

Australian Nursing and Midwifery Federation

***Fair work Legislation Amendment
(Closing Loopholes) Bill 2023 (Cth)***

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Australian
Nursing &
Midwifery
Federation



Australian Nursing and Midwifery Federation - *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth)

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A. About the ANMF

1. The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 322,000 nurses, midwives and personal care workers (PWCs) across the country. Approximately 89% of the ANMF's membership are women.
2. Our members work in the public and private health, aged care, and disability sectors across a wide variety of urban, rural, and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, to fulfil their professional goals, and achieve a healthy work/life balance.
3. Our strong and growing membership and integrated role as both a trade union and professional organisation provide us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

B. The Bill

4. The ANMF welcomes the opportunity to make a submission on the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth)* (**the Bill**) to the Education and Employment Legislation Committee. The Bill presents a modest and sensible package of reforms that will better equip the Australian industrial relations system to tackle the current cost of living crisis, as well as future economic challenges.
5. The ANMF is especially pleased to see the Bill seek to remove barriers for first responders experiencing post-traumatic stress disorder making Commonwealth accident compensation claims. Similarly, the decision to create greater protections for workers experiencing family or domestic violence is welcomed.



6. The ANMF has had the opportunity to view the submissions of the Australian Council of Trade Unions (ACTU), with which the ANMF is affiliated. The ANMF supports this submission and wishes to express its strong support for the analysis and recommendations contained therein.
7. In addition to the ACTU's submission, the ANMF seeks to provide further analysis and recommendations particularly around Schedule 1 Part 7 of the Bill concerning workplace delegates' rights. The ANMF particularly agrees with the ACTU recommendation that the protection for delegates be expanded to include actions that are threatened or organised as well as carried out.
8. The ANMF's recommendations are aimed at strengthening the operation of the Bill to create an industrial framework where workplace delegates can be supported to more effectively advance the industrial interests of the union members they represent. This is a particularly urgent reform amidst a cost-of-living crisis where wage stagnation can be attributed to a lack of worker empowerment.

C. Definition of workplace delegate

9. The ANMF commends the federal government for taking steps to include a definition for a 'workplace delegate' in the *Fair Work Act 2009 (Cth)* (**the Act**).
10. A delegate is chosen by colleagues to represent their industrial interests as part of the industrial association of which they are members. In practical terms, the delegate is the local union representative, and acts as a conduit between union members, their employer and the industrial association. These are complex relationships that a skilled delegate needs to manage diplomatically.
11. They are often the first point of contact for all parties when industrial and other workplace issues arise. It is appropriate that the industrial legislative framework be designed to assist and protect a delegate to perform their core functions.



12. However, the ANMF has concerns over the requirement under the proposed section 350C(1) of the Bill that a delegate must have been ‘appointed or elected in accordance with the rules of an employee organisation’ as a prerequisite to attracting the protection of the legislation. Our concern is illustrated, by way of example, in the ANMF Federal Rules, which refer to both ‘delegates’ and ‘job representatives’. The role performed by ANMF job representatives, elected under ANMF rules, is that of a workplace delegate.
13. It is unclear whether the framing of the legislation may unwittingly exclude ‘job representatives’ from the protections purportedly offered by the Bill. A court or tribunal could narrowly construe this term in a way that leaves delegates exposed. Other unions may have similar concerns around their rules concerning the appointment or election of delegates, however titled.

RECOMMENDATION 1: The definition of ‘workplace delegate’ should be amended such that the term is sure to include ANMF job representatives and similar roles in other unions that do not use the title ‘delegate’ exclusively.

D. Rights of a delegate

14. The ANMF commends the federal government for articulating the rights of the delegate in subsections 350C(2)-(5) of the Bill, thereby outlining the scope of this important role.
15. The ANMF is nonetheless concerned about some omissions in the framing of the Bill around core functions of the delegate that should be expressly captured by legislation and protected.
16. The ANMF is of the view that subsection 350C(2) could go further to expand on the rights of the delegate. The current wording refers to the right ‘to represent the industrial interests of [union] members... including in disputes with their employer.’ While any attempt to list the work performed by delegates can only be non-exhaustive, the role of the delegate is plainly broader than just being involved in disputation.



