

Employee voice and new rights for workplace union delegates

Impacts on wages, productivity, cooperation and union training

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About the Carmichael Centre

The Carmichael Centre, a project of the Centre for Future Work at The Australia Institute, is named in honour of Laurie Carmichael, the legendary manufacturing unionist who passed away in 2018 at the age of 93.

The Carmichael Centre conducts and published research on themes related to Carmichael's legacy, including:

- industrial relations;
- social policy;
- manufacturing and industry policy;
- vocational education; and
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The Centre sponsors an annual Laurie Carmichael lecture, with a prominent labour or progressive personality speaking on Carmichael's legacy.

The Carmichael Centre also hosts a digital archive of Carmichael's writings and other contributions to public discourse.

The Carmichael Centre's research is supported in part by the Victorian government.



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Summary

A workplace delegate is a worker chosen to represent workers who are 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. Delegates spend their time undertaking vital tasks for workplace representation. (page 7)

Do workplace delegates need rights?

Some employers have actively placed barriers in the way of volunteer union delegates and paid officials. One study in the early 2000s found that 23% of delegates found management hostile, while 22% of delegates reported that management opposition to their role as a delegate had become more intense over the previous two years. Examples from various case studies, including court and industrial cases, illustrate some of the ways in which that minority of employers from workplaces with delegates expressed their hostility towards unionism and their opposition to delegates, including by placing barriers in the way of workplace union activists and delegates. Examples include reducing or removing union access to company resources or facilities, intercepting mail, creating a 'black list', and refusal to negotiate. Some but not all of the more serious forms of obstruction have been addressed by earlier amendments to the Fair Work Act. Establishing a regime of workplace delegates' rights would overcome more, but not all, of the barriers facing workplace delegates in performing their duties. (page 9)

The new rights framework for union delegates

In December 2023, the Fair Work (Closing Loopholes No 1) Act was proclaimed, introducing a new regime of rights for workplace union delegates in Australia industrial law. The law regarding rights in awards and agreements takes effect on 1 July 2024. These rights operate at several levels. Some rights for union delegates are specified in the Fair Work Act itself. A workplace delegate is entitled to represent the interests of their union's members, and any other non-members eligible to be members. They are entitled to reasonable communication with union members and eligible non-members, and to reasonable access to the workplace and its facilities. They can communicate with employees during or outside working hours. In firms above a minimum size, delegates are also entitled to reasonable access to paid time off for union training, during normal working hours. The details of these rights are all to be clarified in modern awards, and the Fair Work Commission (FWC) has issued a model clause for inclusion in awards elaborating upon these rights. Delegate rights can be further clarified, but not reduced, in enterprise agreements. (page 12)

The effects of new rights for workplace union delegates on pay, cooperation and productivity

'Voice', when applied in a workplace context, refers to a range of ways through which workers can influence decisions that affect them. If workers are unable to change anything, even when they speak up, it cannot be said that they have a real voice. Increasing the

workplace rights of delegates is widely agreed to lead to an increase in the bargaining power of workplace delegates, and will improve workers' voice. (page 16)

Based on existing research, increased worker voice, through strengthened workplace delegates' rights, would lead to increases in pay and employment benefits and more worker say in the procedures for redundancies. Increased union delegates' rights would also very likely lead to an increase in union membership — or at least, a deceleration in the decline in union membership — by raising the effectiveness of joining a union and reducing the ability of employers to hamper unionisation. However, large increases in union membership would not be expected. (page 17)

Unionisation increases safety. OECD research (published in its *Economic Outlook*) shows that consultation with employee representatives is crucial for ameliorating the impact of new technology, particularly artificial intelligence (AI), including on safety. Adoption of AI was associated with a significantly *lower* risk for workers where there was consultation with a works council, trade union or health and safety representative or committee. The OECD found that 'direct voice between workers and managers...was associated with a higher quality work environment'. (page 18)

Enhancing the voice of volunteer workplace delegates, and reducing the ability of some employers to frustrate that voice, will increase the efficacy of cooperative voice, at least over the longer term. It is thus likely, on balance, to increase cooperation. Research shows that 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 acquiescing. Employees have dual objectives: to maximise their income and to maintain the viability of their employment. If delegates are out of step with the union's membership, either they will be voted out, or at least be unable to gain the support of the membership for collective action, or the union will lose its members. Union delegates are ultimately a basic institution that acts to mediate cooperation at the workplace. They mobilise, and are forced to respond to, employee wishes for cooperation with (but not acquiescence to) management. One major study also pointed to the key role union delegates can play, not only in democratising workplaces, but also in democratising unions themselves. (page 19)

Evidence from empirical studies of the relationship between unionism and productivity shows that productivity is, on average, at least as high in unionised as in non-union workplaces. A Portuguese survey found that increases in the proportion of members who were union representatives were linked to increased firm performance. Lower worker resistance to technology, which OECD research suggests arises when employees are consulted through workplace representatives, would be expected to lead to higher labour productivity over the longer term. As employees see maintaining and improving productivity (instead of cuts in pay and conditions) as being in their interests, increasing employees voice through enhanced rights for workplace delegates will likely, on average, improve productivity — though much will depend on whether a culture of 'mutual respect for worker, union, and employer rights and responsibilities' is established. (page 22)

Formalised delegate rights to union training

Paid union training leave was first inserted into Australian awards in the 1970s, mostly by consent. In 1997, the Howard government passed legislation preventing awards from including paid union training leave provisions, so they could only be contained in enterprise agreements. In 2006 it extended the ban to enterprise agreements. The *Fair Work Act 2009* reversed these prohibitions. By 2015 approximately 30% of enterprise agreements included a paid union training leave provision. (page 25)

While comparisons are difficult, the five days minimum provided in the FWC's model award clause (for the first year) appears in line with common practice in agreements and old awards, but the provision of only one day paid leave per year in the second and subsequent years does not. The restriction of one delegate entitled to paid training leave per 50 eligible employees in the model award provision appears likely to fail to account for the number, possibly high, of establishments that have more than one delegate per fifty members and potential members. Hence the model award provisions are likely to mostly only affect employees in workplaces without enterprise agreements. (page 26)

By increasing union voice, the paid union training entitlement could prima facie reinforce the positive effects on pay, union membership, safety, cooperation and productivity mentioned above. However, in some workplaces it will depend on whether the new rights lead to a raising or a lowering of the 'floor' for bargaining. (page 27)

More importantly, the impact will depend on how unions respond to the new regime. This is because research shows that effective union training relies not just on classroom learning but informal learning on the job and 'follow up' of classroom lessons. With more delegates available to be trained, the incentives facing unions could be to increase classroom training but ease up on the follow-up and mentoring activities that require union officials to access workplaces. If this leads unions to spread their training resources more thinly, over a larger number of delegates, and devote fewer resources to follow-up and to organiser mentoring of delegates, the effect on employee voice could be minimised. More delegates could be trained, but there is no certainty that voice would be improved. If employee voice is to be increased over the long run, in the context of the new delegate rights schema, unions must address how the total benefit from union education and training is to be increased, whether the total resources available for delegate education and training are to be increased, and how to identify who, amongst those previously unable to access union education, has the greatest potential to enhance employee voice. (page 29)

Conclusions

The new regime of workplace delegates' rights is very likely, overall, to increase the voice of employees, and thereby have positive consequences, over the long run, for pay and conditions, union membership, workplace cooperation, grievance resolution and productivity. However, the effects of new rights for paid union training leave depend very much on union responses, in particular on their subsequent reliance on classroom versus informal training and the 'follow up' of classroom education. (page 31)

Introduction

This report examines the content and impact of a new regime of rights for workplace union delegates following recent changes to the Fair Work Act.

