



Union delegates powers – analysis of MEU submissions in reply

Background

The Albanese government's 'Closing Loopholes' legislation inserted new provisions into the *Fair Work Act* to expand entitlements and powers for union delegates in workplaces. The legislation requires the Fair Work Commission to insert new terms for union delegates 'rights' into every award and every workplace agreement, regardless of the wishes of the workforce. This process is now underway.

The terms enhancing union 'rights' in awards and agreements will become enforceable by law, taking effect from 1 July 2024. As part of this process, the ACTU and various unions have put forward their proposals for what should be included.

On 29 March, the Mining and Energy Union filed its submission in reply in response to various employer submissions to the Fair Work Commission in the current proceeding to insert compulsory union delegates terms in each award. This submission has been published on the Commission's website.¹

This followed its original submission and draft award term, which has previously been analysed.²

Highlights of the MEU's submission

- The union currently provides its delegates with three days of training, yet under its proposal, all delegates would receive a minimum of five days paid leave for union training per year – at the employer's expense;
- In response to employer concerns that the MEU's proposal would place no limits on what union delegates could do, the union argues that this will actually make things simpler and more 'efficient' as there won't need to be any disputes over whether a delegate is or isn't allowed to do something;
- More union delegates will help promote "gender equality" and "social inclusion";
- More union delegates will better enable the union to organise industrial action;
- The union's proposal would require employers to pay for flights and accommodation for delegates to attend industrial dispute hearings – for example to travel from the Pilbara to Perth, when a 'dispute' arises.

Evidence relied on by the MEU

In terms of evidence filed in support of its submission, the MEU relies on a witness statement of its National Organising and Training Director, Mr Michael Weise. The witness statement is attached to the submission in reply.

The submission states that '*the MEU has filed a witness statement of Michael Weise, establishing the assertions the MEU relies on*'.³

The witness statement is cited as authority in support of arguments that are subjective assertions and matters of opinion. The most oft-cited section of the witness statement is paragraph 24, which is as follows:

¹ <https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-reply-cfmeumd-020424.pdf>

² <https://minerals.org.au/wp-content/uploads/2022/12/Union-Delegate-Powers-Response-to-MEU-proposals-March-2024.pdf>

³ MEU submission in reply, paragraph 28

'In my experience, worksites with higher union density and good union delegates have the best chance of negotiating an enterprise agreement and achieving the best outcomes during the resultant bargaining.'

In effect, the MEU's evidence relies on this subjective opinion contained in the witness statement of its own employee.

Mr Weise has previously spoken of his strategy to '*re-unionise the Pilbara*'.⁴ His witness statement illustrates how the MEU intends to use 'delegates rights' to achieve this goal.

Analysis of claims in MEU's submission in reply

MEU claim	Analysis
<p><i>The MEU submits its proposed clause is necessary to achieve the Modern Award Objective in light of the following considerations:</i></p> <ul style="list-style-type: none"> <i>The need to encourage collective bargaining</i> <i>The need to achieve gender equality in the workplace</i> <i>The need to promote social inclusion</i> <i>The need to promote ... the efficient and productive performance of work</i>⁵ 	<ul style="list-style-type: none"> The MEU is claiming that its proposed delegates rights terms are not simply desirable but are, in fact, necessary, as a matter of statutory construction to achieve the objects of the legislation (the Modern Award Objective is one such object)
<p><i>The MEU submits that its proposed delegates' rights clause achieves the Modern Award Objective by encouraging collective bargaining in the following ways;</i></p> <p><i>a. Increasing employee awareness of the benefits of bargaining – Expressly allowing delegates to have discussions with workers and allowing delegates to communicate with new employees during onboarding will increase employees' awareness of the benefits of bargaining.</i>⁶</p>	<ul style="list-style-type: none"> '<i>Allowing delegates to communicate with new employees during onboarding</i>' is a euphemism for giving them unlimited access to new employees (both in and out of the workplace) to pressure them to become union members. (This is considered in the previous analysis of the MEU's submission).
<p><i>d. Increasing delegates' capacity during bargaining– Providing delegates with sufficient opportunity to train will empower them to navigate the FW Act's complex rules concerning initiating and participating in bargaining, the forms bargaining may take, and provide information on taking protected industrial action. Proficient delegates drive bargaining and increase the likelihood of reaching an agreement.</i>⁷</p>	<ul style="list-style-type: none"> The argument around the 'complexity' of the Act is self-serving. The Act is now more complex than ever – the more complex it becomes, the more delegates will therefore be required. The reference to industrial action concedes that such action will be more likely under the MEU's proposal. The more 'rights' that delegates have, the more strikes can therefore be expected.
<p><i>e. Increasing union density – a broad delegates' rights term will increase union density by increasing the visibility and effectiveness of unions in the workplace.</i>⁸</p>	<ul style="list-style-type: none"> This is an admission of the primary motivation for the MEU's position for seeking these terms in awards. The submission also argues that 'increasing union density' is not just desirable but <u>necessary</u> to achieve the objects of the <i>Fair Work Act</i>. Given that the Act specifically

