VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES' RIGHTS TERM

AREEA submission in reply: Delegates' Rights Model Term

22 MAY 2024

SUBMISSION CONTENTS

1. Introduction / Principles

Introduction

1. Australian Resources and Energy Employer Association (**AREEA**) is the national employer group for Australia's mining, oil and gas and service contracting sectors.

2. AREEA is the industry's longstanding industrial relations specialist organisation and represents its members on the National Workplace Relations Consultative Committee, Council on Industrial Legislation and through various other government and industry forums.

3. AREEA is also the resources and energy industry representative member of the Australian Chamber of Commerce and Industry (**ACCI**). AREEA has had substantial input into the submissions of ACCI to the Fair Work Commission's (**FWC)** consultations to date on the variation of modern awards to include a delegates' rights term and continues to support and endorse the submissions of ACCI.

4. AREEA makes the following submission in reply to Justice Hatcher's statement of 10 May 2024 regarding the FWC's requirement to vary modern awards to include a delegates' rights term. Most notably, this statement sets out the first published draft delegates rights' award term (**draft term**).

5. On a general note, AREEA is fully supportive of the FWC's open consultation and intent to balance employer and union views in relation to inserting delegates' rights into modern awards, notwithstanding AREEA's fundamental position that there was no policy justification (outside of artificially inflating union influence in Australian workplaces) supporting the Albanese Government's insertion of new delegates' rights into the *Fair Work Act 2009* (**FW Act**) (and legislating the requirement on the FWC to insert such terms into modern awards) via the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**CL Act**).

Principles – are they met by the draft term?

6. To provide context to subsequent positions on specific clauses, AREEA wishes to reaffirm **four key principles** the FWC should use as guidance in setting the delegates rights' modern award term (and consequently default enterprise agreement term) and express a general view as to whether the draft term meets these principles.

Principle 1: A workplace delegate is first and foremost an employee.

7. A key concern is making delegates who are employees first and foremost, de-facto union organisers paid for by employers.

8. The important historic distinction between union officials, who are funded by union members to conduct union business, and delegates who are paid by employers to work in the interests of their businesses, must be maintained.

9. It is critical the FWC ensures the delegates' rights award term does not facilitate delegates abdicating their primary responsibility as employees in favour of acting as employer-funded union organisers.

10. In AREEA's view the FWC's draft term only partially meets this criteria:

    a) The definitions in clause X.2 correctly reflect historically understood meanings of employer, delegate's organisation and eligible employees; and

    b) The qualifications on how delegates may exercise their entitlements as set out in clause X.9, seek to apply appropriate restrictions on delegates' activities that align to this principle; however:

- Significant amendments are required throughout the draft to clarify how clause X.9 interacts with and, where appropriate, subjugate the workplace delegates' entitlements under clauses X.5 to X.7. Such amendments should affirm the employer's right to refuse recognition of a delegate's rights under X.5 to X.7 should they form a reasonable view that the delegate is in breach of clause X.9; and
- Various rights and entitlements provided to delegates within clauses from X.5 to X.8 appear entirely inconsistent with the qualifying contents of clause X.9, to the extent that some parts of clauses X.5 to X.8 should be heavily amended or removed altogether. This is further detailed below.

Principle 2: <u>The modern award term should be limited to the delegates rights in s.350C</u>

11. The CL Act inserted the following broad delegates rights as s.350C of the FW Act:

    a) entitlement to represent the industrial interests of members and eligible persons (representation);

    b) reasonable communication with members (and eligible non-members) of an employee organisation in relation to their industrial interests (communication);

    c) reasonable access to facilities within the enterprise for the purpose of representing the industrial interests (access to facilities); and

    d) other than for small businesses (fewer than 15 employees), reasonable access to paid time, during normal working hours, for the purpose of training related to representing industrial interests (paid time off to attend training).

12. The modern award term/s should only deal with the above four distinctive rights and only in a manner that provides clarity to delegates and their employers as to what each of these broad rights mean, practically, in the workplace.