The first part of the report focuses on the new rights themselves, including those provided specifically through legislation, how the FWC has applied those protections in the content of modern awards, and the framework for delegates' rights provisions in enterprise agreements.

The second part then addresses the question of the impact of these new rights on pay, conditions, safety, union membership, workplace cooperation and productivity. It concentrates on the activities of union delegates and the relationship to cooperative and productive workplace relations (a focus of the main object of the *Fair Work Act 2009*).¹ That is, the emphasis is on the way in which worker voice through workplace delegates affects workplace cooperation, productivity and related outcomes.

The third part looks more specifically at the new rights for paid union training, their implications and the way in which the effects will be contingent on union responses to them.

WHAT ARE WORKPLACE DELEGATES

A workplace delegate can be defined as a worker (normally an employee) chosen to represent the members of the union (themselves also normally employees) in dealings with management.² Delegates are volunteers who perform their union duties on an unpaid basis in addition to their normal job at work. Equivalent terms are 'shop steward', or 'workplace union representative'. A workplace delegate is typically elected by the members (unless there is only one candidate).

A workplace with a significant union presence is often referred to as being 'unionised'. 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.³ The

¹ *Fair Work Act 2009*, s3.

² Technically, a delegate can also be a contractor, as some union members are contractors (especially in areas such as road transport). The FWC's model clause refers to only employees, and for convenience that is the term used here.

³ 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

proportions would be smaller now, but we do not know by how much, because union density is now lower than then.⁴

WHAT DO DELEGATES DO?

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 conditions and work practices; and negotiating workplace or enterprise agreements.⁵

⁴ ABS, *Characteristics of Employment*, Cat No 6333.0, and *Employee Earnings, Benefits and Trade Union Membership*, Cat No 6310.0.

⁵ 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.

Do workplace delegates need rights?

Some employers have actively placed barriers in the way of union delegates and officials. There are not many quantitative studies of employer opposition to union delegates, but one study in the early 2000s found that 23% of delegates found management hostile. In the same study, 22% of delegates reported that management opposition to their role as a delegate had become more intense over the previous two years.⁶

While a majority of management (at least in workplaces with delegates) appeared indifferent or even supportive, and it is unclear exactly what proportion of hostile managers would have breached any delegates' rights, what is clear is that there was significant minority hostility towards union delegates. Examples from various case studies, including court and industrial cases, give us an idea of some of the ways in which that minority of employers from workplaces with delegates expressed their hostility towards unionism and their opposition to delegates.

An obvious method of opposition to unions is refusal to allow right of entry, which, amongst other places, has been documented in mining,⁷ banking,⁸ and telecommunications⁹ (especially at outsourced sites).¹⁰

This union exclusion¹¹ might be justified by reference to claims that paid union officials are outsiders to the workplace, but this argument cannot be justified when referring to impediments placed in the way of volunteer union delegates, who are inherently part of the workplace. Barriers in the way of workplace union activists and volunteer delegates have been documented in areas such as mining¹² and communications,¹³ including reducing or removing union access to company resources or facilities¹⁴ and intercepting mail of suspected union sympathisers.¹⁵ One mining company even had a 'black list' of activists and

⁶ David Peetz and Barbara Pocock, *Organising and delegates: An overview*, Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ), 2005, 445.

⁷ B. Ellem, 'We're solid': Union renewal in the Pilbara <www.labor.net.au/worksite/pilbara.html>, 2001.

⁸ *FSU v Comm Bank*, [2000] FCA 1372, para 14.

⁹ *CPSU v Telstra Corporation Ltd* [2000] FCA 1610 (13 November 2000), (<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2000/1610.html> acc 15/10/01).

¹⁰ *CPSU v Telstra*, [1999] FCA 1224 (3 September 1999), para 25.

¹¹ Smith & Morton 1993:105-6, 1994:8

¹² *CFMEU v Coal and Allied Operations Pty Ltd* [1999] FCA 1531, paras 134, 136, 154, 164; *AWU v BHPIO*, [2001] FCA 3, paras 90-94.

¹³ *CPSU v Telstra Corporation Ltd* [2000] FCA 1610 (13 November 2000).

¹⁴ *CPSU v Telstra Corporation Ltd* [2000] FCA 1610 (13 November 2000); *FSU v Comm Bank*, [2000] FCA 1372, para 14.

¹⁵ T. Dundon, 'Employer opposition and union avoidance in the UK', *Industrial Relations Journal*, vol. 33, no. 3, 2002.

delegates that it put on 'gardening duty' or sacked,¹⁶ and was then forced to compensate.¹⁷ While targeting union delegates for dismissal had since become illegal under the 'adverse action' provisions of the Fair Work Act, many other actions inhibiting delegates' performing of their duties had not been prohibited until the 'Closing Loopholes' amendments.

A possibly more common problem is refusing to negotiate.¹⁸ In Australia, there have been examples of employers refusing to recognize any role for a union in representing employees in negotiations, with wage increases sometimes withheld for years,¹⁹ and some employers making non-negotiable offers and then refusing to take part in any negotiations,²⁰ with the intent of making the union appear ineffectual.²¹ Sometimes refusal to negotiate has extended to locking out unionised employees.²² In the US, a common tactic in decertification attempts (ie removing unions from the workplace) is to pursue negotiations 'in such an aggressive or superficial manner as to preclude settlement'.²³

Overall, then, it appears that many volunteer workplace union delegates, probably a minority (but it is hard to be definitive on numbers), were in need of a formalised system of rights to enable them to perform their role adequately. Many volunteer union delegates have been obstructed from doing their proper job of enabling employees' voice at the workplace to be heard.

It should be noted that not all employer resistance to unionism takes the form of resistance to delegates. Some of it is manifest as resistance to union organisers or other paid union staff. The simplest form of this may be to refuse organiser entry to the workplace, as mentioned earlier. This creates a barrier to the union's relations with actual and potential members and, of course, with the corporation.²⁴ There are numerous examples in New

¹⁶ *R.D. Smith and Others and Pacific Coal Pty Ltd*, AIRC, 9 April 2001, Print PR902679;

¹⁷ 'Blair Athol battle finally over, as Rio Tinto and CFMEU reach settlement', *Workplace Express*, 5 August 2005.

¹⁸ J. Kelsey, 'Employment and union issues in New Zealand 12 years on', *California Western International Law Journal*, vol. 28, 1997, p:265; E. Dannin, *Working Free: The origins and impact of New Zealand's Employment Contracts Act*, Auckland University Press, Auckland, 1997, pp216-7,239; W. Brown, S. Deakin, M. Hudson, C. Pratten and R. Ryan, *The individualisation of employment contracts in Britain*, Employment Relations Research Series no. 4, Department of Trade and Industry, London, 1998, p34.

¹⁹ N. Timo, 'The management of individualism in an Australian mining company', *Employee Relations*, vol. 19, no. 4, 1997, p343

²⁰ *AWU v BHPIO*, [2001] FCA 3, paras 129, 160, 163, 166.

