

IN THE FAIR WORK COMMISSION

Fair Work Legislation Amendment (Closing Loopholes) Act 2023

Variation of modern awards to include a delegates' rights term

(AM2024/6)

Introduction

1. The Fair Work Commission ('the FWC') issued a direction on 30 January 2024 relating to the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, dealing with terms that must be included in modern awards. Parties were directed to lodge submissions in reply by 28 March 2024.
2. This is a submission by the Commissioner for Public Employment (CPE) in response to submissions made by the relevant parties for the proposed workplace delegates' rights terms to be included in the Northern Territory Public Sector Enterprise Award 2016 [MA000151] ('the Modern Award').
3. The Modern Award is the enterprise award for the Northern Territory Public Sector ('the NTPS') as established by the *Public Sector Employment and Management Act 1993* (NT) ('the PSEM Act').
4. Whilst the CPSU support the ACTU's submission and draft model clause, they have also provided a draft term that has broader applicability to the Modern Award.
5. I refer to clause 7.3 of the CPSU draft term (**Attachment B**), and would support rewording the clause as follows:

Allow reasonable official union communication appropriate to the agency from union delegates with employees, including through email, intranet pages and notice boards.

6. However, I draw the FWC's attention to the fact that this proposed amendment does not support the provision of a link to the CPSU's or other unions' websites being placed on the Northern Territory Government's intranet. This is not consistent with well-established practices of the use of publicly funded digital communication channels within the Northern Territory Government.

7. I refer to clause 8 of the CPSU draft term (**Attachment B**) in relation to employees elected as officials of a trade union or professional association, not being required to seek permission from the employer before speaking publicly in that capacity, notwithstanding the provisions regarding the Code of Conduct, which is subordinate legislation of the PSEM Act. It is requested that it be reworded as follows:

When carrying out duties as an NTPS-affiliated trade union official, the NTPS employee must not disclose information or documents acquired in the course of their employment, other than required by law or where proper authority has been given, and must continue to exhibit all other professional and ethical standards as stated in the Code of Conduct and the *Public Sector Employment and Management Act 1993*.

8. I refer to the ACTU draft model clause and provide the following comments and suggested amendments:

- a. Clause 2(2)(d) – ‘participate in any dispute or grievance in the workplace’ – this would only be appropriate in those circumstances in which an employee has requested the presence of the workplace delegate and where the union has constitutional coverage of the employee.
- b. Clause 2(3) – ‘the employer must allow all workplace delegates to attend all related Fair Work Commission, court or employment-related tribunal ...’ – it would not be appropriate for all workplace delegates to attend. It would only be appropriate for a workplace delegate to attend where the employee has requested the presence of the workplace delegate or the delegate has been assisting with the management of the dispute.
- c. Clause 2(4)(c) – ‘An employer must not deal directly with a person who is being represented by a delegate about a dispute, bargaining for a collective agreement...’ - this proposal, especially in relation to bargaining for a collective agreement is contrary to the statutory obligation for an employer to consult with employees about the progress of negotiations etc. To leave this entirely in the hands of workplace delegates could result in excluding employees who are not members of a union from learning about the progress of negotiations. Further in relation to bargaining for an enterprise agreement, the employer is required to undertake a number of steps to comply with the *Fair Work Act 2009* (‘the FW Act’). These include the requirement to consult with all employees; or the statutory requirement to distribute a notice of employee representational rights to ‘each employee’ (s. 173 of the FW Act refers); or the requirement to explain the terms of the agreement to employees (s. 180(5) of the FW Act refers).
- d. Similarly, with ACTU proposition at clause 3(6) unrestricted release of workplace delegates could not be agreed. Any release should be subject to operational requirements, but the clause could contain a provision that such a release would not be unreasonably refused.

- e. The ACTU clause 4 that deals with the right to communications would need to be qualified by a statement that an employee or workplace delegates must maintain the confidentiality of Northern Territory Government information as well as preserving the privacy of NTPS employees.
- f. Similarly, the CPE objects to Clause 5(2)(e) – ‘use of electronic address lists, using electronic communication facilities that the employer uses to communicate with its workforce’. The employer sends broadcast messages to all employees where it would be inappropriate for a union delegate to use this electronic address list as there would be many employees that are not union delegates and there are already strict internal protocols about the use of global distribution lists in the NTPS.

Summary

In summary the CPE would support the ACTU proposed model clause noting the comments as follows:

- not establishing links to union websites on the Northern Territory Government intranet
- ensuring workplace delegates demonstrate professional and ethical standards as stated in the Code of Conduct when speaking publicly
- ensuring that workplace delegates and the relevant union only participate in any grievance or disputes in the workplace in which the affected employee has requested their assistance and where they have constitutional coverage of the affected employee
- no fettering of the employer’s right and obligation to deal directly with a person who is being represented by a delegate about bargaining for an enterprise agreement
- ensuring that the release of workplace delegates for training is subject to operational requirements
- requiring workplace delegates to maintain confidentiality regarding sensitive or confidential Northern Territory Government information as well as safeguarding the privacy of employees
- no fettering of the employer communicating with employees

- not granting workplace delegates or unions access to global distribution lists in the NTPS

 28/3/24

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