

IN THE FAIR WORK COMMISSION

Matter No: AM2024/6

VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES' RIGHTS TERM

1 March 2024

Background

1. The Australian Workers' Union (AWU) is a diverse union of approximately 72,000 workers across numerous industries including construction, manufacturing, steel, glass, aluminium, hydrocarbons, mining, quarrying, agriculture, aviation and many more.
2. The Fair Work Commission (**Commission**) has recently commenced a process for all modern awards to contain a delegates' rights term in response to amendments to the *Fair Work Act 2009* (**Act**) made by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*.
3. On 30 January 2024, Justice Hatcher published a Statement that set out a timetable for this process, which included a direction for parties to file submissions and proposed terms by 1 March 2024.
4. These submissions of the AWU respond to that direction.

AWU Interest

5. Owing to its broad constitutional coverage, the AWU has an interest in dozens of modern awards.
6. The modern awards in which the AWU has an interest include:
 - *Aged Care Award 2020*
 - *Airline Operations – Ground Staff Award 2020*
 - *Alpine Resorts Award 2020*
 - *Aluminium Industry Award 2020*
 - *Amusement, Events and Recreation Award 2020*
 - *Animal Care and Veterinary Services Award 2020*
 - *Aquaculture Industry Award 2020*
 - *Asphalt Industry Award 2020*
 - *Building and Construction General On-site Award 2020*
 - *Cement, Lime and Quarrying Award 2020*
 - *Cemetery Industry Award 2020*
 - *Cleaning Services Award 2020*
 - *Concrete Products Award 2020*
 - *Cotton Ginning Award 2020*
 - *Dredging Industry Award 2020*
 - *Dry Cleaning and Laundry Industry Award 2020*

- *Electrical Power Industry Award 2020*
- *Fast Food Industry Award 2020*
- *Fire Fighting Industry Award 2020*
- *Fitness Industry Award 2020*
- *Food, Beverage and Tobacco Manufacturing Award 2020*
- *Funeral Industry Award 2020*
- *Gardening and Landscaping Industry Award 2020*
- *Gas Industry Award 2020*
- *General Retail Industry Award 2020*
- *Hair and Beauty Industry Award 2020*
- *Health Professionals and Support Services Award 2020*
- *Horse and Greyhound Training Award 2020*
- *Horticulture Award 2020*
- *Hospitality Industry (General) Award 2020*
- *Hydrocarbons Industry (Upstream) Award 2020*
- *Local Government Industry Award 2020*
- *Manufacturing and Associated Industries and Occupations Award 2020*
- *Maritime Offshore Oil and Gas Award 2020*
- *Meat Industry Award 2020*
- *Mining Industry Award 2020*
- *Miscellaneous Award 2020*
- *Nursery Award 2020*
- *Oil Refining and Manufacturing Award 2020*
- *Pastoral Award 2020*
- *Pest Control Industry Award 2020*
- *Pharmaceutical Industry Award 2020*
- *Plumbing and Fire Sprinklers Award 2020*
- *Poultry Processing Award 2020*
- *Premixed Concrete Award 2020*
- *Professional Diving Industry (Recreational) Award 2020*
- *Racing Clubs Events Award 2020*
- *Racing Industry Ground Maintenance Award 2020*
- *Rail Industry Award 2020*
- *Registered and Licensed Clubs Award 2020*
- *Salt Industry Award 2020*
- *Seafood Processing Award 2020*
- *Security Services Award 2020*
- *Silviculture Award 2020*
- *Social, Community, Home Care and Disability Services Industry Award 2020*
- *Sugar Industry Award 2020*
- *Timber Industry Award 2020*
- *Waste Management Award 2020*
- *Water Industry Award 2020*

- *Wine Industry Award 2020*
- *Wool Storage, Sampling and Testing Award 2020.*

ACTU Submission

7. The AWU has read the submission of the Australian Council of Trade Unions (ACTU) for this matter. The AWU supports and adopts those submissions.

Model Clause

8. The AWU has had the opportunity to contribute to and consider the delegates rights clause filed by the ACTU at Annexure A to the ACTU submission.
9. The AWU supports and adopts the clause proposed by the ACTU for all modern awards in which the AWU has an interest, with the minor amendments below.

AWU Amendments to ACTU Model Clause

10. For reasons of clarity, the AWU proposes two amendments to the model clause filed by the ACTU.
11. The first amendment is to sub-clause 1 of the ACTU clause – Definitions – as follows (AWU amendment in red):

“**union** means an employee organisation (within the meaning of s.12 of the *Fair Work Act 2009*)”
12. This amendment will ensure consistency in the definition of ‘employee organisation’.
13. The second amendment is to sub-clause 5 of the ACTU clause – Right to use facilities – as follows (AWU amendment in red):

“(1) **An employer must provide reasonable facilities and equipment for the use of the workplace delegate to carry out their duties. Unless an employer provides facilities and equipment for the sole use of the workplace delegate, a workplace delegate has the right to make reasonable use of the employer’s facilities and equipment.**

(2) For the avoidance of doubt, the use of **facilities and equipment for the purpose of this clause** shall include (but is not limited to), among other things:...”
14. This amendment provides clarity that an employer that provides a workplace delegate with facilities and equipment for the exclusive use of the workplace delegate is compliant with the clause.

THE AUSTRALIAN WORKERS’ UNION



ACTU Submission – Delegates Rights Term

AM2024/6 – Variation of Modern Awards to insert a
Delegates' Rights Term

ACTU Submission, 1 March 2024
ACTU D. No 15/2024

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Introduction

Delegates Rights

1. *The Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Cth)* (**Closing Loopholes Act**) amends the Fair Work Act 2009 (Cth) (**FW Act**) to make provisions for delegates rights. The Closing Loopholes Act also amends the FW Act to require modern awards to contain a term providing for delegates rights, and for the FWC to vary existing modern awards to provide for this.
2. The FWC has now commenced a process for doing so.
3. The ACTU makes this submission in that regard.
4. Included in this submission, as Annexure A, is a draft clause prepared by the ACTU (**ACTU draft model clause**) in consultation with our affiliated unions. The terms of this clause are submitted for adoption by the FWC as set out in this submission. It is intended that the ACTU draft model clause:
 - a. Serve as a model clause in this process for modern awards, for the reasons set out in this submission;
 - b. Be supplemented according to the specific requirements in different industries, as set out in the submissions of our affiliates; and/or
 - c. Be replaced by more industry specific clauses where sought by our affiliates, for the reasons set out in those submissions.

About the ACTU

5. Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.
6. The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 36 ACTU affiliates. They have more than 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Delegates

7. Union delegates who are representing their colleagues to management make a significant contribution to workplace harmony and productivity. They are volunteers and help workers and employers in avoiding or settling workplace disputes, ensuring a culture

of compliance and respect and act as a facilitator of discussions between employers and their workforce.

8. The Revised Explanatory Memorandum to the Closing Loopholes Bill 2023 (**Explanatory Memorandum**) recognises the role of delegates as follows:¹

Workplace delegates have various roles and responsibilities necessary for the ongoing support and functioning of registered employee organisations. They can serve as the first point of contact for members of an employee organisation within the workplace, including when a worker is considering joining an employee organisation, and represent worker concerns in the workplace.

9. Sometimes delegates are targeted by employers because of their work as a workplace delegate.
10. Delegates can be undermined by an unscrupulous employer who seeks to mislead or deliberately misinform a delegate.
11. Perhaps even more simply, many delegates simply are not afforded the access and facilities that they need to perform their role – imagine trying to do an office job without a computer, or painting without a brush.
12. Union delegates are not experts in workplace law and need basic training to assist them doing their job.
13. Increasing the protections for volunteer workplace delegates can encourage a culture of mutual respect and contribute to workplace harmony.
14. The more workers are listened to, the better the decision making, and the higher the job satisfaction – in some of the most highly successful and productive economies delegates rights and worker voice are supported and respected rather than suppressed.
15. Affording rights to delegates and workers is productive and sensible, not harmful.
16. The Closing Loopholes Bill recognised this and introduced delegates rights into the FW Act. These rights must now be inserted into modern awards.

The Positive Impact of Delegates

17. The ACTU, in preparing this submission, has obtained an expert report from Professor David Peetz, titled: 'Report on Academic Research on Union Delegates and Worker Voice' (**Peetz Report**).

¹ Explanatory Memorandum, 44-45[254]

18. A copy of the Peetz Report, which goes to the question of what the existing body of academic research says in relation to workplace delegates and worker voice, is filed with these submissions.