²¹ J. McDonald, 'Risks apparent for both sides under Workplace Relations Act', *HR Monthly*, July 1997, pp. 40-1.); Timo 'Management of individualism', n19 above, pp342,345; S. Jones, 'The use of AWAs in Telstra', mimeo, Community and Public Sector Union, Sydney, 2001

²² *Australasian Meat Industry Employees' Union v Peerless Holdings Pty Ltd* [2000] FCA 1047 (18 August 2000), <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2000/1047.html> acc 19/10/01; *Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd* [2000] FCA 1760 (5 December 2000)

²³ Lawler, J.J., *Unionization and Deunionization: Strategy, tactics, and outcomes*, University of South Carolina Press, Columbia SC, 1990, p181)

²⁴ Peetz, *Brave New Workplace: How Individual Contracts are Changing our Jobs*, Sydney: Allen & Unwin, 2006, chapter 5.

Zealand and Australia.²⁵ There are other tactics that employers so inclined might also pursue, such as threatened or actual removal of payroll deduction facilities, implied threats of redundancies if people join a union, biased performance appraisal systems,²⁶ and so on. Yet other tactics have already been prohibited by the 'adverse action' provisions of the Fair Work Act²⁷ (such as targeted redundancies²⁸ or dismissals²⁹) or made difficult by 'good faith bargaining' provisions.³⁰ The point is that establishing a regime of workplace delegates' rights would overcome many, but not all, of the barriers facing workplace delegates in performing their duties. A restriction on union bargaining power in the workplace hampers union delegates, even if it is not directly aimed at the delegates themselves.

²⁵ J Kelsey, 'Employment and union issues in New Zealand 12 years on', *California Western International Law Journal*, vol. 28, 1997, p. 265; E Dannin, *Working Free: The origins and impact of New Zealand's Employment Contracts Act*, Auckland University Press, Auckland, 1997, pp. 223–4.; Bradon Ellem, "We're Solid: Union Renewal in the Pilbara." *Worksite (Lloyd Ross Forum)*, September. 2001, 6-7; *FSU v Comm Bank* [2000] FCA 1372, para. 14; *CPSU v Telstra* [2000] FCA 1610; *CPSU v Telstra* [1999] FCA 1224, para. 25.

²⁶ *R.D. Smith and Others and Pacific Coal Pty Ltd*; P Smith, and G Morton, 'Union exclusion and the decollectivization of industrial relations in contemporary Britain', *British Journal of Industrial Relations*, vol. 31, no. 1, March 1993, pp. 105–6; P. Smith and G. Morton, 'Union exclusion— Next steps', *Industrial Relations Journal*, vol. 25, no. 1, March 1994, pp. 3–14; *CPSU v Telstra* [2000] FCA 1610; *FSU v Comm Bank* [2000] FCA 1372.

²⁷ *Fair Work Act 2009*, ss340-345.

²⁸ T. Dundon, 'Employer opposition and union avoidance in the UK', *Industrial Relations Journal*, vol. 33, no. 3, 2002, pp. 239-240; *R.D. Smith and Others and Pacific Coal Pty Ltd.*; *CFMEU and Gordonstone Coal Management Pty Ltd*, AIRC, 26 August 1998, Print Q4628; *B.J. Crawford and Others and Coal and Allied Operations Pty Ltd*, AIRC, 9 July 2001, Print PR906250, para. 296; *J.G. Adam and others and Mount Thorley Operations Pty Ltd*, AIRC, 17 September 2001, Print PR909053; G. Griffin and S. Svensen, 'Industrial relations implications of the Australian waterside dispute', *Australian Bulletin of Labour*, vol. 24, no. 3, 1998, pp. 194–206; M. Lee, 'On the waterfront', *Alternative Law Journal*, vol. 23, no. 3, June 1998, pp. 107–111.

²⁹ Dundon, 'Employer opposition and union avoidance', 2002, n28 above, p.240 ; Farber, 'The decline of unionization in the United States', 1990, pp. s75–s105; P. Smith and G. Morton, 'Union exclusion', n26 above, pp. 97–114.

³⁰ *Fair Work Act 2009*, s228.

The new rights framework for union delegates

In December 2023, the Fair Work (Closing Loopholes No 1) Act was proclaimed, introducing a new regime of rights for workplace union delegates in Australia industrial law. Part of the law regarding these rights took effect on 1 July 2024.

These rights operate at several levels. Some rights for union delegates are specified in the Fair Work Act itself. They are clarified in modern awards. They are further clarified in enterprise agreements. This section looks at rights at each of those levels, but starts by describing the situation that existed before this new rights regime came into effect.

THE ‘CLOSING LOOPHOLES’ AMENDMENTS TO THE FAIR WORK ACT

For the purpose of the Fair Work Act’s delegate rights regime, a ‘workplace delegate’ means someone who is appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative for members of the organisation who work in a particular enterprise’.³¹

The Act specifies a number of rights that delegates have. These rights took effect immediately after the legislation was passed in December 2023. (The Act also required that the FWC had to make relevant variations to modern awards by 1 July 2024, as discussed further below.)

First a workplace delegate is entitled to represent the interests of their union’s members, and any other non-members eligible to be members, including in disputes with their employer.³² It explicitly does not require anyone to be represented by a delegate, but it does mean that if anyone (including an eligible non-member) wants to be represented by that delegate, then they can be.

Second, a workplace delegate is entitled to reasonable communication ‘in relation to their industrial interests’ with union members, and any non-members who are eligible to join that union.³³

Third, a workplace delegate is entitled to reasonable access to the workplace and its facilities, if it is for the purpose of representing members’ interests.

³¹ *Fair Work Act 2009* s350C(1)

³² S350C(2)

³³ S350C(3)(a)

Except in small businesses (those with fewer than 15 permanent employees), the delegate is also entitled to reasonable access to paid time off, during normal working hours, for related training.³⁴ This last right will not apply to gig workers (truck owner-drivers and digital platform workers) who are brought into Fair Work regulation through other 'Closing Loopholes' amendments to the Fair Work Act.

The term 'reasonable' is potentially contentious. The Act specifies that, in determining what is reasonable, at least three factors are relevant, being:

- (a) the size and nature of the enterprise;
- (b) the resources of the employer; and
- (c) the facilities available at the enterprise.³⁵

The Act also sets out a number of protections for workplace delegates from antagonistic employer behaviour.

Perhaps most importantly, the employer must not unreasonably refuse to deal with the workplace delegate.³⁶

The employer is also prohibited from knowingly or recklessly making a false or misleading claim or representation to the workplace delegate. Nor can the employer unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate.³⁷ As would be expected, these prohibitions only apply in relation to the delegate attempting to exercise their rights *as a delegate*.³⁸

Compared to the provisions regarding the active rights of the delegates, 'reasonable' is defined more vaguely but with a reverse onus of proof. That is, the burden of proving that the conduct of the employer is not unreasonable lies on the employer.³⁹ There is no reference in that definition to the size, resources or facilities of the organisation, so a small business employer has no greater right to obstruct a workplace delegate than any other employer.

NEW PROVISIONS IN MODERN AWARDS

Modern awards (often just referred to as awards) are legally binding minimum standards for employees that are determined by the Fair Work Commission (FWC).