⁴ <https://www.queenslandspeaks.com.au/michael-weise> 'Michael Weise explains the process by which the CFMEU and the AWU made an alliance in order to re-unionise the Pilbara...'

⁵ MEU submission in reply, paragraph 13

⁶ MEU submission in reply, paragraph 14(a)

⁷ MEU submission in reply, paragraph 14(d); emphasis added

⁸ MEU submission in reply, paragraph 14(e)

MEU claim	Analysis
	<p>protects the right to join or not join unions, this is a somewhat contestable argument.</p>
<p><i>f. Removes financial burden of bargaining for the employee bargaining team.⁹</i></p>	<ul style="list-style-type: none"> • This raises the question of just how large the union wants ‘bargaining teams’ to be. • Enterprise bargaining is typically conducted by full-time paid officials of the union, rather than workplace delegates, let alone an unlimited number of delegates who all get to do so on paid time at the employer’s expense.
<p><i>The MEU submits that its proposed delegates’ rights clause achieves the Modern Award Objective by supporting gender equality in the workplace and providing workplace conditions that facilitate women’s full economic participation in the following ways;</i></p> <p><i>b. Increased support – The MEU’s delegates’ rights term will increase support for employees subjected to sexual harassment. Readily available, visible, and effective delegates increase the number of support and reporting options for individuals who have been harassed.¹⁰</i></p>	<ul style="list-style-type: none"> • The stereotypical MEU representative is a rugged male. The union argues that the presence of more such male union delegates will make women more likely to report sexual harassment. • The witness statement notes that coal mining ‘is male dominated’¹¹ and that ‘typically, mining industry employers are sophisticated’.¹² • The appropriate avenue for workers to report such concerns is to the appropriate supervisor or HR manager, who have genuine training and genuine expertise in dealing with such matters.
<p><i>d. Clarity as to the content of the rights in s. 350C - A clause, such as the one proposed by the MEU will provide clarity for workplace delegates, employees and employers alike. The MEU’s clause provides sufficient but non-exhaustive particularisation of the requirements of s. 350C(2)’s otherwise undefined right.</i></p> <p><i>This clarity will minimise unnecessary disputation, decreasing time lost and cost and improving productivity.¹³</i></p>	<ul style="list-style-type: none"> • According to the union’s logic, having no limits on what delegates can do will ‘<i>minimise unnecessary disputation</i>’ as there will never be any need for disputes over whether anything a delegate does is allowed or not. • By this logic, the employer should also agree to every demand every made by a delegate, as this will also ‘<i>minimise unnecessary disputation</i>’ and thus ‘<i>improve productivity</i>’.
<p><i>f. Increased support – A broad delegates’ rights term increases support for employees who have been subjected to bullying and harassment.¹⁴</i></p>	<ul style="list-style-type: none"> • This argument ignores the reality that the MEU’s proposal would allow for an unlimited number of union delegates to engage in bullying and harassment of non-union members with complete impunity. • Under the MEU’s proposal, union delegates would have unlimited powers to contact employees at any time, including outside of work, for the purpose of ‘<i>asking a person their union status and to join the union.</i>’¹⁵

⁹ MEU submission in reply, paragraph 14(f)

¹⁰ MEU submission in reply, paragraph 16(b)

¹¹ Witness statement of Michael Weise, paragraph 5

¹² Witness statement of Michael Weise, paragraph 18

¹³ MEU submission in reply, paragraph 16(d)

¹⁴ MEU submission in reply, paragraph 16(f)

¹⁵ MEU Delegates Rights, clause 4.2(a)

