



Union delegates powers – response to Mining and Energy Union proposals

Background – The government’s plan, and how unions propose to implement it

- The Albanese government’s ‘Closing Loopholes’ legislation passed in 2023 included one little-known provision to expand rights for union delegates in workplaces.
- Misleadingly titled ‘Workplace Delegates’ Rights’, it will, in fact, give unions the power to disrupt and control workplaces and force businesses to foot the bill for union work.
- 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.
- Unions are pushing the Fair Work Commission to legally protect their delegates as a privileged class, with rights that ordinary employees don’t get – such as the ability to choose when they work, extra leave, and special access to confidential information.
- The terms enhancing union ‘rights’ in awards and agreements will become enforceable by law, taking effect from 1 July 2024. There is nothing that any worker or any business can do to escape them.
- As part of this process, the ACTU and various unions have put forward their proposals for what should be included. The following outlines specific details from the Mining and Energy Union’s proposals regarding these new union powers. The MEU’s proposal is reproduced below.

The powers that unions will be given

Only unionists can represent workers

- The legislation specifies only union members can represent other workers as ‘workplace delegates’, as a ‘workplace delegate’ is defined solely as one who is ‘appointed or elected’ as such under the rules of a union.¹
- Even if a worker (and all their co-workers) wanted to represent their colleagues, they will have no rights to do so, as ‘workplace delegates’ rights are limited only to union members approved by the union. This is a very intentional loophole that the government has created.

Who can be ‘workplace delegates’? – Whoever the union wants

- There are no limits on who can be a ‘workplace delegate’. Nor are there any limits on how many such delegates there can be in a given workplace. This is a deliberate loophole that will invariably be exploited.
- The *Fair Work Act* will not determine who can or can’t be a workplace delegate, nor will the Fair Work Commission, or the relevant award or enterprise agreement. Instead, the union will have the exclusive right to determine which workers, and how many, receive these powers.

¹ section 350C(1) of the *Fair Work Act*

- Under the new powers, a ‘workplace delegate’ will mean a person ‘*appointed or elected, in accordance with the rules*’ of the relevant union.² There is nothing to prevent a union from updating its rules to say that every union member should be a ‘workplace delegate’ and thus be entitled to these new powers and legal immunities.

Union delegates to represent union members – and everyone else

- ‘Workplace delegates’ appointed by the union will have new legal powers to represent not just union members but ‘any other persons eligible to be such members’.³

Employers will be banned from talking to workers – except via a union delegate

- An employer will not be lawfully allowed to deal directly with and worker who is being ‘represented’ by the union delegate without going through the union delegate.⁴
- Union delegates decide who they wish to ‘represent’, including non-union members, so will have an effective right of veto on the ability of managers to talk to their staff.
- Workers will also be banned from talking directly to their employers, unless they have had a ‘prior opportunity to consult the delegate’.⁵ Whether this opportunity exists will be up to the delegate to decide.

One set of rules for union delegates – another set for everyone else

- Unlike other workers, who must actually work whilst they are at work, and may not be able to choose their own hours of work, union delegates will be entitled to ‘*a particular shift, roster or other flexible work changes where necessary to facilitate the exercise of their right to represent during work hours*’.⁶
- Union delegates will even have the right to decide when they do and don’t work. They will be entitled to ‘*be released from normal duties for the purpose of the workplace delegate participating in bona fide union business*’.⁷
- What constitutes ‘bona fide union business’ can, for example, include:⁸
 - ‘*any dispute or grievance in the workplace*’
 - ‘*any consultation process*’
 - ‘*political lobbying*’ organised by the relevant union.
- If there is not currently a ‘dispute or grievance’ in the workplace to justify the delegate’s use of paid time, then they can always come up with one. If there are not sufficient ‘consultation processes’ then union delegates can always invent their own regular ‘workplace delegate consultation’ meetings, at whatever time or place they choose.

Every mining business will be forced to pay for everything the union delegate does

- Businesses will be forced to provide every union delegate with a minimum of five days paid leave per year to attend union ‘training’, which can be whatever the union wants it to be.⁹
- A union delegate can spend as much of their time at work as they like engaging in union business and must be paid as if they were working.¹⁰
- If a union delegate spends any time outside of work hours engaging in union business then their employer must also pay them, at the rate they would be paid if they were at work (eg. weekend or public holiday penalty rates).¹¹

² MEU Delegates Rights, clause 1

³ section 350C(2) of the Fair Work Act

⁴ MEU Delegates Rights, clause 2.6(c)

⁵ MEU Delegates Rights, clause 2.6(c)

⁶ MEU Delegates Rights, clause 2.2(d)

⁷ MEU Delegates Rights, clause 2.2(e)