³⁴ S350C(3)(b)

³⁵ S350C(5).

³⁶ S350A(1)(a)

³⁷ S350A(1)(b) and (c)

³⁸ S350A(2)

³⁹ S350A(3)

Under the amended Fair Work Act, a modern award must include a delegates' rights term.⁴⁰ This takes effect from July 2024.

The FWC's decision created a model award term that takes effect from 1 July 2024. That decision clarifies in greater detail the rights set out under legislation.⁴¹

On consultation, the model term provides that workplace delegates may represent the industrial interests of eligible employees (who wish to be represented by the workplace delegate) in matters including but not limited to:

- consultation about major workplace change;
- consultation about changes to rosters or hours of work;
- resolution of disputes;
- disciplinary processes;
- enterprise bargaining; and
- any process or procedure in which the employees are entitled to be represented.

On the entitlement to reasonable communication, the model clause confirms that a workplace delegate may communicate with eligible employees for the purpose of representing their industrial interests, and that this includes discussing membership of the union. It also specifies that a workplace delegate may communicate with eligible employees *during working hours* or work breaks, or before or after work.

Regarding access to workplace facilities, the model clause states that the employer must provide a workplace delegate with access to or use of several workplace facilities (except where the employer does not have them), in particular:

- a room or area to hold discussions that is fit for purpose, private and accessible;
- a physical or electronic noticeboard;
- electronic means of communication that are ordinarily used at the workplace (typically e-mail, but without requiring contact details for eligible employees to be provided to the delegate);
- a lockable filing cabinet or other secure document storage area; and
- office facilities and equipment including printers, scanners, photocopiers and wi-fi.

One of the most contentious issues for the FWC is clarifying the entitlement to reasonable access to *training*. Here, the model clause says that, unless the employer is a small business employer, the employer must provide a workplace delegate with access to up to 5 days of paid time during normal working hours for 'initial training' (the number of months or years is not specified) and 1 day each subsequent year, to attend training related to representation of the industrial interests of eligible employees.

This right is subject to a number of conditions. The most significant is that the employer is not required to provide the paid leave to more than one workplace delegate per 50 eligible employees (being full- or part-time or regular casual employees).

⁴⁰ S149E

⁴¹ Draft decision at [2024] FWC 1214. Final determination at PR774855 (AM2024/6).

It also puts notice obligations on the employer and employee regarding the scheduling of training:

- the delegate must give the employer at least 5 weeks' notice of the dates, subject matter and the start and finish times of the training;
- the delegate must, on request, provide the employer with an outline of the training content;
- the employer must advise the workplace delegate as soon as is practicable, and not less than 2 weeks before 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;
- the workplace delegate must provide the employer with evidence of attendance at the training, within 7 days of the training.

There are also obligations on the delegate, when exercising their rights, to comply with their ordinary obligations and with reasonable employer policies, including codes of conduct on health and safety and use of IT equipment. The model award term clarifies that employees retain their freedom of association and cannot be required to be represented by a delegate without the employee's consent.

The model clause makes it clear that, if another clause in the award provides more beneficial rights to delegates, then the more beneficial clause prevails.

NEW PROVISIONS IN ENTERPRISE AGREEMENTS

All new enterprise agreements will include a delegates' rights term.⁴²

If that term is less favourable than the delegates' rights term in *any* modern award that cover the workplace delegates, then the most favourable term amongst the relevant modern awards (as determined by the FWC) prevails. If that happens, then if the modern award changes, the original version of the delegates' rights term (i.e. in the earlier version of the award) is the one that prevails.⁴³ The same concept applies to workplace determinations made by the FWC (for example, if the FWC has suspended industrial action and the parties have not reached an agreement): the delegates' rights clause in the determination must be no less favourable than that in the modern award.

Pre-existing enterprise agreements (ie. those approved by employees before 1 July 2024) will not need to be retrospectively amended to include a delegates' rights term, but the delegates' rights provided in the modern award and the law will apply anyway.

⁴² S205A (1)

⁴³ S205A(2) and (3)

The effects of new rights for workplace union delegates on pay, cooperation and productivity

To assess the impact of the new rights regime, we divide the discussion into two sections: the effects on pay, cooperation and productivity; and the effects on union training. This is for several reasons. The effects on pay, cooperation and productivity are closely inter-related. The provisions on consultation, communication and facilities are all about internal matters within the workplace, and are clearly intended to increase employee voice at the workplace. The provisions on union training are more discrete, they relate to interactions between the workplace and outside it, and the effects regarding union training are more ambiguous.

Below, we consider the impact of new delegates' rights in the context of what delegates do in workplaces, the impact on pay, conditions and safety, the question of to what extent, and in what circumstances, do union delegates and unionism promote conflict or cooperation at the workplace, and the impacts they have on grievances and productivity. We draw on existing research studies to make these assessments.

IMPACT ON PAY, CONDITIONS AND SAFETY

'Voice', when applied in a workplace context, refers to a range of ways through which workers can influence decisions that affect them.⁴⁴ It is not just a matter of a worker saying something. If workers are unable to change anything, even when they speak up, it cannot be said that they have real voice.

Increasing the workplace rights of delegates is widely agreed to lead to an increase in the bargaining power of workplace delegates. As workplace delegates are, by definition, the representatives of employees (at least of unionised employees), then increasing the workplace rights of delegates must, over the long term, increase the voice of employees. In the short term, this might not occur: a workplace delegate might have an agenda that is in conflict with the ideas of members, but the members would either vote that delegate out of the position he or she occupies, or leave the union. Either way, a fundamental inconsistency between the interests of members and the expressed position of their representative cannot be sustainable. Over the long run, improved delegates' rights will improve workers' voice.

Union delegates tend to be the part of the union that members have the most contact with, and research shows that members are most satisfied with the part of the union closest to

⁴⁴ Peetz, *Realities and Futures of Work*, p180.

them.⁴⁵ In one Australian study, members were nearly 1½ times more likely to be satisfied with their delegates than with union officials and leaders.⁴⁶

Voice, pay and union membership

Having a voice brings important benefits for workers. For example, unionism increases the pay⁴⁷ and other benefits⁴⁸ of unionised employees, especially through collective bargaining⁴⁹ (which is almost impossible without workplace delegates). Research also tells us that, when workforce reductions occur, compulsory retrenchments are less likely, and voluntary redundancies more likely, in workplaces where unionised collective agreements dominate compared to workplaces where individual contracts dominate.⁵⁰ So increased worker voice, through strengthened workplace delegates' rights, would lead to increases in pay and employment benefits and more worker say in the procedures for redundancies.

Increased union voice would also very likely lead to an increase in union membership — or at least, a reduction in the decline in union membership. A key factor motivating individuals to join a union is whether they see that this would increase their voice (that is, their power) in the workplace.⁵¹ Increasing employee voice through workplace union delegates would therefore increase employee desire to join a union. A key factor in the decline of

⁴⁵ 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).