19. The Peetz Report, makes clear the following propositions:

- a. Union delegates are a basic institution that acts to mediate co-operation at the workplace.²
- b. Delegates spend a lot of their time (as delegates) performing important work for their union and its members, such as: handling grievances; dealing with queries about award provisions; participating in consultative processes; negotiating wages, physical working conditions and work practices; and negotiating enterprise agreements;³
- c. Delegates and increased worker voice has positive impacts in the workplace, include on health and safety;⁴
- d. Despite the important role that workplace delegates play, many managers actively seek to get rid of them – even going to illegal lengths to do so;⁵
- e. Employees report that they desire a co-operative relationship between their union and management in the workplace, and expect management to reciprocate;⁶ Such co-operation does not mean acquiescence, but rather, genuine co-operation.⁷
- f. Where a delegate is antagonistic and out of step with the union's membership, it is likely that the union membership will remove them as delegate (or leave the union).⁸
- g. Employer efforts to undermine or remove union delegates reduces a basic institution of co-operation;⁹
- h. However, many employers prefer to deal with unions and recognise that doing so reduces transaction costs in employee relations;¹⁰
- i. Productivity is no higher in non-unionised than unionised workplaces;¹¹

² Peetz Report, 5[12]

³ Peetz Report, 2[4]

⁴ Peetz Report, 3[5]

⁵ Peetz Report. 3[6]

⁶ Peetz Report, 3-4[7]-[8]

⁷ Peetz Report, 4[8], 5[10]

⁸ Peetz Report, 5[11]

⁹ Peetz Report. 5[13]

¹⁰ Peetz Report, 5[11]

¹¹ Peetz Report, 6[15]

- j. However, unionisation and worker voice can positively affect productivity through the identification of improved processes or optimised effort:¹²

Labour-management partnerships based on mutual respect for worker, union, and employer rights and responsibilities have been shown to achieve high performance by facilitating employee participation and related high-performance work practices and by creating social networks within and across organizations'

- k. One study indicated that a one percentage point increase in the proportion of members that are union representatives (i.e. workplace delegates for present purposes) increased firm performance by 7 per cent.¹³
- l. The manifestation of worker voice may lead to several potential outcomes, including the resolution of employee grievances (whether on pay, benefits, safety or working conditions).¹⁴
- m. Worker voice is made more cohesive with the involvement of union representatives;¹⁵
- n. In Australia (which doesn't for example feature institutions such as works councils) trade unionism (which is enhanced and relies on workplace delegates) is one of the most common worker voice mechanism that cannot be taken away by management;¹⁶
- o. Workplace delegates play a role in democratising workplaces and unions;¹⁷
20. It may be argued, directly or more obliquely, that affording rights to delegates will put the brakes on productivity.
21. The survey of the body of academic literature contained in the Peetz Report puts paid to that assertion.

Legislative Intent

Legislating Delegates Rights

22. The Explanatory Memorandum sets out the purpose and intention of legislating delegates' rights:¹⁸

¹² Peetz Report, 6[15]

¹³ Peetz Report, 7[17]

¹⁴ Peetz Report, 6[14]

¹⁵ Peetz Report, 7[17]

¹⁶ Peetz Report, 8[19]

¹⁷ Peetz Report, 8[20]

¹⁸ Explanatory Memorandum, [791], 134

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

23. As to the reasons for legislating delegates rights, and the regulatory gap that this fills, the Explanatory Memorandum says the following:

255. There is currently limited legislative protection or specific rights for workplace delegates performing these roles within a workplace. Delegates may have to use annual leave or take unpaid time off work to undertake training necessary to their roles in the registered organisation. Employers may also seek to prevent delegates from communicating with members or eligible members while at the employer's premises. Consequently, in some circumstances it may be difficult for delegates to provide effective support and representation to members and eligible members in the workplace. Imposing such restrictions on workplace delegates can have an impact on how effectively they can perform their roles, and consequently take lawful industrial activity and protected industrial action.

256. Part 7 of Schedule 1 would require that modern awards and all new enterprise agreements contain a term that deals with workplace delegates' rights. These terms must include a right to represent members within their workplace and various supporting rights, including rights to reasonable access to paid time off for training, and reasonable access to the workplace and workplace facilities for advancing their members' industrial interests. The Bill would support these new protections for workplace delegates by introducing a specific protection against an employer unreasonably failing or refusing to deal with the workplace delegate, making a false or misleading representation to the workplace delegate, or unreasonably hindering or obstructing the exercise of a workplace delegate's rights.

257. These amendments would positively engage the right to freedom of association, particularly Article 8(c) of the ICESCR which guarantees the right of

trade unions to function freely, subject to no limitations other than those prescribed by law. These amendments would ensure that workplace delegates are afforded these basic primary rights within the workplace to carry out their delegate duties.

24. Further to this, the legislature has made a conscious and deliberate decision to locate delegates rights within the FW Act Part 3-1 of Chapter 3, forming part of the FW Act's General Protections. Section 336 (in the Part) contains the following:

- (1) The objects of this Part are as follows:
 - (a) to protect workplace rights;
 - (b) to protect freedom of association by ensuring that persons are:
 - (i) free to become, or not become, members of industrial associations; and
 - (ii) free to be represented, or not represented, by industrial associations; and
 - (iii) free to participate, or not participate, in lawful industrial activities;
 - (c) to provide protection from workplace discrimination;
 - (d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.
- (2) The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise).

25. Accordingly, it is submitted that the enactment of those rights, and associated provisions, are best understood as a deliberate effort to deliver protections for workplace rights, freedom of association and relief from discrimination and adverse action. For this reason, the term that results from this process should be set in a way that best enables workers to join their union, to associate and organise and to advance their interests, in concert with their workplace delegates.

International Context

26. *Prima Facie* it may be assumed that Parliament intends to give effect to its international obligations.¹⁹ The Explanatory Memorandum lists some of these obligations as follows:

Article 22 of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Article 8(1)(c) and (d) of the ICESCR also support the right to freedom of association by providing that States Parties

¹⁹ *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20 at [26]-[27] per Mason CJ and Dean J

undertake to ensure the right to form and join trade unions and the right to strike, including picketing activities. There are also specific obligations relating to freedom of association in the ILO's Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) and Right to Organise and Collective Bargaining Convention 1949 (No. 98).

27. Not only should a court or tribunal favour a statutory construction that is consistent with international obligations, the principle extends beyond this to guide the activities of administrative decision-makers. In *Teoh*, Mason CJ and Deane J observed:

‘...ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with [an international convention]...’

28. The recently legislated rights of delegates are located within a set of international obligations that Australia has subscribed to by way of ratifying various instruments (including ILO Conventions) as set out above in the extract of the Explanatory Memorandum. It is clearly the intention of Parliament to have these obligations delivered on by way of the enacted delegates rights provisions and as the outcome of this process.

29. Additionally, Australia has signed and ratified the ILO's Workers' Representatives Convention, 1971 (No. 135). As to the content of Australia's international obligations in this regard, C135 provides:²⁰

Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions **promptly and efficiently.**

30. The ILO's Workers' Representatives Recommendation, 1971 (No. 143) is also instructive. That recommendation contains the following:²¹

Workers' representatives in the undertaking should be afforded the necessary time off from work, without loss of pay or social and fringe benefits, for carrying out their representation functions in the undertaking.

²⁰ ILO Convention 135, Article 1, emphasis added

²¹ ILO Recommendation 143, 10(1), 11(1)-(2), 12, 15(1)-(4), 16

...

In order to enable them to carry out their functions effectively, workers' representatives should be afforded the necessary time off for attending trade union meetings, training courses, seminars, congresses and conferences. Time off afforded under subparagraph (1) of this Paragraph should be afforded without loss of pay or social and fringe benefits, it being understood that the question of who should bear the resulting costs may be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

...

Workers' representatives in the undertaking should be granted access to all workplaces in the undertaking, where such access is necessary to enable them to carry out their representation functions.

...

Workers' representatives acting on behalf of a trade union should be authorised to post trade union notices on the premises of the undertaking in a place or places agreed on with the management and to which the workers have easy access.

The management should permit workers' representatives acting on behalf of a trade union to distribute news sheets, pamphlets, publications and other documents of the union among the workers of the undertaking.

The union notices and documents referred to in this Paragraph should relate to normal trade union activities and their posting and distribution should not prejudice the orderly operation and tidiness of the undertaking.

Workers' representatives who are elected representatives in the meaning of clause (b) of Paragraph 2 of this Recommendation should be given similar facilities consistent with their functions.

...

The management should make available to workers' representatives, under the conditions and to the extent which may be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation, such material facilities and information as may be necessary for the exercise of their functions.

31. As well as being the subject of a specific ILO Convention and Recommendation, workplace delegates rights come within the rubrik of the broader rights to freedom of association, collective bargaining and organising. As well as being the subject of a specific ILO Convention and Recommendation, workplace delegates rights also come within the rubrik of the broader rights to freedom of association, collective bargaining and organising.
32. The ILO's Freedom of Association Committee has made the following observations on workplace representation within the context of freedom of association:²²

1102. The Committee has drawn the attention of governments to the principle that workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including access to workplaces.
(See the 1996 Digest, para. 957; 304th Report, Case No. 1852, para. 493; 333rd Report, Case No. 2255, para. 131; and 334th Report, Case No. 2316, para. 505.)

1103. Governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization.
(See the 1996 Digest, para. 954; 309th Report, Case No. 1852, para. 338; 327th Report, Case No. 1948/1955, para. 358; 330th Report, Case No. 2208, para. 604; 332nd Report, Case No. 2046, para. 446; 333rd Report, Case No. 2255, para. 131; 334th Report, Case No. 2316, para. 505; 335th Report, Case No. 2317, para. 1087; and 336th Report, Case No. 2316, para. 58, and Case No. 2255, para. 112.)

1104. Workers' representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representation function.
(See 318th Report, Case No. 2012, para. 426.)

²² ILO, Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fifth (revised) edition, 2006, 224-5

1105. Trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking. The granting of such facilities should not impair the efficient operation of the undertaking concerned.

(See 334th Report, Case No. 2316, para. 505.)

1106. For the right to organize to be meaningful, the relevant workers' organizations should be able to further and defend the interests of their members, by enjoying such facilities as may be necessary for the proper exercise of their functions as workers' representatives, including access to the workplace of trade union members.

(See 334th Report, Case No. 2222, para. 220.)

33. Accordingly, it is submitted that not only should the FWC interpret the newly enacted delegates' rights provisions in a manner that gives rise to Australia's international obligations (as set out above), but the FWC is also required to exercise its functions in the current process in a way that best delivers upon those obligations. It is therefore submitted that the FWC should reach an outcome in this process which best promotes the rights to freedom of association and organising, as well as the provision of representation rights (and the time to do this), access to the workplace and to its facilities (as envisaged by Convention 135 and Recommendation 143).

