

More rights, more problems Navigating union delegate rights

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Agenda for today

The framework of the new rights

Offences: only the employer

The various rights

Tips

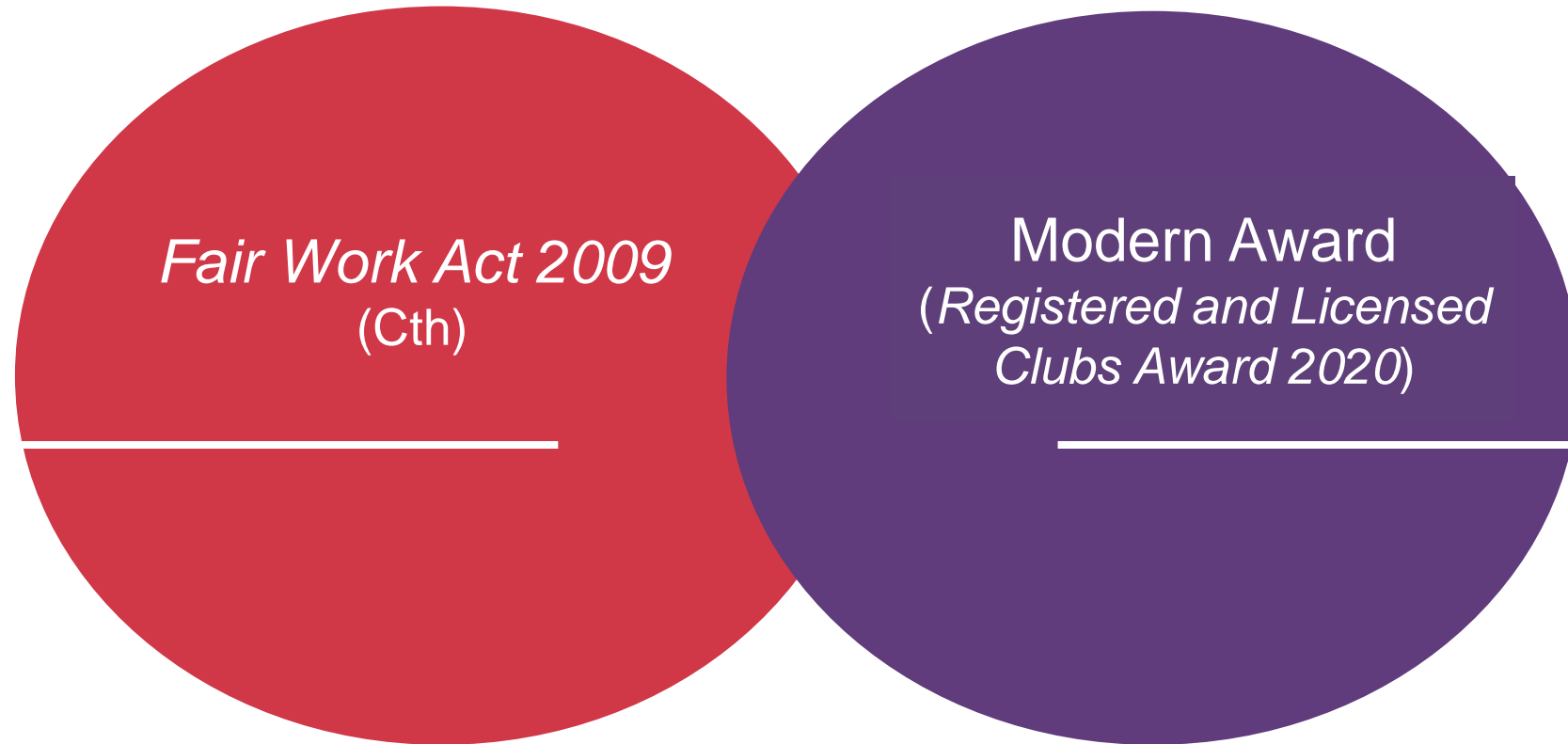
Who is a workplace delegate

- An employee of the business
- An employee appointed or elected, in accordance with the rules of the union
- Elected to be a delegate or representative of union members

Not to be confused with a union official and a right of entry permit



The framework for workplace delegates rights



An employer affords a workplace delegate their rights if the employer complies with the workplace delegates term in the modern award.

Protections: the offences in s 350A of the FW Act

There are only offences for employers

- must not unreasonably fail or refuse to deal with a workplace delegate, or
- must not knowingly or recklessly make a false or misleading representation to a workplace delegate, or
- must not unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate.

Case study

- A supervisor regularly speaks ill of the union.
- A delegate seeks to talk to union members in the lunchroom.
- The delegate's supervisor decides to sit right next to the delegate and other union members to have his lunch. As such, he can hear them as they talk.

Is the supervisor's conduct a concern?