⁴⁶ 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

⁴⁷ Summarised in Richard B. Freeman and James L. Medoff, *What Do Unions Do?*, 1984; again in Richard B. Freeman, 'What Do Unions Do ? The 2004 M-Brane Stringtwister Edition' *Journal of Labor Research* 26(4), 2005, 642-68.; Australian data include V. Christie, 'Union wage effects and the probability of union membership', *Economic Record*, vol. 68, no. 200, March 1992, pp. 43–56; R. Kornfeld, 'The effects of union membership on wages and employee benefits: The case of Australia', *Industrial & Labor Relations Review*, vol. 47, no. 1, October 1993, pp. 114–28; P. Miller and S. Rummery, 'Unionism and the structure of male wages in the labour market', *Journal of Industrial Relations*, vol. 31, no. 2, June 1989, pp. 185–211; M. Wooden, *Union Wage Effects in the Presence of Enterprise Bargaining*, Melbourne Institute Working Paper no. 7/00, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, April 2000.

⁴⁸ A. Jackson and G. Schellenberg, *Unions, Collective Bargaining and Labour Market Outcomes for Canadian Working Women: Past gains and future challenges*, Research Report 11, Canadian Labour Congress, 1999, p. 1.

⁴⁹ Department of Industrial Relations, *Enterprise Bargaining in Australia: 1995 Annual Report*, AGPS, Canberra, 1996, pp. 149–50; D. Peetz, 'Individual contracts, collective bargaining, wages and power: An Australian perspective', paper to Canadian Industrial Relations Association conference, Québec, May 2001; Wooden, *Union Wage Effects*, n47 above.

⁵⁰ Australian Workplace Industrial Relations Survey dataset, Department of Industrial Relations, Canberra, 1995, cited in David Peetz, 88; Keith Sisson, 'In Search of HRM', *British Journal of Industrial Relations*, 31(2), 201-210.

⁵¹ Peetz, *Unions in a Contrary World*, n46 above.

unionisation, in Australia and overseas, has been employer resistance to unions.⁵² Reducing the ability of some employers to hamper unionisation would diminish this downward force on union membership. That said, given the size of the drop in union density in Australia in recent decades, the low base from which any shift in unionisation would start, and the fact that the vast majority of employees are in workplaces without delegates anyway,⁵³ large increases in union membership should not be expected.

Technology and safety

Unionisation is known to improve health and safety by reducing the incidence of traumatic injuries and fatalities (as shown in coal mines, for example), while leading to increased reporting of non-traumatic injuries that are more likely to be glossed over in non-union workplaces.⁵⁴ While safety improvements may be thought of as being beneficial to both management and employees, to some employers (as already shown) this is clearly not sufficient reason to support or accede to a union presence. No doubt this is in part because of the impact of unions in lifting pay and conditions.

Regardless, it is clear that consultation with employee representatives is crucial for ameliorating the impact of new technology, including recent developments in artificial intelligence (AI), and including the impacts of technological change on safety. Two of the most recent studies were undertaken by the Organisation for Economic Cooperation and Development (OECD). Both are summarised in its 2023 *Employment Outlook*.⁵⁵ One, based on the third European Survey of Enterprises on New and Emerging Risks (involving over 45,000 establishments from 33 countries), showed that the adoption of AI was associated with a significantly *lower* risk for workers of exposure to heavy workloads where there was consultation with a works council, trade union or health and safety representative or committee. Similarly, AI-based technology had a lower chance of being associated with heavy noise exposure when there was consultation with a union or health and safety representative or committee, and a higher chance of being associated with social support at work.⁵⁶ The OECD cautioned that some of its findings could reflect reverse causality,⁵⁷ for example the seemingly counter-intuitive finding that hard physical conditions were associated (albeit non-significantly) with greater consultation could be because hard

⁵² Ibid and R B Freeman and M M Kleiner, "Employer behavior in the face of union organizing drives", *Industrial & Labor Relations Review* 43, no. 4 (April 1990).

⁵³ In one Australian online employee survey, in which 15% of respondents were union members, only three quarters of members (that is, 12% of all employees) were in workplaces with workplace delegates. Study reported in Werner Nienhüser, David Peetz and Georgina Murray with Carolyn Troup, *Social Media, the Internet and the Crisis of Unionism*, Hans-Böckler-Stiftung, Düsseldorf, Germany, December 2022, 74pp. https://www.boeckler.de/fpdf/HBS-008499/p_fofoe_WP_262_2022.pdf

⁵⁴ Alison D Morantz, "Coal mine safety: Do unions make a difference?," *Industrial and Labour Relations Review* 66, no. 1 (2013).

⁵⁵ OECD, *OECD Employment Outlook 2023: Artificial Intelligence and the Labour Market*, Paris, 2023, chapter 7: 'Social dialogue and collective bargaining in the age of artificial intelligence'.

⁵⁶ Ibid, citing H Haapanala, I Marx & Z Parolin, 'Robots and Unions: The moderating effect of organized labour on technological unemployment' IZA Discussion Paper No 15080.

⁵⁷ OECD, *Employment Outlook 2023*, section 7.2.

conditions made the workforce more likely to unionise and demand consultation. With that in mind, the effects shown by the OECD seem likely to underestimate the effects of consultation with union representatives in *reducing* adverse effects of AI on workers.

The second study involved a survey of over 5000 workers and 2000 firms in seven countries. It found that workers whose representatives (or who themselves) had been consulted over the introduction of new technology were more likely to report that AI had improved their health and safety, raised productivity, improved satisfaction and improved management after the introduction of technology, than those who were not consulted.⁵⁸ The OECD reported that this finding was 'consistent with previous OECD research that found that direct voice between workers and managers...was associated with a higher quality work environment'.⁵⁹ It again warned about specifying causality, as it could be that 'the act of being consulted generates positive perceptions of the AI, even if little has changed',⁶⁰ but even if this were the case it is clear that worker resistance to AI would be reduced if consultation occurred, as workers would have a more positive view of the technology.

IMPACT OF DELEGATE RIGHTS ON COOPERATION

Increasing the rights of workplace delegates might be thought by some to increase the likelihood of conflict and reduce cooperation at the workplace. This view assumes, however, that management and employee interests are synonymous, and unions are an unwelcome third party in the relationship between management and employee. In reality, the interests of management and employee are a mixture of inherent conflict and inherent cooperation: conflict, because a dollar more to workers is seen as a dollar less for profits; cooperation, because maintaining the viability of the employer and hence of its employment is also in the interests of employees. In this context, union delegates exist to represent employees, and their interests are sometimes to cooperate with, and sometimes to be in conflict with, the employer.

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.⁶¹ Internationally, being a union delegate is one of the most dangerous positions one can hold: for example, 19 union activists were murdered in 2018 alone in Colombia.⁶² Yet union delegates are often the key to cooperative union-management relations.

⁵⁸ OECD, *Employment Outlook 2023*, section 7.2, citing Lane, Williams and Broecke 2023.

⁵⁹ OECD, *Employment Outlook 2023*, section 7.2.

⁶⁰ *Ibid.*

⁶¹ 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; Peetz, *Brave New Workplace*, n24 above, ch. 5.

⁶² International Trade Union Confederation, *2018 ITUC Global Rights Index*, Brussels, ITUC, 2018.

The latter is because, in most countries where the issue is studied including Australia, employees report that they desire a cooperative relationship between the union and management at the workplace.⁶³ 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.⁶⁴

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.

Thus, while two thirds of Australian union members wanted unions to cooperate more with management, they were even more vigorous in demanding that management cooperate more with unions (with 82% saying so). They were almost unanimous in wanting unions to continue to vigorously defend their interests.⁶⁵

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.⁶⁶ This might

⁶³ 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).