The Commission's Task

34. The FW Act s 149E provides that 'A modern award must include a delegates' rights term for workplace delegates covered by the award.'²³

35. The FW Act sch 1 cl 95 provides that the FWC must vary modern awards (in existence and continuing to operate) 'to include a delegates' rights term' by 30 June 2024, with effect from 1 July 2024.

36. "Delegates' rights term" 'means a term in a fair work instrument that provides for the exercise of the rights of workplace delegates'.²⁴

37. A note to the definition makes clear the legislature's intent:²⁵

²³ FW Act s 149E

²⁴ FW Act s 12

²⁵ FW Act s 12, emphasis added

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

38. The Explanatory Memorandum describes the note thusly:²⁶

The note to the definition of 'delegates' rights term' would alert readers to: • new section 350C, which sets out the rights of workplace delegates, and that the delegates' rights term must provide for **at least** the exercise of these rights (in accordance with new section 205A and new subsection 273(7) inserted by items 81 and 82).

39. The term "workplace delegate" is defined as a person appointed or elected as such in accordance with the rules of an employee organisation.²⁷

40. "Employee organisation" is defined as 'an organisation of employees' and "organisation" 'means an organisation registered under the Registered Organisations Act'.²⁸

41. Accordingly, a requirement of meeting the definition of a "workplace delegate" is that the person is appointed or elected pursuant to the rules of a *registered* organisation of employees.

42. The Explanatory Memorandum is clear on this point:²⁹

'Employee organisation' is defined in section 12 of the FW Act as an organisation of employees that is registered under the RO Act. Almost all large trade unions are registered as employee organisations under the RO Act. Limiting the definition of workplace delegate to representatives of such organisations enables the new provisions to rely on the existing regulatory framework established around registered organisations, and is consistent with the approach taken in the FW Act regarding the application of the right of entry provisions in Part 3-4.

43. By way of summary, this means that the term which the FWC must include in modern awards as the outcome of this process, by 30 June 2024, is one which provides for the exercise of the rights of workplace delegates of registered organisations of employees.

²⁶ Explanatory Memorandum, [794] 134, emphasis added

²⁷ FW Act s 350C(1)

²⁸ FW Act s 12

²⁹ Explanatory Memorandum at [821], 137

44. The rights of other representatives in the workplace – whether part of an unregistered organisation or otherwise – do not validly form part of a delegates rights term as it is contemplated in the Act, nor should such rights form part of this review.
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 well 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 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 adopt an expansive conception of delegates’ rights, to ensure that Parliament’s intention in legislating for delegates’ rights flows through to delegates in the workplace.
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 statutory rights.³⁰
48. The FW Act s 350C(4) provides that the rights provided by s 350C(3) will be taken to have been afforded if an employer complies with a modern award delegates’ rights clause.
49. It will inevitably be submitted that this establishes a need to establish the perimeter of delegates’ rights. We make a different submission.
50. The ACTU submits that, in the context of the FWC not interpreting an existing award clause but rather setting the very terms of one, this gives rise to an imperative to ensure that the modern award clause so set does not fall short of embodying the rights intended by the statutory provision.
51. It is submitted that this cannot be done by way of an exhaustive list. Nor does a complete statement of rights necessarily involve such a reduction.
52. Modern Awards generally do not describe every scenario, permutation or combination in which an entitlement might arise. Rather, they set out the obligations in general but applicable terms. A modern award might include specific terms to avoid doubt, list example or provide further guidance, but this is different to categorically ruling out

³⁰ Explanatory Memorandum, [791], [794] 134,

situations in which a right or entitlement might trigger. It is submitted that this approach should be adopted with respect to delegates' rights.

53. For this reason, the ACTU draft model clause contains, for each relevant right, a broad expression of that right, followed by a non-exhaustive and explanatory range of ways in which that right may be exercised.

The ACTU Clause

Overview

54. The ACTU has proposed a model delegates' rights clause for Modern Awards, a draft of which is attached to this submission as Annexure A. The ACTU draft clause is intended to form part of all modern awards, subject to the following:

55. Where, in a particular industry, a different clause is sought by our affiliates on the basis that it is more reflective of the norms and provisions which exist across that industry, the ACTU supports the position of our affiliates. For example, in the Construction industry, where delegates' rights clauses are prevalent in enterprise agreements with wide total coverage, we support the clause put forward by construction unions.

56. The ACTU clause is not intended to be a complete statement of all of the rights, and the manifestation of those rights, that should be provided to delegates. Rather, it provides a structure that is intended to be tailored to the industrial needs and necessities of each industry as required. ACTU affiliates will put forward further matters which ought be included in the delegates rights terms of particular awards.

57. It is submitted that this is consistent with the intention set out in the Explanatory Memorandum that:³¹

[The overarching statutory 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.

58. However, the ACTU draft model clause does set out with sufficient detail the bedrock of overarching principles and examples that would allow for an employer to approach the task of respecting delegates rights with sufficient certainty – particularly after the ACTU draft model clause is modified in accordance with the submissions of our affiliates. Beyond this, guidance material is capable of further explanatory work (but should not be

³¹ Explanatory Memorandum, [827] 138

relied on to state the content of the rights themselves, which instead should be done by the clause).

59. Where an existing award clause provides rights and entitlements for workplace delegates, the ACTU does not seek to derogate from this. Rather, the ACTU clause is intended to lift delegates rights to the highest standard and would therefore adopt any existing right or entitlement which is more positive. This means:
- a. Where a right is already provided for a delegate in excess of the provisions of the ACTU draft model clause, that right or entitlement should be adopted into the ACTU draft model clause or retained as a standalone provision (as appropriate);
 - b. Where other clauses – for example dispute resolution or workplace consultation – provide rights for workplace delegates, these rights should be enhance, not supplanted by the ACTU draft model clause. This is dealt with further below, under the heading: Associated Matters.
60. The specific terms sought by the ACTU are included in Annexure A and treated more fully under the heading: The Commission's Task.

Right to Represent

61. The FW Act s 350C(2) provides union delegates with a broad right to represent their constituents. It is important to note that this right vests in the delegate. Whilst the corollary right to *be represented* is equally important, it is not the direct subject of s 350C.
62. Seen in this light, the rights of the union delegate are comparable to the rights of the permit holder under the right of entry provisions.
63. This understanding assists in locating the extent of the right conferred by s 350C(2). It is a right at large, held by the union delegate. It does not, for example require enlivenment other than insofar as the beholder must properly occupy the position to which the right attaches. Attempts to condition such rights has not been a feature of the modern industrial relations framework – for example, a legislative attempt to condition right of entry upon invitation by union members was introduced to Parliament in 1996 but never saw print in the legislation and has not formed part of it since.³² Neither does it admit

³² See, Minister's Second Reading Speech for Workplace Relations and Other Legislation Amendment Bill 1996 <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansard%2F1996-05-23%2F0047;query=id%3A%22chamber%2Fhansard%2F1996-05-23%2F0046%22>> which would have created this requirement (for invitation) and speech by Senator Murray (Democrats) on moving amendment to remove this requirement <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id%3A%22chamber%2Fhansards%2F1996-11-18%2F0284%22>>

qualification. It is a right, purely and simply, and it must be respected, protected and fulfilled.

64. The ACTU draft model clause gives life to s 350C(2) in two ways:
- a. Firstly, by including a broad right to represent; and
 - b. Secondly, by including examples of the specific actions a delegate is entitled to undertake in executing their right to represent.
65. The right to represent included in the ACTU draft model clause is not conditioned or qualified.
66. Nor should it be. The overarching right in the FW Act is not conditioned or qualified. It does not, for example, make concessions to reasonableness (unlike other provisions within the legislative reforms).
67. Nor is a delegate's right to represent, as provided by s 350C(2) deemed to be complied with if a modern award clause providing a similar right is complied with (again, unlike other provisions within the legislative reforms). The essence of the right expressed in the modern award clause would be declaratory, not constitutive.
68. Accordingly, it is submitted that no less than the overall right should be included in modern awards, to ensure that parties are aware of their rights and obligations with respect to workplace delegates. To include a lesser term would:
- a. Fail to fully realise the intention of Parliament;
 - b. Fail to fully provide a right; and
 - c. Create confusion and lead employers into error if it is their understanding that compliance with a lesser award provision is sufficient to meet their obligations under the FW Act.
69. Further, the ACTU draft model clause ensures that the delegate's right to represent may be fully realised and recognised as an ordinary course of the delegates' role in the workplace. It is not, unlike the right to paid time off for training, a right to externality – it does not take place outside of the workplace. Rather, the right to represent must naturally occur within the workplace. This is not a right to leave, it is a right to remain and exercise the right.
70. Accordingly, the ACTU draft model clause provides paid time at the workplace delegates' full rate of pay whilst they are exercising the right.
71. The ACTU draft clause also contains other necessary corrolaries to ensure that the right is protected, such as a prohibition on inducing a delegate to not exercise their rights, as well as a prohibition on direct dealings. It is submitted that these protective provisions are necessary to ensure that the primary rights cannot be side-stepped. Without such associated protections, the primary rights themselves could go unrespected and unfulfilled.