D.1 Representation in industrial tribunals and courts

17. Proposed framing of section 350C(2) of the Bill around the rights of the delegate state that this includes representing the industrial interests of trade union members in ‘disputes with their employer’. It is unclear to what extent this right is to be facilitated in workplaces, particularly where formal proceedings are afoot over an industrial matter. A delegate is often called upon to represent union members in a dispute either to facilitate a resolution or provide a statement on behalf of the workers being represented.
18. Currently, a delegate may be required to apply for leave to be able to appear in the Commission, with no guarantee that this would be granted by their employer. The proposed change will not guarantee that a delegate can participate in a dispute if they are already rostered to work at the relevant time.

RECOMMENDATION 2: Section 350C(2) of the Bill should expressly permit a delegate to participate in any proceedings in an industrial court or tribunal on paid time when representing any union members.

RECOMMENDATION 3: The Bill should place a positive obligation on an employer to replace the delegate, while they are exercising their rights as a delegate, with another employee capable of performing the usual duties of the delegate.

D.2 Participation in bargaining

19. The operation of section 176 of the Act automatically deems an employee organisation (a trade union) to be a bargaining representative for enterprise agreement negotiations. The Bill should extend rights to delegates to support that role of their union. Given the role



that a delegate already plays in representing employees in the workplace, it logically follows that the delegate is well positioned to support their union as a bargaining representative. Moreover, this would significantly improve bargaining outcomes, which in turn would have an alleviating effect on the cost-of-living crisis.

RECOMMENDATION 4: Section 350C(2) of the Bill should expressly state that a delegate has an automatic right to participate in enterprise bargaining and be allowed to participate in bargaining meetings and related activities, such as communicating about bargaining with the workers they represent, on paid time.

RECOMMENDATION 5: The Bill should place a positive obligation on an employer to replace the delegate, while they are exercising their rights as a delegate, with another employee capable of performing the usual duties of the delegate.

20. Section 350C(3)(a) of the Bill contemplates that a delegate should be able to communicate with members and potential members in relation to their industrial interests. While this is supported by the ANMF, this provision could be expanded to create a more robust right with stronger protections.

D.4 Induction with new employees

21. Any new employee to a workplace, particularly those without extensive work experience generally or prior experience in a particular industry/occupation, will have limited knowledge of their workplace rights or where to go to make such an inquiry without their employer knowing. Some may not even be aware that they have a right to join a union to be represented industrially. Putting a new employee in contact with the delegate and allowing the delegate to explain their role and the rights of that worker will create a workplace environment in which new employees are properly supported and educated about their rights.



RECOMMENDATION 6: The Bill should expressly provide for any new employee to participate in an induction during normal working hours for both the delegate and the employee.

D.5 Private communication with members and potential members

22. In order for workers to feel comfortable raising workplace concerns with a delegate, it is vital that those workers are confident that matters raised with the delegate will not be communicated to the employer without their consent. This is especially important for vulnerable groups of workers, such as migrant workers, who are at greater risk of exploitation. Delegates need to be able to meet with employees without the employer present. It is also common practice for delegates and workers to communicate about industrial issues using work phones and email accounts. Presently, an employer could gain access to confidential messages either by monitoring or seizing a work phone or monitoring emails between delegates and members concerning union activities.

RECOMMENDATION 7: Section 350C(3)(a) of the Bill should be expanded to clarify that ‘reasonable communication’ with members and potential members, includes a right for delegates to meet in private and communicate in confidence without employer interference or monitoring.

RECOMMENDATION 8: Section 350B(1) of the Bill should also include a prohibition on an employer interfering with or surveilling private communications between delegates, union members, and potential members.



D.6 Training for delegates

23. It is particularly pleasing that section 350C(3)(b)(ii) of the Bill specifically provides for access during paid time for delegates to participate in training related to that role. In practice, the provision of such training has been beneficial to both employees and the employer. For instance, the ANMF recently conducted workplace relations training for delegates currently involved in enterprise bargaining at Blue Care, part of Uniting Care Queensland, the largest provider of aged, disability and community care in that state. The training of delegates has ensured that subsequent bargaining meetings have proceeded more efficiently than otherwise would have been the case. In those meetings, ANMF delegates have spoken clearly, succinctly and eloquently about what the terms of the new enterprise agreement should be. They have not raised grievances unconnected to potential terms of a new enterprise agreement, as untrained employees often do in the course of bargaining.