⁶⁴ 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>.

⁶⁵ 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).

⁶⁶ 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). n63 above.

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. Efforts to undermine or remove union delegates thus undermine a basic institution through which cooperative voice can be expressed.

Of course, not all managers are antagonistic to union delegates. Many employers prefer dealing with unions, as doing this may have benefits such as reducing their transaction costs in determining pay.⁶⁷ 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 at least be unable to gain the support of the membership for collective action), or the union will lose its members. That is, antagonism to management that is not supported by the membership is likely to lead to the union losing 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. Chances are, if delegates are persistently antagonistic towards management, then management has brought this situation upon itself, as employees feel that it is not living up to its side of the psychological contract.

One major study also 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 factor was, in this study, the strongest predictor of union power at the workplace.⁶⁸ When delegates did not have strong upward say within their 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. Hence, delegates who said on one survey that members' influence in the union had fallen or remained stable were much less likely to be classed as having workplace power than those who reported that members' influence in the union had increased.⁶⁹

It is especially noteworthy that effective union training is related to effective union democracy. When union delegates have higher levels of training, they perceive members to have a higher degree of influence in the union. Thus enhanced training rights have the potential to make unions more responsive to the wishes of their members, and less likely to fit into the stereotype of a 'third party' that is unresponsive to the wishes of members for cooperation.

It should be noted that workplace unionism is not the only potential voice mechanism for employees. A critical issue, though, is not just about whose voice is heard, but rather 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

⁶⁷ Edmund Heery, "Trade unions and the management of reward", in *Reward Management: A Critical Text*, ed. Geoff White and Janet Drucker (London: Routledge, 2000).

⁶⁸ 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).

⁶⁹ *Ibid.*

can ultimately terminate that arrangement for voice. This relates to most forms of ‘employee participation’, such as quality circles, autonomous work groups, productivity improvement groups, and joint consultative councils, unless they are established via a binding enterprise agreement. Management-constrained voice runs the risk of failing to achieve the changes that employees seek through attempting to exercise their voice.

By contrast, a voice mechanism is employee-controlled if management cannot unilaterally terminate an arrangement for voice. Overseas, while trade unionism exists, employee-controlled voice may also encompass ‘works councils’ (found in parts of Europe), whereby the cooperative 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. In Australia, by far the most common form of employee-controlled voice is trade unionism, and the main instrument through which voice is manifest is the union delegate.

In sum, 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. Enhancing the voice of workplace delegates, and reducing the ability of oppositional employers to frustrate that voice, will increase the efficacy of cooperative voice, at least over the longer term. It is thus likely, on balance, to increase cooperation — provided we do not try to equate cooperation with employee acquiescence, which is very much *not* what employees see cooperation as being about. Cooperation is much more about joint problem solving.

In some workplaces, the short-term effects of increased voice on cooperation may run in the opposite direction, but such exacerbated conflict is not sustainable: the employees would search for alternative mechanisms to achieve their cooperative aims. If management are not cooperative with employees, workplace delegates are able to mobilise members, again in response to member wishes, to force management to change its behaviour, towards what those employees see as a more cooperative, joint problem-solving model.

EFFECTS ON GRIEVANCE RESOLUTION AND PRODUCTIVITY

There are several other potential outcomes from the enhancement of worker voice. One is the potential for resolution of employee grievances, be they on pay, employment benefits, safety (mentioned earlier) or the conditions of work. ‘Maintaining or improving the conditions of their working lives’ is, indeed, a core purpose of trade unions⁷⁰ and need not be elaborated upon here.

Another concerns potential effects on productivity. Evidence from empirical studies of the relationship between unionism and productivity shows that productivity is, on average, at least as high in unionised as in non-union workplaces, despite any purported potential for

⁷⁰ Sidney & Beatrice Webb, *The History of Trade Unionism* (London: Longmans, 1920).

'featherbedding' or union restrictions on use of technology.⁷¹ 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.⁷² 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'.⁷³

The other likely factor, at least in Australia, explaining the absence of a strong net effect of unions on productivity is that much, probably most, 'featherbedding' was removed by the wage reforms of the 1980s (including the 'two tier' wage system) and 1990s (through the early rounds of enterprise bargaining).

After all, 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.⁷⁴

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%.⁷⁵ 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'.⁷⁶

⁷¹ 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).

⁷² 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).

⁷³ 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).

⁷⁴ Wolfgang Dauth, Sebastian Findeisen, Jens Südekum, and Nicole Woessner, 'The Rise of Robots in the German Labour Market'. *Vox*, 19 September 2017.

⁷⁵ Pedro S. Martins, "The Microeconomic Impacts of Employee Representatives: Evidence from Membership Thresholds," *Industrial Relations* 58, no. 4 (2019).

⁷⁶ *Ibid.*

The previously cited OECD evidence⁷⁷ is strongly suggestive of the idea that new technology such as AI meets lower resistance from employees when they are consulted over its introduction, including through workplace representatives (unions, works councils or health and safety representatives). Lower resistance to new technology would be expected to lead to higher labour productivity over the longer term. Indeed, some of the OECD research is directly indicative of higher perceived productivity where consultation with employee representatives occurs over the introduction of new AI technology.⁷⁸

In sum, just as employees see cooperation (not acquiescence) as being in their interests, so too they see maintaining and improving productivity (not cuts in pay and conditions) as in their interests. Increasing employees voice through increasing the rights of workplace delegates will likely, on average, improve productivity, though the effects are likely to vary substantially from workplace to workplace. So much will depend on whether the increased rights for delegates lead to the 'mutual respect for worker, union, and employer rights and responsibilities' that one of the major studies referred to. It is unlikely to see a return to the 'featherbedding' once associated with unionism that was largely cast aside in the 1980s and 1990s.

⁷⁷ OECD, *Employment Outlook 2023*. Chapter 7.

⁷⁸ See n58 above.

Formalised delegate rights to union training

This section focuses specifically on the effects of the provisions providing for paid union training leave.

UNION TRAINING RIGHTS IN HISTORICAL PERSPECTIVE

Training rights before 2024

Paid union training leave was first inserted into Australian awards in the 1970s, mostly by consent.⁷⁹ The provisions then mostly provided for a maximum of 5 days paid union training leave per year per delegate. Compensation was mostly at full pay, though some provided for half pay, and others allowed paid leave for up to 10 days per year. Some had conditions and limitations, such as avoiding inconvenience to the employer. By 1988, some 64 federal awards had such provisions.

In 1997, as part of a major shift in industrial relations policy that was antagonistic to unionism, the Howard government passed legislation preventing awards from including paid union training leave provisions, along with other union-related provisions such as those concerning union right of access to workplaces. It also abolished the Trade Union Training Authority, which had been established with bipartisan support 21 years earlier. Provisions for union training leave moved to collective agreements,⁸⁰ and by the early 2000s many, possibly a majority, of enterprise agreements included union training leave provisions.⁸¹

The 2005 WorkChoices legislation of the Howard government extended the ban on union training leave provisions to enterprise agreements and bargaining over such agreements. Some unions struck unregistered side-agreements covering the matter. The Rudd government's *Fair Work Act 2009* reversed this prohibition, and also removed the prohibition on union training provisions in awards. Union training leave provisions again appeared in enterprise agreements, and examination of the Workplace Agreements Database database showed that 30% of the 5000 agreements approved in 2015 had a

⁷⁹ Renee Burns, Anthony Forsyth, Alice Garner and Mary Leahy, 'The evolution of the regulatory framework for trade union training in Australia', *Australian Journal of Labour Law*, 35(2), 95-118.