Right to Facilities and Communications

72. The FW Act s 350C(3)(a) entitles a workplace delegate to reasonable communications with union members and persons eligible to be members.
73. Two potential limitations on this right are apparent from s 350C.
- a. Firstly, the right is to *reasonable* communication.
 - b. Secondly, the right provided by the FW Act is deemed to have been complied with upon compliance with a term of a Fair Work Instrument.
74. As to the first, it is important to ascertain the nature of qualification imposed by the term “reasonable”. The only meaningful or practical way in which the term can be understood is as to the level or quantum of communication, rather than its content. The alternative would admit scrutiny of the content of communications between delegates and the workers they represent and at its most absurd, detailed analysis of the logical underpinnings of such communication. Such examination of the content of communications between workers and their union delegate should not only not be encouraged, it should be outright prohibited as set out elsewhere in this submission and in the ACTU draft model clause.
75. Reasonableness here is best, and indeed only, understood as a comment upon the amount of communication that might be had. This is entirely appropriate, given that this is the only legitimate interest that the employer might seek to control.
76. Again, this aspect is comparable to the right of entry provisions of the act, which operate as an exception to the laws of trespass but are subject to myriad procedural rules. However, once entry is lawfully effected, the *content* of the communication between the permit holder and workers is unregulated. The right could not operate otherwise.
77. That the right in s 350C(3)(a) is deemed to have been complied with if a term in a Fair Work Instrument is complied with is of critical significance. It means that the Full Bench, in the ACTU’s submission, ought strive to ensure that any delegates rights term which is ultimately adopted as the outcome of this process does not undercut the right that has been enacted by the Parliament.
78. For this reason, the ACTU term is structured as follows:
- a. The expression of broad overarching rights – akin to the right conferred in the FW Act - to: make reasonable use of an employer’s facilities; and, have reasonable communications with a union, union members or persons eligible to be union members.
 - b. The exemplification of certain activities which without question are come within the broader rights.

79. This ensures that the rights expressed in the modern award do not undercut the rights intended to be conferred by Parliament through legislation, whilst also ensuring that there is a practical understanding of how these rights might manifest in the workplace.
80. It is intended that the examples of activities which come within these rights will be supplemented to take into account particular needs in different industries.
81. The ACTU draft model clause also contains key enabling provisions to ensure that workplace delegates' communication rights are respected.
82. These associated provisions include clauses which allow for the receipt and provision of information by and from workplace delegates in connection with their representative role. The ACTU draft model clause also makes provisions to ensure that communications with a workplace delegate are in confidence and are free from monitoring or surveillance by employers.
83. It is submitted that these clauses are necessary to ensure that union delegates are able to communicate freely with and on behalf of those whom they represent. These provisions are vitally necessary to ensure that the workplace delegates' right to represent is enjoyed fully.

Right to Access

84. Access matters. It is entirely hollow to confer a right without the necessary means to exercise that right. In relation to a delegates' rights to represent and communicate, these can only be realised if delegates are provided with genuine access to workplaces and workers.
85. The delegates' rights in the FW Act recognise this by entitling delegates to: 'reasonable access to the workplace and workplace facilities where the enterprise is being carried on'³³
86. Sadly, we do not jump at shadows by pointing to the need for there to be a clear expression conferring on delegates the right to access workplaces and workers.
87. The case of *United Voice v Paisley Park Early Learning Centres (SA) Pty Limited & Anor* is illustrative of the need to provide clear rules governing access.³⁴ In that matter, an employer insisted on confining a permit holder, exercising a right of entry, to a room capable of being described as a "broom or storage room", in contravention of the provisions of the FW Act.

³³ FW Act s 350C(3)(b)(i)

³⁴ [2020] FCCA 578 (18 March 2020)

88. We are mindful that absent of a clear exposition of what a reasonable level of access could include, there will ever be the potential for disagreements to arise as to the nature or extent of the right, such that it could be unreasonably trampled upon.
89. For this reason, the ACTU draft model clause contains a broad right to reasonable access whilst also containing examples, for the avoidance of doubt, of what such access could potentially entail.
90. Further, the ACTU draft clause includes access to management as a necessary component of the Delegate's right to represent workers, consistently with international jurisprudence (see above).

Right to Training

91. Most roles require some form of formal training in addition to informal and experiential learning. The role of union delegate is no different in this regard.
92. If anything, the important nature of a delegates' role and the extent to which other workers rely on union delegates is so as to mandate extensive training.
93. The ACTU has outlined the training requirements for initial training for delegates. That outline is included in this submission at Annexure B. The outline supports the provision of 5 days training per annum for delegates. The outline provides further reasons as to why the quantum of leave sought by the ACTU should be adopted.
94. Accordingly, the ACTU draft model clause contains an entitlement to 5 days paid training for union delegates.
95. The clause also provides an additional entitlement for workers who hold governance roles beyond that of a workplace delegate, to be trained on and participate in the governance of their union. This is consistent with:
- a. The net benefits of democratisation (for employees and employers) that are brought by worker-participation;
 - b. The provisions of ILO recommendation 143 (above and reproduced below):

Workers' representatives who are elected representatives in the meaning of clause (b) of Paragraph 2 of this Recommendation should be given similar facilities consistent with their functions.

Note: Paragraph 2 clause (b) is in the following terms:

elected representatives, namely representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include

activities which are recognised as the exclusive prerogative of trade unions in the country concerned.

Associated Matters

Other Clauses

96. The FWC has identified a number of clauses which contain provisions relevant to workplace delegates.

97. The ACTU supports the submissions of our affiliates on the question of what modifications should be made on specific awards, however we offer the following guiding propositions by way of submission:

- a. Where a superior entitlement exists – for example to workplace delegate training leave – this should be preserved (whether by incorporation into a broader delegates rights clause or as a standalone;
- b. Where a term of a model award provides for representation or representative rights, it should be made clear that this right extends to workplace delegates;
- c. Where clauses such as consultation clauses recognise representatives, a parallel provision relating to workplace delegates should be recognised also.
- d. Dispute resolution clauses should make clear that a worker may be represented during a dispute, and that a step in a dispute resolution process may validly be taken by a workplace delegate on behalf of a worker.

Conclusion

98. For the reasons above, the ACTU submits that the ACTU draft model clause should form the basis of a delegates' rights term in modern awards, subject to industry-specific requirements as set out in the submissions of our affiliates.

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Annexure A - ACTU Draft Model Clause – Delegates' Rights

1. Definitions

In this clause –

confidential communication means a communication made by or to a delegate in the expectation that the employer or a third party would not be privy to the communication, and where the contents of the communication are not already in the public domain.

employer means the employer of a workplace delegate

union means an employee organisation.

union member means a member of an employee organisation of which the workplace delegate is appointed or elected.

workplace delegate means 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

Paid Time means time paid at the full rate of pay (within the meaning of the FW Act s 18).

Union means employee organisation;

2. Right to represent

- 1) A workplace delegate, acting on behalf of their union, is entitled to Paid Time, to represent (including but not limited to in disputes or grievances with the employer):
 - a) their union,
 - b) union members, and
 - c) persons eligible to be union members

Note: the Fair Work Act 2009 (Cth) s 350A(1) provides that an employer may not unreasonably fail to refuse or deal with a delegate, knowingly or recklessly make a false or misleading statement to a delegate or unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate.

Note 2: the Fair Work Act 2009 (Cth) s 350C(2) provides that a workplace delegate is entitled to represent the industrial interests of union members and persons eligible to be union members, including in disputes with the employer.

- 2) Without limiting sub-clause (1), a workplace delegate is entitled to, among other things:
 - a) reasonable access to the workplace (or workplaces);
 - b) reasonable access to management, for the purpose of representing and advocating on behalf of union members, the union and persons eligible to be union members.
 - c) be provided with information relevant to the exercise of their right to represent. Provision of information to a workplace delegate or provision of information by a workplace delegate to their union will not constitute a breach of confidentiality;
 - d) participate in any dispute or grievance in the workplace;
 - e) participate in any consultative process;
 - f) participate in collective bargaining;
 - g) participate in any matters or proceedings in the Fair Work Commission or a court, tribunal or administrative or regulatory body;
 - h) communicate with persons eligible to be union members about joining the union.
 - i) advocate for and make submissions on behalf of their union, union members and persons eligible to be union members to any third party, tribunal or forum.
 - j) represent supported employees and assist in decision-making.
 - k) Identify to [union members, persons eligible to be union members and other persons] that they are a workplace delegate, including by wearing a badge, apparel, sticker or other mark, or to use a sign, or other forms of communication;.
 - l) Access to shift, roster and other flexible work changes where necessary to facilitate the exercise of their right to represent during work time;
 - m) Any other activities within the scope of their delegation as determined by their union;
 - n) All other rights provided for in this clause or by legislation;

for the purpose of exercising the rights in (1) above, or for related purposes, to
Paid Time.

- 3) Where an employer is a party to Fair Work Commission, court, or employment-related tribunal proceedings (including conciliation, mediation, arbitration) involving union, members, or persons eligible to be union members, the employer must allow all workplace delegates to attend all related Fair Work Commission, court, or employment-related tribunal listings, meetings, and conferences without loss of pay. Appropriate time release must allow for appropriate travel time to and from the Fair Work Commission, court, or employment-related tribunal.
- 4) An employer must not:
 - a) induce a delegate not to exercise their rights.
 - b) prevent a delegate from participating in collective bargaining.
 - c) deal directly with a person who is being represented by a delegate about a dispute, bargaining for a collective agreement, their industrial interests, a disciplinary matter, a performance matter, or any other workplace or industrial matter unless by express grant of the person or persons consent, after having had a prior opportunity to consult the delegate.

- 5) An employer that is considering changes of an economic, technological or structural nature which may have a significant impact upon employees must consult with the relevant delegates in good faith before a final decision is taken.

Note: Clause X sets out further obligations in relation to consultation on major change.