MEU claim	Analysis
	<ul style="list-style-type: none"> The employer would have no rights to curb such conduct. It will be a 'workplace right' under the <i>Fair Work Act</i>, with a range of legal protections. It will be unlawful for an employer to discipline the union delegate for such conduct given that they have exercised a 'workplace right'.¹⁶
<p><i>The most significant distinguishing feature of the MEU's clause is a right to be released from normal duties to participate in bona fide union business. As outlined in our 1 March submission, it has long been accepted in the black coal mining industry that delegates represent members by participating in bona fide union business. The historical and contemporary provision of terms allowing delegates to participate in bona fide union business arises from the black coal mining's industrial context. An industrial context that is shared with the industries in which the Awards operate. These industries are characterised by isolation. Invariably, enterprises are located in remote and regional Australia and work performed within the enterprises is often done so in isolation. For example, delegates required to represent their members in a tribunal proceeding commonly have to travel a significant distance. If the delegate is rostered on, they must be released from duty to allow travel to occur safely.</i>¹⁷</p>	<ul style="list-style-type: none"> Under the MEU's proposal, every delegate would have an incentive to invent 'disputes' to then entitle them to paid leave to 'resolve' them. The MEU's goal is to translate black coal industry practices into other sectors, as part of its strategy to 're-unionise the Pilbara'. The union's proposal would require employers to pay for flights and accommodation for delegates to attend industrial dispute hearings – for example to travel from the Pilbara to Perth, when a 'dispute' arises. The more disputes there are, the more free travel this will generate for delegates.
<p><i>Section 350C(1) does not limit the number of workplace delegates who can access the benefit at a particular enterprise or work for a particular employer. If the term inserted into the Awards limits the number of workplace delegates an employer must recognise, the Award terms would be inconsistent with the statutory regime.</i>¹⁸</p> <p><i>Given the rights attached to each delegate, the assessment of what is reasonable should be undertaken by reference to what is reasonable for an individual delegate.</i>¹⁹</p>	<ul style="list-style-type: none"> The MEU rejects the concerns raised by employers that under its proposal there would be no limits on the number of workers who could 'access the benefit' of being a union delegate. There is no regard for whether it is reasonable for the employer, or the workers who are not delegates.
<p><i>How delegates' rights increase union density</i></p> <p><i>Typically, workers will only join a union if they know that the union has a presence at the worksite and are confident that the union can effectively represent their interests....</i></p> <p><i>It goes without saying that the broader the right, the more visible and effective the delegate.</i>²⁰</p>	<ul style="list-style-type: none"> This is a notable admission – the goal of the MEU's proposal is primarily to 'increase union density'; the more control delegates have, the greater the density that is achieved.
<p><i>Currently, the MEU offers several training programs for workplace delegates. They include:</i></p>	<ul style="list-style-type: none"> Mr Weise is National Organising and Training Director within the MEU. He currently believes that three days' training is sufficient.

¹⁶ Section 341(1) of the *Fair Work Act*

¹⁷ MEU submission in reply, paragraph 16(f)

¹⁸ MEU submission in reply, paragraph 30

¹⁹ MEU submission in reply, paragraph 31

²⁰ Witness statement of Michael Weise, paragraph 25

MEU claim	Analysis
<p>a) <i>A one-day course that provides an overview of basic knowledge and necessary skills required to be a delegate.</i></p> <p>b) <i>A two-day course that provides greater detail on the information in the one-day course with a particular focus on bargaining for an enterprise agreement.</i>²¹</p>	<ul style="list-style-type: none"> • However, the MEU's proposal would require every employer to give every delegate five days' minimum paid leave per year for such training.²²
<p><i>The MEU does not and will not support delegates accessing paid time for training unless the training they are to receive will meaningfully increase their capacity to represent workers.</i></p>	<ul style="list-style-type: none"> • This statement does not reflect the position in the MEU's proposed award term • The MEU's proposed term contains no such limit that any paid time for training be either 'meaningful', nor 'increase capacity' of delegates. Instead, it is completely open-ended. Such training can be anything the union wants it to be, including political campaigns and non-workplace matters.²³ • Under the MEU's proposal, union delegates should have unlimited powers to 'communicate' with employees '<i>in relation to any matter or subject</i>'.²⁴ Its training for such delegates would therefore be equally as broad.

²¹ Witness statement of Michael Weise, paragraph 27

²² MEU Delegates Rights, clause 3

²³ MEU Delegates Rights, clause 3

²⁴ MEU Delegates Rights, clause 4(2)