13. The draft term is not limited to the expressed s.350 rights. Various parts of the draft term either do, or have the potential, to go well beyond the rights provided to workplace delegates via s.350C.

14. Examples include the right to represent employees in performance management and disciplinary processes, and "*any process or procedure in which the employees are entitled to be represented*", which go beyond representing "*industrial interests*" and lack a clear definition in the draft term. Examples are detailed later in this submission.

15. Despite this extension beyond *industrial interests*, the draft term has categorised the rights provided to delegates under the four categories provided under s.350C; and has refrained from entertaining some of the more outlandish submissions made by unions, including rights for delegates to attend all court and employment tribunal proceedings relevant to their workplace and rights to complete secrecy of communication undertaken in the workplace and using workplace facilities or stationary.

Principle 3: <u>The modern award term should include a definition of "industrial interests"</u>

16. Section 350C(2) of the FW Act provides that, "*the workplace delegate is <u>entitled to represent the industrial interests</u> of those members, and any persons eligible to be such members, including in disputes with their employer*" (emphasis added).

17. The draft term goes well beyond providing delegates the right to represent the industrial interests of eligible employees and instead allows for delegates to involve themselves in all types of disputes, discussions, processes and procedures between an employee and their employer.

18. This potentially allows delegates to represent employees in performance management, workplace health and safety including psychosocial safety, and other matters of managerial prerogative that fall outside the scope of "industrial interests" as generally understood.

19. To resolve this, amendments are required – particularly at clause X.5 – and a definition of "industrial interests" must be inserted into the term to clarify the boundaries of representation rights.

Principle 4: The modern award term should ensure any right aligns with what is "reasonable"

20. Many elements of the rights conferred by s.350C are qualified by what is "reasonable", having regard to specific circumstances of the workplace including the size and nature of the enterprise, resources and facilities available.

21. AREEA agrees with ACCI's submissions that the award term should allow employers to determine what is "reasonable" on account of factors including:

    a) The impact on the employer's productivity / output;

    b) The fact that work typically undertaken as a delegate might distract from the employee's usual duties as an employee and may require additional resourcing to be put in place, if excessive provision is made for delegates activities;

    c) Cost pressures on the employer, depending on its size and available workers;

    d) The ease with which facilities can be provided (and at what cost);

    e) The maximum number of persons likely to be represented by the relevant delegates (if known); and

    f) The extent to which employees have participated in the process to elect or otherwise appoint the workplace delegate(s).

22. The draft term does not contemplate any of these essential factors in determining reasonableness.

23. The draft term must be amended to provide clarity that employers can take such factors into account when complying with their obligations to recognise the various representation and access rights of workplace delegates.

24. Further, various parts of the rights to representation and access provided at clauses X.5 to X.8 of the draft term clearly go beyond the realm of what could be considered "reasonable", especially in the context of complex workplace settings such as fly-in, fly-out (FIFO) or otherwise remote 24/7 operations within the resources and energy sector.

25. There is no clarity in the draft term as to what number of delegates would be considered "reasonable" for enterprises of certain sizes and industry contexts (see more info next section).

2. General / opening clauses (X.1 – X.4)

Limiting the number of workplace delegates

26. A major concern AREEA's members have expressed is ensuring a reasonable limit is placed on the maximum number of workplace delegates relative to the size of the eligible employees in the enterprise and in particular workplaces.

27. Given the ambiguity in s.350C, employers require the draft term to provide this clarity.

28. It will be unworkable should the modern award term not provide a clear "cap" on the upper limit of delegates that would be considered reasonable in any workplace, given the substantial costs, productivity impacts and general operational disruption that employers are expected to bear in relation to these new delegates rights.

29. Without a cap on delegate numbers all employees could theoretically nominate as delegates of their eligible union, forcing the employer to deal with an unlimited number of their employees seeking representation rights and other privileges leading to an absurd situation where every employee becomes a workplace delegate.