3. Right to paid training leave

- 1) A workplace delegate has the right to reasonable Paid Time to attend training
 - a) on their role as a workplace delegate;
 - b) on workplace delegates' rights, or
 - c) related to their role in representing their union, union members and/or persons eligible to be union members.
- 2) A workplace delegate must be nominated by their union to participate in such training, and the training course must be approved by their union.
- 3) An employer and employee association must agree in writing on the total amount of Paid Time provided to each workplace delegate to attend training, provided that such time must not be less than 5 days per annum per delegate.
- 4) In addition to the Paid Time for delegates in (4) a person who is an officer of a union or who holds some other elected or appointed position in their union beyond that of workplace delegate shall be entitled to 3 days per annum Paid Time to attend training related to their role.
- 5) An eligible delegate (or person taking Paid Time in accordance with (5) above) or their union must give the relevant employer four weeks' notice of the intention to take Paid Time for training, unless otherwise agreed.
- 6) An employer must not refuse the request for leave, except where it can demonstrate that:
 - a) it has already provided the maximum amount of leave under this clause; or
 - b) it would cause unjustifiable hardship to the business to grant the leave at that time.

4. Right to communications

- 1) A workplace delegate is entitled to have reasonable communications (including discussions), including during Paid Time, with their union, union members or persons eligible to be union members in relation to any matter or subject.
- 2) For the avoidance of doubt, a workplace delegate's entitlement to reasonable communications (including holding discussions) shall include (but is not limited to), among other things:

- a) the right to ask a person their union status and ask them to join the union; and
 - b) the right to ask an official or employee of the union to attend the workplace.
 - c) discussing relevant industrial and workplace matters with union members and persons eligible to be union members;
 - d) addressing new employees at an induction or at the commencement of their employment or shift (or to address new employees at a separately convened meeting during Paid Time of no less than 15 minutes and no more than 30 minutes where no such induction occurs); or
 - e) representing or advising an employee or employees, or otherwise discussing, in an individual or collective issue, concern, dispute, grievance, disciplinary matter, performance matter or any other workplace or industrial matter.
 - f) participating in bargaining for an enterprise agreement or other communication in connection with such bargaining;
- 3) A person who is a union member, or person eligible to be a union members, of a union has the right to have discussions with a workplace delegate that represents them.
- 4) If reasonable communications occur during work time, they must be treated and paid as work time for the workplace delegate as well as any union members or persons eligible to be union members who participate.
- 5) An employer must facilitate reasonable communications between a delegate and union members or persons eligible to be union members. This may include provision of access to the workplace and/or to means of communication used in the workplace.

Note: Access to facilities and equipment is further provided for in clause X

- 6) An employer must not knowingly or recklessly survey, monitor, record or otherwise infringe the privacy of confidential communications between workplace delegates and their union, union members or persons eligible to be union members.
- 7) An employer must not:
- a) prevent workers from disclosing information to a workplace delegate or union; or
 - b) require a worker to disclose the contents of any communications with a workplace delegate or union.
- Any term of an arrangement or contract which provides to the contrary is void and unenforceable.
- 8) An employer must not:
- a) prevent a workplace delegate from disclosing information
 - i) to their union;
 - ii) to union members or persons eligible to be union members; or
 - b) require a workplace delegate to disclose
 - i) the contents of any confidential consultations.
 - ii) confidential information to it, or make any use of such information.
- Any term of an arrangement or contract which provides to the contrary is void and unenforceable.

5. Right to access and to use facilities

- 1) A workplace delegate has the right to make reasonable use of the employer's facilities

and equipment, or other facilities and equipment where the enterprise is being carried on.

- 2) For the avoidance of doubt, a workplace delegate's entitlement to access the workplace and/or to make reasonable use of the employer's (or other) facilities shall include (but is not limited to), among other things:
 - a) placing a union notice on an employee noticeboard (including electronic notice boards, intranet pages and other internal electronic pages;
 - b) use of computers;
 - c) making photocopies of a document;
 - d) making telephone calls,
 - e) sending confidential (as between the workplace delegate and the recipients or senders) electronic messages, including making use of electronic address lists, using electronic communication facilities that the employer uses to communicate with its workforce;
 - f) reasonable access to the workplace/s or such other places where work is performed;
 - g) reasonable transport and freedom of movement to or within the workplace, where this is necessary in order to provide reasonable access;
 - h) holding discussions in an appropriate room or location on the premises, independent of employer representatives.

6. Right to Attend Meetings

- 1) An employer must allow every union member employed by the employer to attend a reasonable number (at least 2) of union meetings (each of a maximum of 2 hours' duration) during Paid Time in each calendar year.
- 2) An employer must allow an employee who is an officer of a union or who holds some other elected or appointed position in their union beyond that of workplace delegate Paid Time for the purpose of carrying out duties or exercising rights as an officer (or holder of some other role) of an employee association.

Annexure B - 5-Day Delegate Training Sample Outline

Union Delegates in the workplace play a pivotal role in shaping cooperative and productive workplaces. Union delegates are a vital link between the workforce and management, fostering open communication, resolving issues, and championing the collective voice of workers. Union delegates promote collaboration in thriving and harmonious work environments. Throughout the union delegate training program, we will equip workplace delegates with the skills and knowledge needed to excel in their role, ensuring that they can be a catalyst for positive change as leaders in building workplaces where cooperation, equality and productivity flourish and workplace bargaining, negotiations and dispute resolution can be facilitated efficiently.

This five-day development program is representative of the areas of knowledge and skill development that currently undertaken by Union delegates as a course of good practice.

As a standard course, this five-day course would comprise 5 days each covering four sessions. A delegate would undertake this program in their first year of being a workplace delegate. They would also undertake more union, workplace, and topic specific development each year during their tenure as a workplace delegate.

Day 1: Union Delegates @ Work

Session 1: The employer and employee relationship

This session will enable delegates to identify the shared and conflicting interests in the employee - employer relationship and identify the source of employers and workers control and influence. Delegates will explore collective approaches to problem solving.

Session 2: Purpose and structures of unions

This session will explore some basic union history and the purpose of unions. This content would then vary based on the context of the relevant delegates. It may focus on structures within a single union, in a single union workplace, or it may explore union structures across multiple union, or multiple worksites / employers especially in a multi-employer bargaining setting.

Session 3: Your Union – an induction into the functions of your union

This content would vary depending on the relevant union but will take participants through the various functions of the union and how they are structured to support members. Delegates will become familiar with the various functions of the union and how and when to connect members to these various functions. This includes membership, industrial, workplace and member welfare support and services.

Session 4: The different roles that delegates play:

Not all managers have the same role, neither do all delegates. This session will explore the different and many roles that delegates play. Some delegates may play all the roles and in other work groups, a network of delegates might work together to provide all these functions as a group. The kinds of common roles that delegates play in a workplace include Communicator, sharing information between union structure, members and even management. Convenor or facilitator of workplace union meetings. Chairing meetings effectively to enable member participation and decision-making is an essential role that many workplace delegates play. Delegates dedicate their efforts to key activities related to workplace representation, such as addressing grievances; responding to questions regarding award conditions; representing and engaging workforce during the introduction of workplace changes, serving on joint consultative committees; engaging in negotiations over salaries, physical work environments, and work procedures; and negotiating agreements specific to the workplace or enterprise.

Learning Outcomes Day 1:

- Identify shared and conflicting interests in the employee-employer relationship.
- Analyse the sources of control and influence held by employers and workers.
- Explore collective approaches to problem-solving within the workplace context.
- Understand the historical context and purpose of unions.
- Relate the role of unions to collective representation and advocacy for workers' rights.
- Become familiar with the various functions of the union, including membership support, industrial advocacy, workplace support, and member welfare services.
- Learn how and when to connect members to different functions of the union to maximise support and benefits.
- Understand the role of delegate including as communicator, convenor, and chairperson.
- Begin to learn how to facilitate and chair meetings to enable member participation and effective decision-making.
- Begin to develop an understanding of the key activities related to workplace representation, including addressing grievances, responding to questions, engaging in negotiations, and participating in joint consultative forums.

Day 2: Delegate Roles and Rights for Effective Workplace Communication

Session 1: Delegates' Rights

This session will educate delegates about their rights under their industrial instrument / model clause / FW Act

Session2: Delegates' Responsibilities

This session will outline the delegates responsibilities including their responsibilities under the rules and procedures of their union (E.G. meeting and notification procedures, codes of conduct), their responsibilities within the workplace and their responsibilities under the Sex Discrimination Act.

Session 3: Communication with purpose

This day will have a heavy focus on effective communication which is a fundamental role of a workplace delegate. Delegate's will participate in sessions exploring how to properly call meetings, chairing meetings and meeting facilitation skills, taking and circulating meeting notes, providing a report back or an update to groups of members, verbal, and written communication essentials, presenting at worker inductions.

Session 4: Introduction to Representation

This session will explore problem solving and grievance handling including understanding grievance and dispute settlement procedures and effectively communicating with management.

Learning Outcomes Day 2:

- Awareness of delegate rights and responsibilities under industrial instruments and union rules.
- Identify the scope and limitations of their rights as workplace delegates.
- Understand how to apply knowledge of rights to advocate effectively on behalf of members in the workplace.
- Comprehend and adhere to the rules and procedures of their union.
- Recognise responsibilities under anti-discrimination laws, such as the Sex Discrimination Act, to promote a fair and inclusive workplace.

- Develop effective communication skills essential for workplace delegates, including the ability to call and chair meetings.
- Develop effective communication skills for workplace representation.
- Begin to develop skills in meeting facilitation, note-taking, and circulation of meeting minutes.
- Acquire skills for providing informative and engaging updates to groups of members.
- Improved verbal and written communication skills, including presentation skills for worker inductions.
- Begin to explore problem-solving and grievance-handling strategies.
- Begin to understand grievance and dispute settlement procedures and how to effectively communicate these processes to members.
- Begin to develop skills for constructive communication with management to address workplace issues.

Day 3: Equity and Inclusion and Safer Workplaces

Session1: Gender Equity:

Delegates will be introduced to the concepts of gender equity in the workplace, the drivers of gender inequality and the impact of gender inequality and gender violence in the workplace.