⁸ MEU Delegates Rights, clause 2.3

⁹ MEU Delegates Rights, clause 3

¹⁰ MEU Delegates Rights, clause 2.4

¹¹ MEU Delegates Rights, clause 2.5

What it would mean in practice

Union access to everything – every facility in every part of the workplace

- Union delegates will have the power to *'make use of the facilities and equipment where the enterprise is being carried on.'*¹²
- Access to 'facilities' can include any facility or location in any workplace. Unions have previously attempted to use such powers to access workers on draglines in open cut mines (requiring them to be shut down at enormous expense and risk to safety), or to require the employer to pay to fly them to remote work sites.
- The powers to access facilities and equipment specifically include:
 - *'making telephone calls'*¹³
 - *'sending electronic messages, including making use of electronic address lists, using electronic communication facilities that the employer used to communicate with its workforce.'*¹⁴
 - *'transport and freedom of movement to or within the workplace, where it is necessary to provide access.'*¹⁵
- The powers also include *'holding discussions in an appropriate room'*.¹⁶ What is 'appropriate' is up to the union delegate. This could include the company boardroom or the CEO's office.

Union control of every business

- Whenever a business is *'considering'* changes which may have a *'significant impact'* on any employees they must consult with the union delegates before a decision is made, even if they ultimately decide not to make the change.¹⁷
- This would mean union delegates must be involved in all important decisions of a company board or company management, and be provided with all relevant information, including commercially sensitive or confidential information. Any such information can then be passed on to the union and it will be illegal for the business to attempt to prevent this.¹⁸

New loopholes for unions to exploit

- Union delegates will have an unlimited right to use their paid time and company resources to *'have communications (including discussions)'* with any employee *'in relation to any matter or subject'*.¹⁹ This includes non-union members.
- *'Any matter or subject'* means it does not need to relate to a workplace matter.
- Workers who are not union delegates, but may wish to avoid work, will also have the right to engage in unlimited 'communications' with union delegates, and also be paid for any time spent doing so.²⁰ It will be illegal for an employer to try to curtail this.
- The employer will also be legally required to *'facilitate'* any such communications, including *'provision of access to the workplace and/or to means of communication used in the workplace'*.²¹

¹² MEU Delegates Rights, clause 5(1)

¹³ MEU Delegates Rights, clause 5(2)(e)

¹⁴ MEU Delegates Rights, clause 5(2)(f)

¹⁵ MEU Delegates Rights, clause 5(2)(h)

¹⁶ MEU Delegates Rights, clause 5(2)(i)

¹⁷ MEU Delegates Rights, clause 2.7

¹⁸ MEU Delegates Rights, clause 8(a)

¹⁹ MEU Delegates Rights, clause 4(2)

²⁰ MEU Delegates Rights, clause 4(3)-(4)

²¹ MEU Delegates Rights, clause 4(5)

Another loophole: Confidentiality and privacy for unions – but not businesses

- Employers will be powerless to respond to abuses of union delegates powers, or even determine if the powers are being abused. It will be illegal for an employer to monitor or control such ‘communication’, or even ask whether it is appropriate.²²
- On the other hand, the employer will be legally obliged to provide union delegates with any information they desire, including commercially sensitive information or personal information of workers.²³

The impact on workers who aren’t union activists

Compulsory unionism

- The unlimited right of union delegates to ‘communicate’ with employees specifically includes ‘*asking a person their union status and to join the union*’.²⁴
- There are no limits on this entitlement. It can include ‘*addressing new employees and other workers at an induction or at the commencement of their employment or shift*’.²⁵
- Union delegates will have the power to collect details of who is or is not a union member and then provide this information to all other workers in the workplace. It will be illegal for an employer to attempt to prevent this.²⁶

No privacy

- Businesses must provide union delegates with ‘*information relevant to their right to represent*’.²⁷ This will include all names and contact details of all workers, including home addresses and other private information.
- Existing confidentiality obligations that apply under company policies and contracts of employment will not apply, as the ‘*provision of information to a workplace delegate... will not constitute a breach of confidentiality*’.²⁸
- Such information can also be passed on to the union, as ‘*provision of information by a workplace delegate to their union will not constitute a breach of confidentiality*’.²⁹

No protection from bullying or harassment

- Employers will be powerless to discipline union delegates who abuse their powers. Union delegates will have the right to spend all of their work time harassing other workers about their union membership or ‘*any matter or subject*’ – and be paid for it.
- They will even be paid by their employer to harass workers outside work hours, including at their home address, and be able to use the employers’ facilities and communications channels for this purpose. And the employer will be powerless to prevent it.

No reward for effort

- Workers who wish to come to work to actually work and work hard to get ahead will be treated worse than those who exercise their ‘right’ to use their paid work time to spend an unlimited amount of time ‘communicating’ with union delegates on ‘any matter’ they like. This will be a ‘workplace right’ under the *Fair Work Act*, with a range of legal protections.
- It will be unlawful for an employer to treat the shirking worker any differently from the diligent worker, as the *Fair Work Act* prohibits an employer from ‘discriminating’ between employees on the grounds that one employee has exercised a ‘workplace right’.³⁰

²² MEU Delegates Rights, clause 4(6)-(7)

²³ MEU Delegates Rights, clause 2.2(a)

²⁴ MEU Delegates Rights, clause 4.2(a)

²⁵ MEU Delegates Rights, clause 4(2)(d)

²⁶ MEU Delegates Rights, clause 4(8)(a)(ii)

²⁷ MEU Delegates Rights, clause 2.2(a)

²⁸ MEU Delegates Rights, clause 2.2(a)

²⁹ MEU Delegates Rights, clause 2.2(a)

³⁰ Section 341(1) of the *Fair Work Act*

Overall consequences

8% union membership = 100% union control

- Union membership is currently down to only 8% of the private sector workforce. Under the Albanese government's proposal, they will be able to control 100% of Australian workplaces.
- They will have more power than management to access and disseminate information and 'communicate' with workers. All this can be done with legal impunity.
- They will have input into management decisions on how every business runs, without any investment in the business, any expertise in running it, or any responsibility for the result.