Implications of clause X.8(a)

30. The only existing reference to a cap or ratio of workplace delegates to eligible employees is contained within clause X.8(a) in relation to paid training:

> *(a) The employer is not required to provide the 5 days or 1 day of paid time during normal working hours, to more than one workplace delegate per 50 eligible employees* (emphasis added).

31. It is unclear if the underlined part is intended to be what the FWC sees, generally, as being an appropriate ratio of workplace delegates to eligible employees. Without any clarity elsewhere in the draft term, it is highly likely it will be construed in this way.

32. While a ratio of one delegate per 50 eligible employees may work for businesses with, for example, 200 employees (thus inferring up to four delegates would be reasonable), this ratio becomes extremely problematic for big businesses, including many AREEA members which have several thousand employees.

33. Should a 1-to-50 ratio become broadly accepted as reasonable, an employer with 5,000 employees may be required to deal with 100 workplace delegates; an employer with 10,000 employees would have to deal with 200 workplace delegates, and so forth.

34. Given the potential significant new representation, communication and access rights, requiring any business to deal with hundreds of workplace delegates would be simply impracticable, if not unworkable

35. The draft term must establish an appropriate cap on the number of workplace delegates.

Setting an appropriate cap on workplace delegates

36. AREEA's position is the total number of workplace delegates should have a starting point of one delegate per union eligible to represent the industrial interests of groups of employees at any one enterprise.

37. The typical mining or hydrocarbons operation would see around three to four unions represented within the principle's direct-hired workforce. Further, contracting companies engaged at resources projects would typically deal with three to four unions of their own, often unions in common with their client and sometimes not, depending on the commonality of classifications within their workforces.

38. Should circumstances arise where eligible unions believe having one delegate to represent the interests of eligible employees in the workplace is unreasonable, the matter could be

determined by the FWC on application where no agreement is reached with the relevant employer.

39. Circumstances which might give rise to such applications include:

    a) Allowing for two delegates per union per enterprise, to cover on and off swings typical of rostering arrangements in the resources and energy sector;

    b) Allowing alternating delegates for each union to cover alternating day/night shifts;

    c) Allowing for the reasonable ratio of workplace delegates to be applied at a site-by-site basis rather than a cap for the overall enterprise.

        - Note, such a right should only be enlivened where there are at least 15 employees eligible to be represented by that union at each site or workplace – consistent with the small business exemption at s.350C.

40. Should an application process be considered appropriate by the FWC, the insertion of a sliding scale for the number of delegates depending on characteristics beyond simply the size of the workforce could be considered, such as:

    a) Geographical concentration of operations/sites.

    b) Use of rosters – day shift only / combination of day and night.

    c) Number of unions eligible to represent members of the workforce (with a minimum of 15 eligible employees required); and

    d) Highly unionised workplaces being potentially allocated a larger number of delegates.

Other feedback on X.1 – X.4

41. AREEA recommends the FWC consider prescribing standard forms for workplace delegates in complying with their administrative obligations under clauses X.3 and X.4.

42. The standard form for written notice of a delegate's appointment (X.3), should require detail of the union rules under which the delegate is appointed and evidence or demonstrated understanding of their eligibly to represent other employees in the workplace (such as a reference to enterprise agreement or award classifications).

43. Requiring evidence of what union and eligible employees a delegate is purporting to represent, would also assist employers in dealing with circumstances where dual union coverage exists and clarify that a delegate can only nominate to represent one union at any one time (and thus only have access to a single set of entitlements such as paid training leave).

3. Right of representation (X.5)

A non-exhaustive list is problematic

44. The draft term sets out the matters in which a workplace delegate may represent the industrial interests of eligible employees in a non-exhaustive list. Specifically, the clause contains the following terms to that effect:

    a) "including but not limited to"; and

    b) "any process or procedure in which the employees are entitled to be represented" (subclause x.5(f)).

45. As a result, clause X.5 is ambiguous and has the potential to enliven and encourage attempted representation in any matter relating to an employee.