Delegates will have an introduction into the Sex Discrimination Act, Respect@Work changes, Family and Domestic Violence leave and the gender equity objects of the Fair Work Act.

Delegates will start to explore their role and possible basic level interventions that they can make to promote gender equity.

Session 2: Cultural Competency and Inclusion

Delegates will also explore the impacts of racism and ableism in the workplace and the importance of culturally safe and disability inclusive workplaces. Delegates will have an introduction into anti-discrimination law.

Delegates will start to explore their role and possible basic level interventions that they can make to promote, cultural competency, and inclusion in their workplaces.

Session 3: Work Health and Safety Foundations

This session will provide a broad overview of the Work Health and Safety act and systems. Participants will then explore behaviour-based and systems-based approaches to health and safety.

Session 4: WHS Foundations, Risk Identification, and the Hierarchy of Controls.

Building on the previous Work Health and Safety Foundations session, delegates will explore the basics of hazard and risk identification and the hierarchy of controls and role of WHS structures and Health and Safety Representatives in the workplace.

Learning Outcomes Day 3:

- Gain an understanding of the concepts of gender equity in the workplace, including the drivers and consequences of gender inequality.
- Be introduced to key legislative frameworks, including the Sex Discrimination Act, Respect@Work changes, Family and Domestic Violence leave, and the gender equity objectives of the Fair Work Act.
- Begin to explore the role of individuals in promoting gender equity and identify basic-level interventions to address gender inequality and violence in the workplace.
- Begin to become familiar with the impacts of racism and ableism in the workplace and recognize the importance of creating culturally safe and disability-inclusive work environments.
- A basic understanding of the relationship between anti-discrimination laws and their relevance to promoting cultural competency and inclusion.
- Identify and develop basic-level interventions to foster cultural competency and inclusion within the workplace.
- Acquire an introductory level overview of the Work Health and Safety Act and related systems.
- Develop a basic Understanding of behaviour-based and systems-based approaches to health and safety in the workplace.
- Identify the importance of promoting a culture of safety and well-being.
- Explore the basics of hazard and risk identification in the workplace.
- Develop a basic understanding of the hierarchy of controls and the role of Work Health and Safety structures and Health and Safety Representatives in promoting a safe working environment.

Day 4: Industrial foundations and dispute resolution

Session 1: Industrial instruments and legal framework fundamentals

This session will explore the relationship and application of Legislation including the Fair Work Act, Work Health and Safety Act, Sex Discrimination Act, and the application of industrial instruments including the National Employment Standards, Awards and Agreements.

Session 2: Types of employment

Delegates will learn about the various employment types and entitlements to enable them to better support a diversity of workers in their workplace.

Session 3: The basics of dispute resolution:

This elective will explore employer and employee responsibilities under common law contract of employment. Participants will identify and explore the various sources of workplace rights, dispute resolution procedures, and gain a basic understanding of the concepts of Natural justice and procedural fairness.

Session 4: Worker engagement and representation around workplace change:

We work in a dynamic environment. Workplaces and the way work is performed is often changing. It might be a change about worker's rosters, or the technology that is used, it might even be major workforce planning changes, whatever the issue, the introduction of workplace change can have the most significant impact on workers lives and how the change process is approached, can have the most significant impact on workplace disputation. Union delegates play an essential role in engaging, consulting, and representing workers through the workplace change process. This session will explore the industrial consultation process that employers need to follow and skills and techniques for delegates to engage members in the discussion.

Learning Outcomes Day 4:

- Understand the relationship between key legislations such as the Fair Work Act, Work Health and Safety Act, and the Sex Discrimination Act.
- Apply knowledge of industrial instruments including the National Employment Standards, Awards, and Agreements to address workplace issues.

- Identify and distinguish between different types of employment arrangements.
- Demonstrate an understanding of entitlements associated with various employment types.
- Develop strategies to support a diverse workforce based on their specific employment entitlements.
- Recognise employer and employee responsibilities within the common law contract of employment.
- Identify and apply sources of workplace rights and dispute resolution procedures.
- Gain a basic understanding of concepts such as Natural Justice and Procedural Fairness in the context of dispute resolution.
- Recognise the dynamic nature of workplaces and the impact of change on workers' lives.
- Awareness of the industrial consultation process that employers must follow during workplace changes.
- Acquire skills and techniques to effectively engage, consult, and represent workers during the workplace change process.

Day 5: Bargaining, Negotiation, and Grievance Handling

Day 5 will comprise of 4 of the following sessions depending on the current priorities and context of the delegate's workplace.

Session 1: Skills for handling workplace grievances; gathering information.

This session will assist participants to develop the skills for effective handling of workplace grievances and disputes. This session will explore effective listening and questioning skills and how to gather information from members to help resolve matters.

Session 2: Skills for handling workplace grievances; options for resolution

This session will assist participants to develop the skills for effective handling of workplace grievances and disputes. Participants will learn frameworks to assist them generate and assess options for resolution.

Session 3: Skills for handling workplace grievances; making representations.

This session will assist participants to develop the skills for effective handling of workplace grievances and disputes. Delegates will learn about and practice preparing written and verbal representations in a dispute process.

Session 4: Skills for handling workplace grievances; Developing communication and representation networks.

This session will include exploring identifying and empowering others, principles and practicalities of worker representation networks and strategies for effective and timely network and work and member communication during introduction of change, dispute and grievance processes.

Learning Outcomes Day 5, sessions 1-4; Handling workplace grievances cluster:

- Develop effective listening and questioning skills to facilitate the collection of relevant information during workplace grievances.
- Apply techniques for gathering information from members to support the resolution of workplace matters.
- Develop an understanding of the importance of information gathering in the early stages of handling workplace grievances.
- Become familiar with applying frameworks for generating and assessing options to resolve workplace grievances and disputes.
- Start to develop an understanding of the suitability of different resolution options based on the specific context of workplace issues.
- Start to develop the ability to guide individuals on appropriate resolution pathways.
- Explore the skills to prepare effective written and verbal representations in the context of workplace disputes.
- Be introduced to some of the basic legal and procedural aspects involved in making representations during the dispute resolution process.
- Practice the ability to communicate grievances persuasively and professionally.
- Understand the need to identify individuals who can be empowered to play key roles in workplace representation networks.
- Explore the principles and steps to establishing and maintaining worker representation networks.
- Start to develop strategies for effective and timely communication within networks during periods of change, dispute, and grievance processes.

Session 5: Bargaining and negotiations; an overview of the bargaining process.

This session will start by providing participants an overview of the bargaining system in Australia and the different stages and requirements of commencing, negotiating, and finalising a collective agreement under the Fair Work Act.

Session 6: Bargaining and negotiations; building bargaining claims across a membership.

Delegates will explore how and why parties develop and present claims during the bargaining and negotiation process. Delegates will consider the steps of developing a union bargaining claim including involving members in the developing and prioritising issues for bargaining.

Session 7: Bargaining and negotiations; an introduction to developing communication and representation networks.

This session will include exploring identifying and empowering others, principles and practicalities of worker representation networks and strategies for effective and timely network and work and member communication during the bargaining process.

Session 8: Bargaining and negotiations; an introduction to the process of bargaining – at the negotiating table.

This session will explore the different bargaining and positions of negotiating parties. Participants will learn about and practice putting a position at the negotiating table, explaining a position, using research in discussions, listening to exploring and responding to alternative positions.

Learning Outcomes Day 5, sessions 5-8; Bargaining and negotiations cluster:

- Develop a base understand of the overall structure and functioning of the bargaining system in Australia.
- Develop a familiarity with the stages and requirements involved in commencing, negotiating, and finalising a collective agreement under the Fair Work Act.
- Explore the process of development and presentation of claims during the bargaining and negotiation process.
- Understand the steps involved in formulating a union bargaining claim, including the active involvement of members in identifying and prioritising issues for bargaining.
- Understand the need to identify individuals who can be empowered to play key roles in workplace representation networks during the bargaining process.

- Understand the principles and practicalities of effective worker representation networks.
- Be introduced to strategies for timely and efficient communication within networks to enhance coordination and engagement during bargaining.
- Understand that there are various bargaining positions of negotiating parties and their implications.
- Be introduced to approaches for presenting a position at the negotiating table.
- Be introduced to the process of explaining, supporting, and defending a bargaining position.
- Understand how negotiation skills are enhanced by actively listening, exploring alternative positions, and responding appropriately during negotiations.

NOTE: Grievance handling, bargaining and negotiations are complex skill sets. Ordinarily these are areas of skill development that a delegate would regularly revisit and deepen throughout their tenure as workplace delegate. The above sessions 1-8 for day five would serve as a base level introduction to the concepts and processes for a delegate starting out in their role.

IN THE FAIR WORK COMMISSION

VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES RIGHTS TERM (AM2024/6)

STATEMENT OF PROFESSOR DAVID PEETZ

I, David Peetz of 170 Kessels Road, Nathan, Queensland 4111, Professor Emeritus, state as follows:

Introduction

1. I make this statement of my own knowledge and beliefs, except where stated otherwise.
Where I depose to matters on the basis of information provided to me, I believe that information to be true.
2. I am a Professor Emeritus of Employment Relations in the Griffith Business School at Griffith University (170 Kessels Road, Nathan QLD 4111) and the Laurie Carmichael Distinguished Research Fellow at the Centre for Future Work in the Australia Institute (1 Franklin Street, Manuka, ACT 2602).

