

# Comments on the Draft Award Term for Delegates' Rights

ACCI

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# Table of Contents

<b>Introduction and General Comments</b>	<b>1</b>
<b>X.5 Right of Representation</b>	<b>2</b>
<b>X.6 Entitlement to Reasonable Communication</b>	<b>4</b>
<b>X.7 Entitlement to Reasonable Access to the Workplace and Workplace Facilities</b>	<b>5</b>
<b>X.8 Entitlement to Reasonable Access to Training</b>	<b>6</b>
<b>X.9 Exercise of Entitlements Under Clause X</b>	<b>8</b>
<b>About ACCI</b>	<b>9</b>

# Introduction and General Comments

1. The Australian Chamber of Commerce and Industry (**ACCI**) has previously lodged initial submissions on 01 March 2024 and reply submissions on 28 March 2024 to the Fair Work Commission (**FWC**) with respect to its process to vary modern awards to include a delegates' rights term. ACCI does not retreat from those submissions and reiterates our preference for those views to play a foundational consideration in the Commission's decision.
2. With respect to the draft delegates' rights award term (**draft term**) which the FWC has published, ACCI would make comments on several matters. ACCI notes the Commission's decision to incorporate several of its submissions into the draft term. ACCI also welcomes its decision to repudiate certain submissions of union parties, including suggestions that workplace delegates be provided iPads or time off to engage in political lobbying.
3. Although discussed in greater detail in the following submission, ACCI urges the Commission to place an absolute cap on the number of workplace delegates which can be appointed at a given workplace. It is ACCI's view that without such limitations there could arise outcomes where certain employers have hundreds of workplace delegates with entitlements that, by sheer number, inhibit the productive functioning of the workforce and workplace due to the obligations simultaneously imposed on employers.
4. Furthermore, and this too will be discussed further below, the ratio of workplace delegates to eligible employees having the entitlement to paid training leave should be decreased so that only one workplace delegate per a greater number of eligible employees is able to take paid training leave. Once again, without such an amendment, the clause as drafted could result in some employers having hundreds of delegates being eligible to take time off, creating hundreds or even thousands of extra days not worked due to training leave. This would have a significant practical impact on a business' operations.
5. ACCI is also concerned that the model clause does not explicitly state that workplace delegates are only entitled to paid time off in the context of paid training leave. Where a delegate seeks to undertake their voluntary duties in other contexts, they are not entitled to paid time. The draft terms needs to expressly state this.
6. ACCI would here make the suggestion, and this may well be a consideration separate to the development of the draft term, that the FWC create standard forms for delegate appointments in line with notification requirements under X.3, resignation according to X.4 notification requirements, and training content as covered by X.8(d).
7. Further to the above paragraph, ACCI submits that notice of appointment to an employer should also include the union rules under which they were appointed, and the membership coverage or coverage of eligible employees that they are entitled to represent.

## X.5 Right of Representation

8. ACCI notes the Commission's decision to prescribe certain matters which may pertain to the industrial interests of eligible employees that a workplace delegate is entitled to represent. Although this list is non-exhaustive, it specifies only those matters which ACCI called for in its submission. ACCI would reassert its desire for this list to be exhaustive, contained only to those matters currently expressed in the draft term and specify that no other matters are relevant to the industrial interests of eligible employees.
9. If the term is not constrained to those matters in an exhaustive fashion, then uncertainty is likely to arise from the practical implementation of the model clause. Employers will not have any significant certainty about those matters which a workplace delegate may rightly or improperly attempt to involve themselves in if the list is non-exhaustive.
10. ACCI submits that greater certainty for employers could be achieved by replacing current clause X.5(f) with "no other matters".
11. Additionally, although workplace delegates may have entitlements to represent the industrial interests of members or eligible employees, those entitlements only exist where said employees wish the workplace delegate to do so. Workplace delegates do not and should not have an unfettered ability to insert themselves in situations where they are unwelcome or have not been requested.
12. This is absolutely crucial in the context of performance management and disciplinary procedures. It would be a totally perverse outcome if delegates obtained the ability to insert themselves into such processes as anything other than a support person when requested, as current procedures encourage through section 387(d) of the Fair Work Act. Any other approach would be severely inappropriate and would have undesirable ramifications for managerial prerogative. The clause should clarify that a workplace delegate may only participate in such procedures at the request of an eligible employee as a support person otherwise ACCI would register its strident opposition.
13. ACCI submits that sub-clause X.5(d) should be amended as follows:

*(d) performance management and disciplinary processes as a support person when requested by an eligible employee that is being performance managed or disciplined;*
14. Without the above amendment, ACCI has grave concerns that a workplace delegate would be able to insert themselves into such procedures without being requested by the employee. This would be highly inappropriate.
15. Similarly, sub-clause X.5(e) also requires amendment. As currently drafted it could be interpreted to imply that workplace delegates have an entitlement to represent eligible employees regardless of whether they have been formally appointed as a bargaining representative under section 176 (or another section) of the Fair Work Act. Clearly it would not be appropriate to bestow additional rights to delegates beyond what the Act provides.

