to which it is reasonable. In some instances the employer may not possess some such facilities.

126. We note that the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) adopts this clause in its model clause. We echo these submissions in relation to that submission.

Australian Manufacturing Workers' Union

Not Required to Attend for Shift

127. The Australian Manufacturing Workers' Union (**AMWU**) proposes a number of additions to the ACTU clause that it submits should be included in specific modern awards. The AMWU proposes that additional wording be included to address the fact that its members often undertake shift work, or do not work a 38-hour week that starts on a Monday and ends on a Friday.

128. We do not support the AMWU's proposed clause.

129. The AMWU draft clause is also unnecessarily generous. There may be situations where an employee attends a training program on a day and nonetheless has an opportunity for sufficient rest before the start of their rostered shift to enable them to undertake the work.

130. We note that the CEPU supports the model clause proposed by the AMWU and we echo these submissions in relation to the submissions of the CEPU.

Australian Chamber of Commerce and Industry

131. The Australian Chamber of Commerce and Industry (**ACCI**) and the ACTU in their respective model clauses propose an entitlement to 5 days of paid training leave for workplace delegates. Neither ACCI nor the ACTU have adequately made out a case as to why 5 days is reasonable to be included in the model term.

132. In our proposed clause, we have adopted the approach of entitling an employee to reasonable access to paid time, during normal working hours, for the purposes of relevant training. We have also identified specific matters that should be considered in determining what is reasonable. This additional detail will provide practical guidance to parties, including employers.

133. We have nonetheless also proposed a cap of two days on the amount of leave that can be taken by a delegate. This is, in our view, a reasonable limit in all circumstances. Paid absences from work are a significant entitlement that impose a burden on employers in terms of cost and operational disruption.

134. We also note that we have proposed that there may be merit in capping the number of delegates in a workplace. Obviously, part of the consideration of what quantum of leave is reasonable, is the overall or cumulative impact of participation of an employer's workforce in such training. We do however anticipate that there *may* be complexities in some industries associated with simply suggesting a sliding scale based on size of workforce. We have accordingly suggested that such matters are best canvassed in the context of further consultation with the Commission, including through joint consultation with the ACTU. Such discussions could involve consideration of whether a 'pool' of maximum entitlements to paid leave (based on

the size of the employer) should instead be provided to delegates rather than a prescriptive limit on the number of delegates.

135. It is also unclear that 5 days is actually warranted, let alone reasonable. It is certainly doubtful that a sensible case can be put for the same delegate attending 5 days of training each year.

136. The ACTU Submission at annexure B includes a sample 5-day delegate training outline. Such limited material is not a satisfactory basis for a 5 day entitlement being inserted into awards. Further, looking at the content of the training, it is apparent that this training is not limited to that which is related to a workplace delegate representing the industrial interests of members or potential members of the union. Accordingly, it can be presumed that once irrelevant training is stripped from any course, fewer than 5 days would be adequate.

137. Further while ACCI proposes a 5 day leave entitlement and seeks to limit the number of workplace delegates who can access training each year by reference to number of full-time and part-time employees an employer has, it has provided limited reasoning for this approach. To the extent that the proposal is based on provisions in existing awards, we would emphasise that caution needs to be taken in assuming that any entitlement substantively developed for particular industries at a very different time, in different circumstances and under a different legislative framework is either reasonable or necessary in the sense contemplated by the current legislative regime.

138. In the absence of robust material establishing how such training will be undertaken, or the potential impact of the entitlement on employers, it is appropriate to adopt the approach that we have proposed (coupled with a potential cap on the number of delegates who can access such leave or indeed the other benefits aligned to s.350C(2) and s.350C(3)) in favour of the more generous approach adopted by the ACTU and ACCI. We accept of course that such matters could be revisited by the Commission at a later point if warranted.

7. AI GROUP'S AMENDED PROPOSED DELEGATES' RIGHTS TERM FOR MODERN AWARDS

139. We have made some amendments to our proposed model clause to take into account circumstances where the relevant work is undertaken in a person's residence. This would be relevant in several awards, but this would include the *Social, Community, Home Care and Disability Services Industry Award 2010*), to afford protection to these individuals we propose that an additional subclause be included in the clause for these awards, see clause X.17 below, that is in red text.

140. We have also addressed some minor formation / wording issues. The amended clause that we would propose is as follows:

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. For the avoidance of doubt, the workplace delegate must also be an employee of the particular enterprise.

X.2 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.3 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.4 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.5 Clause X.4(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.6 A workplace 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.4.

x.7 In determining what is reasonable for the purposes of subsection X.4, 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.4(b)(ii)

X.8 In determining what is reasonable for the purposes of clause X.4(b)(ii), in addition to those matters specified in clause X.7, regard must also be had to the following issues:

(a) whether the workplace delegate has given the employer a reasonable amount of notice of the related training

(b) whether the workplace 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.

(d) the number of days that the workplace delegate will be absent to attend the training

(e) whether the workplace 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.4(b)(ii); and

(f) the content of the training, including whether it is likely to lead to the avoidance of industrial disputes.

X.9 A workplace 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.10 A workplace delegate is not entitled to be absent on paid time off under this clause to participate in training unless the delegate has provided to the employer:

(a) at least 8 weeks' notice 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; and

(c) evidence of participation in the training, 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 workplace delegates that can access the leave in a given year or the total amount of leave that an employer could be required to grant.* Such matters should be discussed at the scheduled consultation meeting.

Performance of delegate activities

X.11 A workplace 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.12 Clause X.3 and X.4 do not give a workplace delegate the right to hold a meeting with an employee (or group of employees) during the working hours of either the workplace 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.13 Clause X.3 and X.4 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.14 Clause X.4 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 workplace delegate with access to personal information about other employees, such as their name or contact details.

X.15 A workplace delegate is only permitted to exercise a right under clause X.3 and X.4 in a manner that is consistent with any reasonable requirement or policies of the employer that have been communicated to the workplace 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.16 A workplace 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.

X.17 Nothing in this clause entitles a workplace delegate access to the domestic residence of a person.