⁸⁰ Ibid.

⁸¹ Ibid, citing Richard Mitchell, Rebecca Campbell, Andrew Barnes, Emma Bicknell, Kate Creighton, Joel Fetter and Samantha Korman, *Protecting the Worker's Interest in Enterprise Bargaining: The 'No Disadvantage' Test in the Australian Federal Industrial Jurisdiction*, Final Report for the Workplace Innovation Unit, Industrial Relations Victoria, Centre for Employment and Labour Relations Law, University of Melbourne, 2004, 45.

provision for union training leave.⁸² Some agreements provided for more than the previous 5 days standard (e.g. 7 or 10 days),⁸³ though it is not obvious that this was a common departure.

The process of award modernisation did not lead to the mass reinsertion of explicit union training leave provisions into awards; instead the FWC chose to maintain 'dispute resolution training leave' provisions in awards. These provisions had become a partial work-around of the WorkChoices-era prohibition of union training leave. So, most of the action on union training leave remained in enterprise agreements.

Comparison of new minimums with old

It is difficult to make a full comparison of the new entitlement (outlined in an earlier section on pages 13-15 of this report) with previous ones in awards and agreements, due to the absence of systematic data about entitlements under previous regimes.

That said, the 5 days minimum provided in the FWC's model award clause (for the first year) appears in line with common practice in agreements and old awards.

A seemingly major departure, however, occurs with the provision of only 1 day paid leave per year in the second and subsequent years. This scaling down of entitlements by 80% after an initial period does not appear to reflect existing arrangements in awards or agreements.

These limitations appear to reflect concern by the FWC that the cost burden on employers of union training leave should not be too large. However, there is a built-in incentive that stops unions from imposing too high a cost upon employers through union training, and that is that training is costly for unions themselves.

A second departure from apparent common practice is the FWC's proviso that the employer is not required to provide the paid leave to more than one workplace delegate per 50 eligible employees (the latter number including non-members who are eligible to join that union).

Although there are no recent published data on the ratio of workplace delegates to members, a question was asked in a survey of Australian delegates in 2013, asking participants about approximately how many members they had personal responsibility for. It showed that the median delegate had responsibility for 25 members, but a quarter had responsibility for 10 or fewer, while just over a quarter had responsibility for 50 or more.⁸⁴ While these numbers are for *members* per delegate, not *employees* per delegate, it is noteworthy that, across that sample, median union density (in response to the question

⁸² Search of WAD conditions dataset provided by then Department of Employment, September 2016. The 30% number also applied to agreements approved in the first 8 months of 2016.

⁸³ Burns, Forsyth, Garner & Leahy 2022, n79 above.

⁸⁴ These data are unpublished but the survey is reported in David Peetz et al., "The meaning and making of union delegate networks", *Economic and Labour Relations Review* 26, no. 4 (December 2015).

‘approximately what percentage of people in your workplace are in the union’) was estimated at 65%, with a quarter reporting density below a third and a quarter claiming density of 90% or more. (Bear in mind, while these numbers might appear high, it is in the most highly unionised workplaces that trained workplace delegates are likely to exist.) If the median delegate mentioned above also had median union density, he or she would be in a workplace with one delegate per 50 employees, but (if representative of delegates as a whole) that in turn would mean that something approaching half of delegates were in workplaces with more than one delegate per 50 employees.⁸⁵

There are no other recent data on the ratio of members per workplace delegate but John Benson’s 1985 book referred to an average ratio of 1:24 for FEDFA members in the La Trobe Valley,⁸⁶ and an international study from the 1970s suggested ratios of something like 1:35 in the UK, 1:45 in Italian metalworking, 1:11 in Dutch transport unions, 1:20 in German metalworking, 1:30 in unionised Danish textile firms and 1:15 in Norwegian textiles and transport, but ratios higher than 1:50 in some other sectors in those countries.⁸⁷ These averages, of course, are not only very dated but also would disguise the high amount of variability between establishments regarding the numbers of members and delegates.

Overall, the 1:50 restriction in the model award provision appears likely to fail to account for the number, possibly high, of establishments that have more than 1 delegate per 50 members and potential members.

For this reason, more importantly because of the provision of only one day paid leave after the ‘initial’ period, the award provision is likely to be less generous overall than that applying in most enterprise agreements, and so is likely to mainly affect only people covered by enterprise agreements that do not have a training provision.

THE EFFECTS OF THE NEW UNION TRAINING RIGHTS REGIME

Overall, despite the (unknown) number of establishments where paid union training leave rights are already greater than the new legislated minimum, it appears very likely that the total availability of union training will increase — provided that unions have the resources to deliver increased training. Obviously, this would mostly be the case where delegates have previously been unable to access union training due to the absence of a right to paid leave. This in turn would very likely lead to greater employee voice in those workplaces where training increases. That would have impacts on wages, conditions, safety, union membership, cooperation and productivity as described in the previous section as arising from the increases in workplace delegates’ rights generally.

⁸⁵ *ibid.*

⁸⁶ John Benson, *Unions at the Workplace*, Oxford University Press, 1991.

⁸⁷ Anthony Carew, *Democracy and Government in European Trade Unions*, Routledge, 1976 (republished 2022).

The impact on union membership is worth commenting on in the context of existing research on union training and education. It shows that, broadly speaking, education and development activities promote union membership growth and activism, which in turn matters for promoting union membership.⁸⁸ Union training is more important than tenure as a delegate building activism.⁸⁹ Both training and tenure boost delegates' confidence, and this is a critical pathway to boosting activism and the success of employee voice. Delegate activism will be influenced by the breadth of training (the quantity of it) and the perceived quality of it. For example, training in a broad range of skills associated with building member voice (such as training in campaigning and developing networks) does more over the long run to build membership growth and employee success than training in recruitment alone.⁹⁰ As not all delegates want or are suited to becoming, say, successful recruiters, a union may aim to train enough delegates across a workplace to enable specialisation where necessary in tasks such as recruitment.⁹¹ So, if more training rights lead to broader training and to it covering a larger number of delegates within a workplace, then those rights could indeed be expected to lead to higher membership. (Whether that happens may depend on how the stepped leave allowance, with five days leave in the initial period and then one day in subsequent years, is administered in practice.) It also depends on whether unions have the resources to enhance their provision of training, or at least target it more effectively.

Aside from these factors, there are key uncertainties arising from the new legislation, even while the legislated union training rights regime provides important benefits to many union delegates that did not exist before to such a degree. We can categorise those into two types of uncertainties.

Uncertainties about bargaining over union training

One uncertainty, which could be a risk for either employers or employees, is over whether and how the new legislative regime changes the 'floor' (or starting point) for bargaining over training rights in enterprise agreements. This is relevant in cases where enterprise agreements already provide for paid union training — especially where the paid leave in the second and subsequent years exceeds the one year provided in the FWC model award clause. This only affects a minority of establishments with enterprise agreements, as the majority probably do not have a paid training leave clause in their EBA.