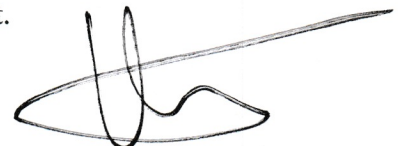
Qualifications

3. I hold the following qualifications:
 - a. A Bachelor of Economics with First Class Honours from the University of Sydney (awarded 1979);
 - b. A Doctor of Philosophy from the University of New South Wales (awarded 1995)
4. I have been teaching, researching and writing on matters relating to union delegates and to worker voice since the late 1980s (when I undertook a doctoral thesis on union decline in Australia). I have published about these matters on a number of occasions, including in several journals and books cited in the footnotes to this report.
5. I have published 7 books (4 authored and 3 edited), 22 other research monographs, 99 refereed journal articles, 48 book chapters, 23 other journal articles, 16 discussion or working papers and 108 media articles. I have also made 33 submissions to public inquiries and given 170 academic conference presentations.
6. A list of most research pieces that I have had published is available via my personal page on the Griffith University website: <https://experts.griffith.edu.au/18648-david-peetz/publications>.

7. I have appeared as an expert witness in several industrial cases, most recently in the Queensland State Wage Case when I was commissioned jointly by the opposing parties to be an agreed expert witness, providing a written report and oral evidence in August and October 2023.

Expert Report

8. On 26 February 2024, ACTU Senior Legal and Industrial Officer Sunil Kemppi requested that I prepare a report on the question: 'What does the research say about union delegates and worker voice?' Attached to this statement and marked 'DP-1' is a true and correct copy of the request from Mr Kemppi for a research report, dated 26 February 2024.
9. On 29 February 2024, in response to the above request, I completed and provided the report titled 'Report on Academic Research on Union Delegates and Worker Voice'. Also attached to this statement and marked 'DP-2' is a true and correct copy of that Report, dated 29 February 2024.
10. Due to the very limited time available for the preparation of this report, however, this is a very short report and I draw heavily on material I have already written for other purposes.
11. Nonetheless, in the time available I have made all the inquiries which I believe are desirable and appropriate and, in light of my understanding of the issue from several decades of involvement in it, no topics of significance which I regard as relevant to the question have, to my knowledge, been withheld. In doing this, I have not canvassed all the literature on worker voice, but focused on those aspects relevant to the intersection with research on union delegates. The report therefore focuses on the activities of union delegates and the relationship to co-operative and productive workplace relations, that is to workplace co-operation, productivity and related outcomes.
12. I have been provided with, read, understood and complied with the Federal Court of Australia's Harmonised Expert Witness Code of Conduct in connection with the preparation of my report. The Report reflects my specialised knowledge gained through training, study, research and experience, as outlined in this statement.



Professor Emeritus David Peetz

Thursday, 29 February 2024

From: Sunil Kemppi <skemppi@actu.org.au>
Sent: Monday, 26 February 2024 10:12 PM
To: David Peetz <davidp@australiainstitute.org.au>
Subject: Re: Request for Expert Report - union delegates and worker voice

Dear Professor Peetz,

ACTU is making a submission to the Fair Work Commission, which is consulting interested parties on the inclusion of a delegates' rights term in modern awards.

This email is to request that you prepare a report as an expert witness, which will be tendered to the Fair Work Commission (FWC) as part of that consultation.

In terms of procedure, I note that the process being undertaken by the Fair Work Commission differs from, and does not involve the formality of, an ordinary hearing process. For example, the matter is not set down for hearing and will instead proceed by way of written submission and consultation conferences. Your report will be provided to the FWC by the ACTU, alongside our written submission.

Background

The recently passed Closing Loopholes (No. 1) legislation inserted provisions relating to workplace delegates' rights into the Fair Work Act 2009. These rights are set out in the newly inserted FW Act sections 350A & 350C.

Under the legislation, there is also a requirement for the FWC to insert a workplace delegates' right clause in modern awards. It is pursuant to this requirement that the FWC is consulting parties and has invited submissions.

Expert Report

We would like you to prepare a short report which answers the following question:

What does the research say about union delegates and worker voice?

Being an Expert Witness

As an expert witness, you will have an overriding duty to the FWC to provide objective and independent information about the matters you have been asked to provide an opinion on.

While the FWC is not strictly bound by the rules of evidence, we feel that it is best practice for you to comply with the Federal Court's rules in relation to expert witnesses. Please read the Federal Court's Expert Evidence Practice Note ([available here](#)) which contains (as Annexure A) the "Harmonised Expert Witness Code of Conduct" and comply with it in preparing your report. Please include in your report the matters set out in 3.(a)-(l) of the Harmonised Expert Witness Code of Conduct (as applicable).

Please provide reasons for each opinion in your report, and the methodology you have used to reach your conclusion (including any assumptions which you might have made). If a particular question or issue is outside of your expertise, please advise.

Regards,

Sunil Kemppi

Sunil Kemppi

Senior Legal & Industrial Officer

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Adelaide
4-6 June, '24

We acknowledge the Traditional Owners of country throughout Australia and recognise their continuing connection to land, waters and culture. We pay our respects to their Elders past and present.

DP-2

**REPORT ON ACADEMIC RESEARCH ON UNION DELEGATES AND
WORKER VOICE**

Report to Fair Work Commission

David Peetz

29 February 2024

REPORT ON ACADEMIC RESEARCH ON UNION DELEGATES AND WORKER VOICE

1. A union delegate is as an employee chosen to represent union members in dealings with management. Delegates are volunteers who perform their union duties on an unpaid basis in addition to their normal job at work. They are sometimes known as ‘workplace union representatives’. A union delegate can be elected by the members or (much less commonly) selected by the union. Delegates are volunteers who perform their union duties on an unpaid basis in addition to their normal job at work.
2. While only a small proportion of workplaces are unionised, this is in part because most workplaces are, themselves, very small and therefore difficult to unionise. But in 2007, over two thirds of large workplaces (those with 100 or more employees) had a union presence, and the majority of those were unionised strongly enough to have union delegates.¹ The proportions would be less now, as union density is lower, but I have not attempted to model by how much.
3. The rest of this report focuses on the activities of union delegates and the relationship to co-operative and productive workplace relations, a focus of the main object of the *Fair Work Act 2009*.² That is, the emphasis is on the way in which worker voice through workplace delegates affects workplace co-operation, productivity and related outcomes.
4. Delegates spend their time undertaking vital tasks for workplace representation, including: handling individual grievances; dealing with queries about award conditions; participating on joint consultative committees; negotiating wages, physical working

¹ Gillian Considine and John Buchanan, *Workplace Industrial Relations on the Eve of Work Choices: A report on a survey of employers in Queensland, NSW and Victoria*, Workplace Research Centre, University of Sydney (Sydney, September 2007):14

² *Fair Work Act 2009*, s3.

conditions and work practices; and negotiating workplace or enterprise agreements.³

Union delegates tend to be the part of the union that members have the most contact with, and members are most satisfied with the part of the union closest to them.⁴ In one Australian study, members were nearly 1½ times more likely to be satisfied with their delegates than with union officials and leaders.⁵

5. Having a voice brings important benefits for workers. For example, unionisation is known to improve health and safety by reducing the incidence of traumatic injuries and fatalities in coal mines, while leading to increased reporting of non-traumatic injuries that are more likely to be glossed over in non-union workplaces.⁶
6. There is a curious paradox in the relationship between management and union delegates. Many managers actively seek to rid the workplace of union delegates, and will sometimes go to illegal lengths to do so.⁷ Yet union delegates are often the key to co-operative union-management relations.
7. This is because, in most countries where the issue is studied including Australia, employees report that they desire a cooperative relationship between the union and

³ Ron Callus et al., *Industrial Relations at Work: The Australian Workplace Industrial Relations Survey* (Canberra: AGPS, 1991):109; Alison Morehead et al., *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey* (South Melbourne: Longman, 1997):167)

⁴ David E. Guest and Philip Dewe, "Company or trade union: Which wins workers' allegiance? A study of commitment in the UK electronics industry," *British Journal of Industrial Relations* 29, no. 1 (March 1991), <http://proquest.umi.com/pqdweb?did=985739&Fmt=7&clientId=13713&RQT=309&VName=PQD.:86>; T Simey and et al, *The Dock Worker: An Analysis of Conditions of Employment in the Port of Manchester* (Liverpool: Liverpool University Press, 1954).

⁵ David Peetz, *Unions in a Contrary World: The future of the Australian trade union movement*, Reshaping Australian institutions., (Cambridge: Cambridge University Press, 1998). ch 2

⁶ Alison D Morantz, "Coal mine safety: Do unions make a difference?," *Industrial and Labour Relations Review* 66, no. 1 (2013).

⁷ Tony Dundon, "Employer opposition and union avoidance in the UK," *Industrial Relations Journal* 33, no. 3 (2002); "Union delegate unfairly denied labour-hire job at Patrick: AIRC," *Workplace Express*, 30 July 2004, https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=23777; David Peetz, *Brave New Workplace: How Individual Contracts are Changing our Jobs* (Sydney: Allen & Unwin, 2006), ch. 5.

management at the workplace.⁸ This 'dual commitment' of union members to their right to a voice through their union, and to supporting management to ensure a successful workplace is a widespread phenomenon that has been recognised in the industrial psychology literature for well over half a century.⁹

8. Not only do employees see that the union needs to behave cooperatively; they also expect management to reciprocate, by cooperating with the union to solve workplace problems. Detailed questioning has revealed that, to workers, cooperation means management sharing power and authority with unions, not an artifice whereby management 'leads' and the union 'cooperates' by following.
9. Thus, while two thirds of Australian union members wanted unions to cooperate more with management, they were even more vigorous in demanding that management

⁸ Richard B. Freeman, Peter Boxall, and Peter Haynes, eds., *What Workers Say: Employee Voice in the Anglo-American World* (Ithaca NY: ILR Press, 2007); David Peetz, "Workplace cooperation, conflict, influence and union membership," in *Contemporary Research on Unions: Theory, Membership, Organisation and Non-standard Employment*, ed. G Griffin, Monograph No 8 (Melbourne: National Key Centre in Industrial Relations, 1996).