46. The non-exhaustive list of matters does not provide any guidance (i.e., limitation) as to when a delegate can represent the industrial interest of employees. Rather, it will be taken as a general guide as to the types of matters a delegate can represent on.

47. This issue is further compounded by a lack of definition as to what "industrial interests" means.

48. For example, it would not be appropriate for a delegate appointed to represent employees by dint of the rules of an industrial organisation to seek to represent employees in work health and safety matters, which WHS legislation already deals with. Further during enterprise bargaining, it is only a duly appointed bargaining representative who should represent eligible employees and not delegates per se. This is further discussed below.

49. To clarify and remove contentious ambiguity the following changes should be made:

    a) Amending clause X.5 to read as follows:

       A workplace delegate may represent the industrial interests of eligible employees in the following matters:

    b) Amend clause X.5(f) to read as follows:

       Any process or procedure within a relevant award, enterprise agreement or company policy related to the industrial interests of employees, in which employees are entitled to be represented.

    c) Add a definition of "industrial interests" to clause X.2 that specifies its meaning to be limited to NES, award and enterprise agreement terms which provide for employee representation.

X.5(a) and X.5(b) – Consultation on workplace changes

50. The terms of these clauses are appropriate, provided these rights only manifest in the usual way once the consultation clause is triggered and employees are exercising a right to representation provided for under the award or enterprise agreement terms.

X.5(c) – Resolution of individual or collective grievances

51. Clause X.5(c) should be qualified to restrict representation rights to matters only in accordance with the NES, award or enterprise agreement terms. It should not allow for grievances to be raised that are general in nature; concerning workplace policies that are the prerogative of management; on insignificant changes; or on bargained terms in agreed enterprises.

52. This would ensure clause X.5(c) does not see representation rights on grievances extend to matters regarding for example food, accommodation, minor workplace conditions, or otherwise seeking to hold up or prevent policy changes that are outside the scope of employee involvement.

53. Existing dispute resolution procedures must be followed and delegates should only be engaged in this process when expressly invited by an eligible employee, given concerns regarding freedom of association. This also raises the issue of an employee having a delegate as a representative and whether this role supplants that of a support person or is in addition to a support person.

X.5(d) – Performance management and disciplinary processes

54. Clause X.5(d) should be removed or heavily amended.

55. This clause can be construed as to allow a delegate to "represent" employees in performance management and disciplinary process, as opposed to being a support person.

56. Most internal processes include the right of an employee subject to performance and/or conduct related disciplinary processes to have a support person, but not a union representative

as the process is part of a company policy/procedure. Moreover, s.387 of the FW Act makes the unreasonable refusal of a support person to attend any discussion relating to a dismissal a factor it must consider in an unfair dismissal application.

57. There is a clear difference between the longstanding right for an employee to have a support person in a performance management or disciplinary meeting, and for that person to be actively represented by a workplace delegate appointed by a union.

58. Clause X.5(d) of the draft term provides workplace delegates more powers than union officials; introducing a new right that is inconsistent with decades of managerial prerogative. It would also hinder the ability of an employer to conduct internal disciplinary processes in the usual way.

59. In lieu of deleting clause X.5(d) in its entirety, the following qualifications should be made:

    a) Representation should be limited to time to consult with the eligible employee on the matter before or after any relevant disciplinary processes or procedure;

    b) A workplace delegate can attend disciplinary meetings only as a support person, and only if requested by the employee, and only if the employer does not reasonably refuse;

    c) The draft term should specify that performance management does not include routine performance reviews (in addition to the concerns raised above, it could become logistically unworkable if routine performance reviews have to be scheduled around workplace delegates' availability, particularly for large FIFO workforces);

    d) An exclusion should be specified that a workplace delegate cannot represent an eligible employee in any disciplinary process if the workplace delegate is subject to the same disciplinary process for the same matter or was a witness to an incident or event;

    e) An exclusion must be specified in relation to workplace investigations. These processes often create uncertainty and for some, increase risk of psychosocial hazard where they are unnecessarily delayed. It is critical that investigation processes are able to proceed without hinderance or obstruction including on the availability of a delegate;

    f) Delegates should not be able to represent employees in such meetings by speaking on their behalf; and

    g) Employers should not be required to release delegates from work to attend meetings.