If the regime raises the 'floor' or starting point for bargaining where agreements already provide for paid training leave, this could be to the advantage of employees and the disadvantage of employers; if it lowers the 'floor' (the 'floor' also becoming the 'ceiling'), it could be to the disadvantage of employees and the advantage of employers. It is difficult to say *ex ante* what the more likely outcome is, though of course for the majority of EBAs (those that do not presently have a paid union training leave) the 'floor' is raised anyway.

⁸⁸ David Peetz and Michael Alexander, "A synthesis of research on training of union delegates", *Industrial Relations Journal* 44, no. 4 (2013).

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

Uncertainties about union choices in training

The larger uncertainty concerns the impact on union behaviour. The question is: how will the legislative paid training rights regime affect the quantity, content and delivery of union training? Put briefly, if the greater availability of paid union training leave increases the number of delegates who are trained at the expense of the content and delivery of union training, there may be no improvement in the overall effectiveness of union education and training.

To explain this proposition, it is necessary to step back a bit and look further at what the last two decades of research on union training has found. A key lesson from that research is that there is limited value from formal training of delegates if there is not follow-up to that training. Post-training contact with organisers is strongly related to continuing commitment and the effectiveness of voice. Formal training is important, but at least as important is the informal side: what happens when organisers train delegates 'on the job'. Organiser mentoring of delegates is critical for developing voice.⁹²

Almost certainly, improved delegates' training rights will increase the number of delegates available to be trained. If this leads unions to spread their training resources more thinly, over a larger number of delegates, and devote less resources to follow-up and to organiser mentoring of delegates, the effect could be less productive from a union perspective, and ultimately for employee voice. More delegates could be trained, but not necessarily as effectively, and if that happened then there is no certainty that voice would be improved. (This is more likely if the 5 day/1 day step in paid leave leads to unions concentrating their training resources on new delegates, a response that would seem intuitively sensible to many.)

This risk is magnified by the fact that the workplace delegates' rights regime does not explicitly alter processes for union access to workplaces, and therefore it need not make it any easier for organisers to engage in the follow-up and mentoring that good education and training practice would warrant. While right-of-entry provisions were amended slightly, those changes do not materially affect the issues facing organisers in accessing workplaces for follow-up to training purposes (classed as 'discussions with employees'). Amongst other things, an organiser seeking access must obtain a right of entry permit, provide at least 24 hours notice to the employer, and hold discussions, during breaks, in an agreed location or a meal room. While the delegates' rights provisions guarantee that delegates are entitled to a room or area to hold discussions that is fit for purpose, it is unclear whether this will be interpreted as encompassing a meeting with paid officials of the union, or just with members and employees. Regardless, meeting the above conditions has a resource cost for unions, and so when the resource cost of providing classroom training goes down, it could be tempting for unions to shift their attention. The incentives facing unions could lead them to increase classroom training, and ease up on the follow-up and mentoring activities that require union officials to access workplaces. If increasing employee voice is the priority then unions should allocate *more* resources to union education and training (since a new cohort

⁹² Ibid.

of members with potentially high returns from training is accessible) and consider the most effective way of using scarce resources.

Thus, if employee voice is to be increased over the long run, in the context of the new delegate rights schema, unions must address several questions:

- How can the total benefit from union education and training be increased in the new delegates' rights regime, bearing in mind the need for follow-up to classroom training and the role of informal education in improving employee voice?
- Can the total resources available for delegate education and training be increased?
- Amongst those delegates who previously were unable to access union education because of the absence of paid training leave, which ones have the greatest potential to enhance employee voice through a program of classroom and informal training and post-classroom follow up?

If these matters are systematically addressed, the new union training rights regime could indeed lead to an increase in employee voice at the workplace. If they are not, the benefits for employee voice could be very muted.

Conclusions

The new regime of workplace delegates' rights is very likely, overall, to increase the voice of employees. This in turn is likely to have positive consequences, over the long run, for pay and conditions, union membership, workplace cooperation, grievance resolution and productivity. This is principally because, overall, a long history of research has shown that:

- union delegates tend to be the part of the union with which members have the most contact, and are most satisfied;
- 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;
- to maintain their position, delegates need to behave cooperatively, but employees do not expect that to continue if management itself is uncooperative;
- 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;
- workplace unionism and hence delegates represent the only form of employee voice in Australia that cannot be easily removed by management;
- delegates can potentially play an important role not only in democratising workplaces but also in democratising unions.

Many managers actively seek to rid the workplace of union delegates, yet those delegates are often the key to cooperative union-management relations. In an individual firm, management might think that avoiding union delegates is something that will help them improve their profitability. This may be because, even though unions can boost cooperation and productivity in a workplace, they will also usually improve the pay and conditions of members — especially if they have high representation in a workplace, which are the workplaces that are most likely to have workplace delegates. This unambiguously increases costs facing those organisations, which might or might not be offset by higher productivity.

From a broader social perspective, however, it does not make sense to enable employers to hinder the ability of workplace union delegates to represent the interests of their members. The logic of the move to enterprise bargaining in the early 1990s was very much to shift decision-making from state institutions, such as the former Australian Industrial Relations Commission, to the workplace parties. But the workplace parties cannot reach an informed, negotiated agreement if one party has its hands tied behind its back. Research has shown that union members do actively seek cooperative relations between management and unions, and that they expect both management and unions to behave that way. If union delegates are unreasonably uncooperative, their members will dump them or leave the union. But if management is unreasonably uncooperative, there is nothing the employees without union representation can do (except quit their job).

It is in this context that the Fair Work Act was amended to give workplace union delegates' rights, and prevent employers from unreasonably hampering the exercise of those rights. In

the long run, this should lead to an increase in workplace cooperation, and potentially productivity. Those amendments to the Act include giving delegates reasonable access to members and eligible non-members, communication, facilities and (in medium and larger workplaces) training. They also act to prevent employers from obstructing delegates by refusing to deal with delegates, misleading them on industrial matters, or otherwise hindering or preventing delegates exercising their workplace rights. Rights for delegates are also set out and clarified in awards and enterprise agreements.

Overall, these rights (in combination with the 'adverse action' and related provisions already in the Fair Work Act) will address the active barriers that some employers place in front of delegates attempting to perform their duties as delegates, as described earlier in this paper. They would not bring an end to all employer opposition to unions — there is first the matter of ensuring compliance, and then the fact that some employers use various other means to attempt to exclude unions from the workplace.⁹³ They would be a step forward for employee voice, nonetheless.

One caveat on these conclusions concerns the new rights for paid union training leave in medium and larger workplaces. Here, the incentives unions face are different from those on other aspects of delegates' rights. At its simplest level, the new rights give unions an incentive to train more delegates, but this could feasibly take the form of increased classroom training and reduced informal training and follow-up. If unions respond that way, the positive outcome from increased paid training leave could be minimised. To prevent this from happening, unions need to ensure that there is no loss of focus on the informal aspects of union education, and to focus on the need for follow-up and support for delegates as this new training rights regime is implemented. If unions use the new training rights simply to emphasise getting more 'bums on seats', ahead of taking a holistic approach to education, the benefits would be minimised.

⁹³ Peetz, *Brave New Workplace*, n24 above.