16. It is not the prerogative of modern awards to provide a safety net above what the Act legislates, that is firmly in the realm of enterprise agreements (EA). Modern award delegates' rights terms should not venture beyond clearly a minimum safety net of rights for workplace delegates.

17. This has been clearly explored by the courts in its examination of section 138 of the Act, which states:

*'A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'* (emphasis added).

18. The Federal Court clearly stated that:

*"The words "only to the extent necessary" in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4."*<sup>1</sup>(emphasis added).

19. ACCI hence suggests the following or another similar amendment to sub-clause X.5(e) to clearly elucidate that it is not the intention to provide an additional, special entitlement to workplace delegates beyond which the legislation allows for:

*(e) enterprise bargaining, where appointed in accordance with the Fair Work Act or an industrial instrument to be a bargaining representative; and*

20. Finally, ACCI submits that sub-clause X.5 more broadly needs to specifically clarify that a workplace delegate is only entitled to represent the industrial interests of eligible employees where those employees wish them to represent their industrial interests. ACCI strongly recommends that X.5 be amended in order to remove any doubt about its operation. This could be achieved through the following addition:

*For the avoidance of doubt, under clause X.5 a workplace delegate's entitlement to represent the industrial interests of an eligible employee is only enlivened when requested to do so.*

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<sup>1</sup> [2017] FCAFC 123.

## X.6 Entitlement to Reasonable Communication

21. ACCI does not agree that workplace delegates should have the ability to speak with employees about joining the union. Work time is neither the time nor the place to engage in commercial activities for a union. Workplace delegates are employees first and foremost.
22. If the Commission insists on explicitly allowing workplace delegates to do so, as the draft term implies, then it is not appropriate that a workplace delegate has a right to disrupt productive work for the purposes of union membership recruitment. Accordingly, sub-clause (b) should be amended to explicitly clarify, in addition to clause X.9(a)(iii), that where the purpose of communication is for “discussing membership of the delegate’s organisation”, that this be limited to work breaks, or before the start or after the end of work – and otherwise, any communications during productive work time be subject to agreement with the employer (which should not be unreasonably withheld).
23. Employers have also raised concerns with ACCI about the potential for large-scale employee meetings organised by workplace delegates under their entitlement to reasonable communication to be attended by other unions and their employees. An employer could not feasibly prevent or control other employee organisations’ workplace delegates or officials from attending even in circumstances where they have no right to represent the industrial interests of those employees. There should be some sort of protocol, not dissimilar to right of entry arrangements, to manage such possibilities.
24. ACCI also submits that before work and after work meetings must be explicitly restricted to the workplace of the eligible employees with whom a workplace delegate is intending to communicate. For example, it would be entirely inappropriate for the practical expressions of a delegate’s entitlement to reasonable communication to take place in FIFO accommodation facilities as the boundaries between work and non-work must be retained for the well-being of residents.

## X.7 Entitlement to Reasonable Access to the Workplace and Workplace Facilities

25. ACCI is concerned that clause X.7 does not reiterate that access to the workplace and to workplace facilities is only entitled to a workplace delegate to the extent that it is reasonable. X.7 should make clear that “The employer must provide a workplace delegate with reasonable access to...”. Without this clarification it is possible that the draft term could be interpreted to extend beyond that which the legislation clearly provides. This is particularly relevant with respect to neutral and non-work spaces such as FIFO accommodation. Boundaries between work and non-work spaces must be maintained for the benefit of employees in such circumstances. Access therefore must be couched consistently in the language of reasonable to prevent such outcomes.
26. Furthermore, the clause needs to clarify that a workplace delegate is only afforded reasonable access in the context of their delegate duties. Where they are not acting in the capacity of workplace delegate then there is no entitlement, reasonable or otherwise, to said facilities.
27. The current drafting of X.7(c) has also aroused some privacy concerns from ACCI members. Members have expressed to ACCI that if this clause is intended to allow workplace delegates access to an employer’s SMS, email or other messaging systems they would inevitably be able to view contact details and messages. Access to such software inherently gives you access to those details. Hence, although there is an attempt to address this in X.9(b), an inevitable consequence of having access to such systems will mean that a workplace delegate will be able to view contact details and messages between the company and employees. ACCI would urge the FWC to reconsider the manner in which it proposes to deal with reasonable communication given these concerns.
28. Additionally, ACCI submits that there needs to be some clarity written into the clause about what may constitute reasonable use of workplace facilities. This is due to the fact that, company facilities should not be used to create commercial products for the union which a workplace delegate represents. Reasonable access must be purely for the purpose of representing the industrial interests of eligible employees.
29. Finally with respect to sub-clause X.7(a), the use of the term “fit-for-purpose” is inappropriate. A ‘multiuse’ room should be reasonable for the needs of meetings or voluntary delegate duties. The room could be adjusted to accommodate differing requirements. There is, however, no clear justification why a workplace delegate should have a dedicated space. From ACCI’s view, that would be unreasonable and highly impractical especially in the context of a small business that may have little to no office space.