⁹ L R Dean, "Union activity and dual loyalty," *Industrial & Labor Relations Review* 7, no. 4 (July 1954); T V Purcell, "Dual allegiance to company and union: Packinghouse workers," *Personnel Psychology* 7 (1954); Daniel G Gallagher, "The relationship between organizational and union commitment among federal government employees," *Academy of Management Proceedings* 44 (1984); Cynthia V. Fukami and Erik W. Larson, "Commitment to company and union: Parallel models," *Journal of Applied Psychology* 69, no. 3 (Aug 1984 1984),

<http://proquest.umi.com/pqdweb?did=1152711&Fmt=7&clientId=13713&RQT=309&VName=PQD;>
Harold L. Angle and James L. Perry, "Dual commitment and labor-management relationship climates," *Academy of Management Journal* 29, no. 1 (Mar 1986 1986),

<http://proquest.umi.com/pqdweb?did=1908385&Fmt=7&clientId=13713&RQT=309&VName=PQD;>
John M. Magenau, James E. Martin, and Melanie M. Peterson, "Dual and Unilateral Commitment Among Stewards and Rank-and-file Union Members," *Academy of Management Journal* 31 (1988); P A Bamburger, A N Kluger, and R Suchard, "The antecedents and consequences of union commitment: A meta-analysis," *Academy of Management Journal* 42, no. 3 (June 1999); Ed Snape and Andy W Chan, "Commitment to company and union: Evidence from Hong Kong," *Industrial Relations* 39, no. 3 (July 2000),
<http://proquest.umi.com/pqdweb?did=56237480&Fmt=7&clientId=13713&RQT=309&VName=PQD.>

cooperate more with unions (with 82% saying that). They were almost unanimous in wanting unions to continue to vigorously defend their interests.¹⁰

10. Overall, then, the meaning of ‘cooperation’ is quite complex, and a long way from ‘acquiescence’. Indeed, union members were more likely to have taken part in industrial action where they saw unions as having tried to cooperate with management.¹¹ This might seem paradoxical, but it reflects the dual objectives of employees – to maximise their income and to maintain the viability of their employment – and the fact that employees will be alienated from management *if* they consider that one side (the union) has tried to cooperate with management while management has failed to reciprocate – but they will *not* support action if the union has not tried to cooperate where possible.
11. Of course, not all managers are antagonistic to union delegates. Many employers prefer dealing with unions, as it may have benefits such as reducing their transaction costs in determining pay.¹² And not all delegates are cooperative with management, but if they are out of step with the union’s membership, either they will be voted out, or the union will lose its members and hence its power in the workplace. A situation in which management is cooperative towards union delegates but delegates do not return the favour is thus not normally sustainable.
12. Thus union delegates are a basic institution that acts to mediate cooperation at the workplace. They mobilise, and are forced to respond to, employee wishes for cooperation with management. And if management are not cooperative with employees, they are able to mobilise members, again in response to member wishes, to force management to change its behaviour, towards a more co-operative model.
13. Efforts to undermine or remove union delegates would thus undermine a basic institution through which cooperative voice can be expressed.

¹⁰ Julian Teicher et al., "Employee Voice in Australia," in *What Workers Say: Employee Voice in the Anglo-American World*, ed. Richard B. Freeman, Peter Boxall, and Peter Haynes (Ithaca NY: ILR Press, 2007).

¹¹ Peetz, "Workplace cooperation, conflict, influence and union membership." n8 above.

¹² Edmund Heery, "Trade unions and the management of reward", in *Reward Management: A Critical Text*, ed. Geoff White and Janet Drucker (London: Routledge, 2000).

14. There are several potential outcomes from the manifestation of worker voice. One is the potential for resolution of employee grievances, be they on pay, employment benefits, safety (mentioned in paragraph 0) or the conditions of work. ‘Maintaining or improving the conditions of their working lives’ is, indeed, a core purpose of trade unions¹³ and need not be elaborated upon here.

15. Another concerns potential effects on productivity. Evidence from empirical studies of the relationship between unionism and productivity shows that productivity is no higher in non-union than unionised workplaces, despite any former potential for ‘featherbedding’ or union restrictions on use of technology.¹⁴ This is mostly because such negative effects are frequently outweighed by the potential positive impacts of worker voice on productivity, for example, by encouraging employees to identify better ways of doing things, or motivating them to optimise their effort. The net impact, it appears, depends on circumstances.¹⁵ As Appelbaum, Gittell & Leana found in a 2011 study, ‘neither highly adversarial battles over union organizing nor ongoing adversarial labor-management relations are conducive to... achieving positive results’. They added that

Labor-management partnerships based on mutual respect for worker, union, and employer rights and responsibilities have been shown to achieve high performance by facilitating employee participation and related high-performance work practices and by creating social networks within and across organizations’.¹⁶

¹³ Sidney & Beatrice Webb, *The History of Trade Unionism*, (London: Longmans, 1920).

¹⁴ J. Addison and C. Belfield, "Union Voice," *Journal of Labor Research* 25 (2004); B.T. Hirsch, "What do unions do for economic performance?," *Journal of Labor Research* 25, no. 3 (2004); Freeman, Richard B. 'What Do Unions Do ? The 2004 M-Brane Stringtwister Edition'. *Journal of Labor Research* 26, no. 4 (Fall 2005): 642–687; Bruce E Kaufman, "What do unions do?—Evaluation and commentary," *Journal of Labor Research* 26, no. 4 (2005).

¹⁵ Sandra E. Black and Lisa M. Lynch, "How to compete: the impact of workplace practices and information technology on productivity," *The Review of Economics and Statistics* 83, no. 3 (2001).

¹⁶ Eileen Appelbaum, Jody Hoffer Gittell, and Carrie Leana, "High-Performance Work Practices and Sustainable Economic Growth," (memo to Obama Administration, Brandeis University, 20 March 2011).

16. The other likely factor, at least in Australia, is that ‘featherbedding’ was mostly removed by the wage reforms of the 1980s (including the ‘two tier’ wage system) and it is not generally in the interests of the workers concerned to prevent the introduction of new technology, as such technology gives their firm a competitive edge which improves their employment and pay prospects. Hence, in German manufacturing, where employees have an institutionalised say in the introduction of technological change through ‘works councils’, it appears that ‘exposure’ to robots is associated with an increased probability that an employee will keep their job.¹⁷

17. There are fewer studies on the specific impact of workplace delegates (rather than unions) on productivity, but one recent Portuguese survey using matched employee-employer records found that a one percentage point increase in the proportion of members who were union representatives increased firm performance by at least 7 per cent.¹⁸ The author suggested that the result was likely driven by increased training investments by employers in such firms, as

workers' voice is potentially made more cohesive through the intermediation of union reps and the resulting dialogue with employers can become more effective.¹⁹

18. It should be noted that workplace unionism is not the only potential voice mechanism for employees. The relevant issue, though, is not just about whose voice is heard but who makes the decisions about whether employee voices are heard. Almost all other (non-union) forms of employee voice are management-constrained, meaning that management can ultimately terminate that arrangement for voice. This relates to most forms of ‘employee participation’, such as quality circles, autonomous work groups,

¹⁷ Wolfgang Dauth, Sebastian Findeisen, Jens Südekum, and Nicole Woessner, ‘The Rise of Robots in the German Labour Market’. *Vox*, 19 September 2017.

¹⁸ Pedro S. Martins, "The Microeconomic Impacts of Employee Representatives: Evidence from Membership Thresholds," *Industrial Relations* 58, no. 4 (2019).

¹⁹ *Ibid.*

productivity improvement groups, and joint consultative councils, unless they are established via a binding enterprise agreement.

19. By contrast, a voice mechanism is employee-controlled if management cannot unilaterally terminate an arrangement for voice. In Australia, by far the most common form of such arrangements is trade unionism and the main instrument through which voice is manifest is the union delegate. Overseas, trade unionism also exists, but employee-controlled voice may also encompass 'works councils' (found in parts of Europe), whereby the co-operative functions performed by union delegates in Australia are performed by works councillors. Employee-controlled voice may also encompass some non-government organisations (NGOs), mainly in developing countries.
20. One major study pointed to the key role union delegates can play, not only in democratising workplaces, but also in democratising unions themselves. Unions perceived as democratic by delegates had more power at the workplace. This was, in this study, the strongest predictor of union power at the workplace.²⁰ When delegates did not have strong upward say in the union, the union typically had little power in the workplace. Without union delegates, unions lack influence in the workplace, and members lack influence in the union.
21. To summarise, the key points from the research are:
 - a) union delegates tend to be the part of the union with which members have the most contact, and are most satisfied;
 - b) many managers actively seek to rid the workplace of union delegates, yet those delegates are often the key to co-operative union-management relations;
 - c) employees desire a cooperative relationship between the union and management at the workplace, and higher commitment to the organisation is positively correlated with higher commitment to the union;

²⁰ David Peetz and Barbara Pocock, "An analysis of workplace representatives, union power and democracy in Australia," *British Journal of Industrial Relations* 47, no. 4 (December 2009).

- d) to maintain their position, delegates need to behave cooperatively, but employees do not expect that to continue if management itself is uncooperative;
- e) the net impact of delegate presence and union membership on workplace productivity is heavily contingent on the extent of adversarialism or cooperation and employee voice in labour-management relations;
- f) workplace unionism and hence delegates represent the only form of employee voice in Australia that cannot be easily removed by management;
- g) delegates can potentially play an important role not only in democratising workplaces but also in democratising unions.

David Peetz
February 2024