A disaster for productivity

- It is impossible to imagine a more damaging impact on productivity in Australian workplaces.
- Unions will have unlimited power to use unlimited amounts of work time to disrupt, distract or harass workers – and be paid for it.
- Businesses will not even be able to consider making any important decisions without first consulting however many union delegates the union chooses to appoint.
- Management will no longer have the power to manage and workers will no longer have the freedom to work hard and get ahead.

IN THE FAIR WORK COMMISSION

Fair Work Act 2009 (cl.95, Schedule 1)

Matter Number: AM2024/6

Matter: Variation of modern awards to include a delegates' rights term

Awards: *Black Coal Mining Industry Award 2020* [MA000001]; *Mining Industry Award 2020* [MA000011]; *Electrical Power Industry Award 2020* [MA000088]; *Coal Export Terminals Award 2020* [MA000045]

MEU Delegates Rights – Award Clause

1 Definitions

In this clause –

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.

2 Right to represent

2.1.A workplace delegate is entitled, on paid time during normal working hours, to represent (including but not limited to in disputes or grievances):

- 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 or refuse to 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: 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.

2.2. Without limiting sub-clause (1), a workplace delegate is entitled to, among other things:

- a. 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;

- b. at the election of a union member or a person eligible to be a union member, participate in (including by representing and advocating) any disciplinary or investigatory process;
- c. assist union members and persons eligible to be union members in decision-making.
- d. access to a particular shift, roster or other flexible work changes where necessary to facilitate the exercise of their right to represent during work time;
- e. be released from normal duties for the purpose of the workplace delegate participating in bona fide union business;
- f. represent a member or potential member in a dispute with the site owner or operator;
- g. 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.

2.3. For the purpose of clause 2.2.e bona fide union business includes, but is not limited to preparing for, travelling to, attending, or otherwise participating in:

- a. collective bargaining meetings.
- b. the resolution of any dispute or grievance in the workplace.
- c. any consultative process.
- d. any court, or tribunal proceeding which relates to the industrial interests of a member or potential member who works in the same enterprise as the workplace delegate.
- e. any event or meeting (however described) acknowledge by the rules of the relevant registered organisation.
- f. any political lobbying delegation organised by the relevant registered organisation and which impacts on the industrial interests of members or potential members of the relevant registered organisation.
- g. any other bona fide union business.

2.4. While a workplace delegate is representing union members or persons eligible to be union members during time which they would otherwise be at work, the employer of the workplace delegate must pay the workplace delegate as if they were at work.

2.5. While a workplace delegate is representing union members or persons eligible to be union members during time which they would not otherwise be at work, the employer of the workplace delegate must pay the workplace delegate as if they were at work.

2.6. 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 the persons consents, after having had a prior opportunity to consult the delegate.

2.7. 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 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 five (5) days per annum per delegate.
- 4) A workplace delegate must give the relevant employer four weeks' notice of the intention to take paid time for training, unless otherwise agreed.

4 Right to reasonable communications

- 1) A workplace delegate is entitled to have 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 communications (including holding discussions) includes (but is not limited to), among other things:
 - a) asking a person their union status and to join the union; and
 - b) asking 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, including at mass meetings;
 - d) addressing new employees and other workers at an induction or at the commencement of their employment or shift; or
 - e) representing or advising an employee or employees, or otherwise discussing, 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;
 - g) identifying to [union members] 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;
- 3) A person who is a union member, or person eligible to be a union member, of a union has the right

to have discussions with a workplace delegate that represents them.

- 4) If 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 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 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 consultations.
 - ii) 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 use facilities

- 1) A workplace delegate has the right to make use of the facilities and equipment where the enterprise is being carried on.
- 2) Without limiting sub-clause (1), use shall include, among other things:
 - a) a lockable notice board in a high traffic area. The workplace delegates are to have exclusive access to the notice board.
 - b) placing a union notice on employee noticeboards (including electronic notice boards, intranet pages and other internal electronic pages;
 - c) use of computers and printers;
 - d) making photocopies of a document;
 - e) making telephone calls,
 - f) sending electronic messages, including making use of electronic address lists, using electronic communication facilities that the employer uses to communicate with its workforce;
 - g) access to the workplace;
 - h) transport and freedom of movement to or within the workplace, where this is necessary in order to provide access;
 - i) holding discussions in an appropriate room.