## X.8 Entitlement to Reasonable Access to Training

30. ACCI notes the Commission's decision to place limits on the number of workplace delegates entitled to paid training leave and the number of paid training leave days which a delegate is entitled to as ACCI called for in its submissions. Without such limitations the clause would have had drastic safeguarding issues.
31. However, ACCI is disappointed that the draft term does not place restrictions on the number of workplace delegates which may be present at any given workplace. ACCI does note though that the Commission may have been constrained by the wording of the Fair Work Act at section 350C(1). ACCI reiterates its view that the number of workplace delegates that may be appointed in a particular workplace should be constrained as follows:

<b>No. of full time and part-time employees</b>	<b>Max. no. of delegates</b>
1-30	1
31-50	2
51-100	3
101 and over	4

32. If the absolute number of workplace delegates at a workplace cannot be constrained due to the legislative limitations imposed by the Act then the limitations on the number of delegates eligible to take paid training leave should be expanded.
33. For some large companies 1 in 50 employees taking paid training leave could in fact have significant cost and operational ramifications. Take a company with 5,000 employees. If 1 in 50 of their employees were to become delegates after the installation of the draft term, then the company would be required to provide 100 employees with up to 500 paid days off for training leave. That would clearly be inconsistent with the modern award objectives, which requires that modern awards be fair to both the perspective of employees and employers.<sup>2</sup>
34. ACCI would also seek to register with the Commission that these concerns have originated from its members across multiple and very different sectors. ACCI therefore submits that the Commission should look to contract the ratio further so that only one workplace delegate per a greater number of eligible employees is able to take paid training leave.
35. ACCI therefore, in accordance with the additional feedback received from members, submits that it would not be opposed to the following approach:

<b>No. of full time and part-time employees</b>	<b>Max. no. of delegates eligible to attend training per year</b>
16-50	1
51-100	2
101 and over	3

<sup>2</sup> [2022] FWCFB 3500 at [18].

36. Additionally, sub-clause (a) is unclear – ACCI suggests that it be amended to “The employer is not required to provide the access to paid time for training to more than one workplace delegate per XX eligible employees.” Noting ACCI has also integrated its proposal to amend the limitation as discussed above.
37. Sub-clause (b) should also clarify that not only is a workplace delegate only entitled to paid leave with respect to the hours that they would have otherwise worked but they are only to be paid at their base rate of pay for the absence, in keeping with other paid leave.
38. Furthermore, the clause should acknowledge that a delegate’s voluntary position with a union on behalf of other employees is totally subservient to their duties as an employee and based on that fact training leave should not unnecessarily inhibit the operational requirements of a business. ACCI recommends amending sub-clause X.8(e) to read as follows (emphasis added):

*The employer must advise the workplace delegate as soon as is practicable, and not less than 2 weeks from the day on which the training is scheduled to commence, whether the workplace delegate’s access to paid time during normal working hours to attend the training has been approved. Such approval must not be unreasonably withheld, however, may be refused for operational reasons.*

## X.9 Exercise of Entitlements Under Clause X

39. ACCI does not have broader issues with this particular clause but believes that the Commission should endeavour to make the following rewordings.
40. Sub-clause (b) should be reworded to “Clause X does not entitle a workplace delegate to receive access to electronic means of communication in a way that provides individual contact details for eligible employees.”
41. Sub-clause (c) be reworded to “Clause X does not entitle a workplace delegate to represent an eligible employee without the employee’s request and agreement.”
42. ACCI submits that the above rewordings would provide employers with far greater certainty over the manner in which delegates exercise the rights afforded under the draft term.
43. Additionally, ACCI submits that the clause should be amended to include words to the following effect as new sub-clause X.9(a)(v):

*Entitlement to representation, communication, access to the workplace or workplace facilities, and leave for training purposes may be withdrawn or refused if a workplace delegate is found to have failed to comply with their duties and obligations as outlined in clause X.9(a).*

## About ACCI

The Australian Chamber of Commerce and Industry represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

ACCI strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth, and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education, and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.



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