24. Despite the clear benefits of providing training for delegates, referred to above, the current *Blue Care/Wesley Mission Brisbane Nursing Employees Enterprise Agreement 2013* does not include any express rights for delegates, either generally or in relation to training. For the current round of bargaining, the ANMF was met with some resistance by the employer to allowing some of the delegates to attend the training and one was ultimately refused. The absence of an express right in the current enterprise agreement meant that access to training had to be advocated for in the first instance, and the delegate who missed out was hamstrung by the employer's refusal. The inclusion of the proposed section 350C(3)(b)(ii) of the Bill will ensure that employers cannot unreasonably refuse to allow a delegate to participate in delegate training.

D.7 Attendance at conferences

25. It is noted in the ACTU submission that the role of delegate is voluntary, performed alongside their ordinary duties and consumes much of their personal time. It is a selfless duty to represent their colleagues to ensure that their industrial interests are met. By virtue of their important role, many delegates also happen to be Conference Delegates for their



trade union. Trade unions are fundamentally democratic organisations and in order to be competently and professionally run for the benefit of members, they require the involvement of rank-and-file delegates to be involved in the good governance and decision making of the union. Section 350C(3)(b)(ii) of the Bill permits attendance at delegate training, but not delegate conferences.

RECOMMENDATION 9: Section 350C(3)(b)(ii) of the Bill should also include a right for a delegate to attend a trade union conference on paid time where that delegate has been nominated to attend such a conference in accordance with the rules of the trade union.

E. Union notice boards

26. A notice board in a workplace in a common break area is one the main ways that a delegate can ensure that important information is available and visible to employees. It is particularly helpful at times when a delegate is time-poor and may need a quick way of distributing information for workers to read during a break. Many ANMF enterprise agreements already include a clause providing for this, as is the case with other trade union negotiated enterprise agreements.

RECOMMENDATION 10: Consideration should be given to amend the Bill to include a union notice board term as a mandatory term in all modern awards and enterprise agreements.

F. Conclusion

27. The ANMF offers its strong support for the amendments contained within the Bill and urges the Education and Employment Committee to recommend the Bill be passed.



28. Workers need strong representation during a cost-of-living crisis. The protections provided for delegates are vitally important to ensure that worker representatives are able to fulfil their role and effectively represent the interests of all union members. Strong and protected worker representation is key to providing stable and co-operative workplaces. The ANMF submits the proposed legislative changes will be enhanced by the adoption of the following recommendations:

1. The definition of ‘workplace delegate’ should be amended such that the term is sure to include ANMF job representatives and similar roles in other unions that do not use the title ‘delegate’ exclusively.
2. Section 350C(2) of the Bill should expressly permit a delegate to participate in any proceedings in an industrial court or tribunal on paid time when representing any union members.
3. The Bill should place a positive obligation on an employer to replace the delegate, while they are exercising their rights as a delegate, with another employee capable of performing the usual duties of the delegate.
4. Section 350C(2) of the Bill should expressly state that a delegate has an automatic right to participate in enterprise bargaining and be allowed to participate in bargaining meetings and related activities, such as communicating about bargaining with the workers they represent, on paid time.
5. The Bill should place a positive obligation on an employer to replace the delegate, while they are exercising their rights as a delegate, with another employee capable of performing the usual duties of the delegate.
6. The Bill should expressly provide for any new employee to participate in an induction during normal working hours for both the delegate and the employee.



7. Section 350C(3)(a) of the Bill should be expanded to clarify that 'reasonable communication' with members and potential members, includes a right for delegates to meet in private and communicate in confidence without employer interference or monitoring.
8. Section 350B(1) of the Bill should also include a prohibition on an employer interfering with or surveilling private communications between delegates, union members, and potential members.
9. Section 350C(3)(b)(ii) of the Bill should also include a right for a delegate to attend a trade union conference on paid time where that delegate has been nominated to attend such a conference in accordance with the rules of the trade union.
10. Consideration should be given to amend the Bill to include a union notice board term as a mandatory term in all modern awards and enterprise agreements.