- Potentially, yes.
- It is an offence to unreasonably hinder, obstruct or prevent the exercise of the rights
- To hinder is to delay, interrupt or cause difficulty to do something or for something to happen.
- A person may hinder or obstruct without specifically intending to achieve that result. The terms are not confined to deliberate actions. So, a person may accidentally hinder or obstruct.
- Whether conduct hinders or obstructs depends upon its effect not its purpose.

Four (4) workplace delegates rights

1

Right to represent the industrial interests

2

Right to **reasonable** communication

3

Right to **reasonable** access workplace and facilities

4

Right to **reasonable** access to training

Reasonableness

- The FW Act does not define what reasonable means.
- Section 350C(5) says that in determining what is reasonable, regard must be had to the following:
 - (a) the size and nature of the enterprise;
 - (b) the resources of the employer of the workplace delegate;
 - (c) the facilities available at the enterprise.
- What about the role and responsibilities of the delegate as an employee? What about the needs of the business and customers? What about safety?

Right to represent

S 350C(2)

The workplace delegate is entitled to represent **the industrial interests** of those members, and any other persons eligible to be such members, including in disputes with their employer.

Note: This section does not create any obligation on a person to be represented by a workplace delegate

Modern Award

A workplace delegate may represent the industrial interests of eligible employees who wish to be represented by the workplace delegate **in matters**.

Matters is not defined, nor exhaustive, but includes, consultation about workplace change, changes in rosters, disputes, disciplinary processes and enterprise bargaining.

Eligible employees includes prospective union members.

Right to communicate

S 350C(3)(a)

The workplace delegate is entitled to **reasonable** communication with those members, and any other persons eligible to be such members, in relation to their industrial interests.

Modern Award

A workplace delegate **may communicate with** eligible employees for the purpose of representing their industrial interests. This includes discussing membership of the union and representation with eligible employees.

A workplace delegate **may communicate with** eligible employees during working hours or work breaks, or before or after work.

Right to access

S 350C(3)(b)(i)

For the purpose of representing industrial interests, **reasonable access** to the workplace and workplace facilities where the enterprise is being carried on.

Modern Award

Must provide access to or use of the following workplace facilities:

- (i) room or area fit for purpose, private and accessible,
- (ii) noticeboard – physical or electronic,
- (iii) electronic means of communication, plus Wi-Fi,
- (iv) lockable filing cabinet or other secure document storage area
- (v) office facilities and equipment including printers, scanners and photocopiers.

Right to paid training

S 350C(3)(b)(ii)

For the purpose of representing industrial interests reasonable access to paid time, during normal working hours, for the purposes of related training.

Does not apply to small business.

What is paid time?

Modern Award

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 and at least one day each subsequent year, to attend training related to representation of the industrial interests of eligible employees, subject to conditions ...

A case study

- Delegate each week leaves their work area and walks around the club
- Delegate is seen approaching other employees, one by one, and talking to them
- Employees tell you the delegate is always talking about union matters and membership (and the footy)
- The delegate returns to their work, two hours later
- Other staff are upset that the delegate does not pull their weight at work
- On this day, an employee at the cashier was distracted by their discussion with the delegate and gave a customer an extra \$100.

Anything the employer can do?

The Award seeks to impose obligations on delegates

A workplace delegates entitlements are subject to the conditions that the workplace delegate must, when exercising those entitlements:

- comply with their duties and obligations as an employee;
- comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources;
- not hinder, obstruct or prevent the normal performance of work; and
- not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.

But wait, there are more problems

- Can an employer refuse a delegate their rights (like ability to attend an interview as support) when issues arise like confidentiality, conflict of interest or the delegate is a witness?
- Can an employer refuse a delegate their rights if the delegate is conducting themselves in an inappropriate or unsafe manner?
- Can an employer dismiss a delegate for the manner in which they exercise their workplace rights, for example, aggressive, rude or violent?

High Court has endorsed:

Being a member, delegate or officer of a union organisation:

"does not confer on that employee an immunity from dismissal by reason of the circumstance that he is a delegate of an organization'. ... The timekeeping offence for which the prosecutor was dismissed had no relation to his position as a union delegate or to the part which he had played in the industrial disputation with the company. His position as delegate gave him no immunity from dismissal for the offence."

Tips

1 Comply with the Award: tick it as a checklist

2 Update your policies to set standards (applicable to all, incl the delegate)

3 Be practical, not precious, in dealing with delegate's exercise of rights

4 Develop a workable relationship with the workplace delegate

5 Train your managers

Watch this space



- Some unions are already seeking to expand upon the new delegates rights and obtain further rights. Some proposals include:
 - seeking paid time off for political lobbying,
 - an entitlement to flexible work changes to facilitate their right to represent during work time,
 - right to access facilities including air-conditioned and heated facilities,
 - access to stationary, an iPad and a telephone
- Cases will work out the validity of the modern award term, whether delegates are paid when exercising rights etc.

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