X.5(e) – Enterprise bargaining

60. The right of representation for bargaining within the draft term requires clarification.

61. It is unclear whether this right is intended to still operate within the current enterprise bargaining rules where employee bargaining representatives are required to be nominated.

62. Should this clause allow for workplace delegates to be appointed as bargaining representatives outside of with existing requirements, this inconsistency would be confusing for users of the enterprise bargaining system and also have freedom of association implications.

63. This clause must clarify the existing FW Act requirements in relation to employee bargaining representation.

64. For a bargaining process involving multiple unions, union organisers/officials and delegates, it would be reasonable to impose limits on attendance.

4. Entitlement to reasonable communications (X.6)

X.6(a) – Purposes of communication

65. Clause X.6(a) sets out the purposes which workplace delegates can reasonably communicate with eligible employees as:

> *(a) A workplace delegate may communicate with eligible employees for the purpose of representing the industrial interests of the employees under clause X.5. This includes discussing membership of the delegate's organisation with the employees and consulting the delegate's organisation in relation to matters in which the workplace delegate is representing employees.*

66. The types of restrictions conferred through clause X.9 should be more firmly described within this clause. For instance, a note to clause X.6(a) that all communication be limited to a reasonable duration and not impact on the normal requirements of both delegate and employees to perform work.

67. Further, there needs to be a qualification that the delegate must respect the rights of employees who choose not to participate in any such communication and an express obligation that they will not be victimised (however described) for not agreeing to participate in either individual or collective discussions.

68. Controls are needed where a delegate is representing the interests of eligible employees in enterprise bargaining. This should not mean a delegate can perform both roles simultaneously and therefore has extended or unlimited rights to discuss progress of bargaining with eligible employees for uncapped periods of time. Any such implied rights could be leveraged into a form of indirect or covert industrial action, where delegates pressure employers to settle on bargaining terms so they can return to their roles as employees.

X.6(b) – Times of communication

69. Clause X.6(b) sets very broad and unlimited times in which a workplace delegate has rights to communicate with eligible employees:

> *(b) A workplace delegate may communicate with eligible employees individually or collectively, during working hours or work breaks, or before the start or after the end of work.*

70. This should be amended to delete the reference to "during working hours" so that it is clear discussions can only occur during meal breaks or outside of working hours. This is consistent with rights of union officials (and right of entry provisions).

71. Without such an amendment, discussions during working hours will interfere with normal work performance, despite clause X.9(ii) and (iii) – in relation to *"prevent(ing) the normal performance of work".*

72. Without any obligation for delegates to seek approval and/or for employees to disclose communication, uncontrolled non-productive hours will escalate.

73. It must be noted that while there is a new right for delegates to communicate with eligible employees, there is no such right for employees to be allowed to stop work to communicate with workplace delegates, nor do the changes to the FW Act allow for this. The implication is employees would either have to stop work in breach of their employment obligations to meet with delegates or continue to perform work while meeting with a delegate.

74. These options seem incompatible, impractical and potentially unsafe. Delegates should only hold discussions with eligible employees before and after the start of work, and during work breaks, which is when non-delegate employees would be free to participate in any discussions.

Concerns about collective meetings

75. The rights for delegates to hold collective meetings create the potential for mass meetings involving employees of multiple employers involved in an enterprise (e.g. principle and contractor employees); delegates of multiple unions within a workplace; and delegates of the same unions but working for different employers within the enterprise.

76. There would be very limited controls available to employers for large collective forums, including very limited ways to ensure delegates have the appropriate representational rights.

77. To deal with these significant concerns the following amendments need to be made:

    a) Add a new clause X.6(c) to the draft term covering rights and protocols for collective meetings, given they are uniquely different to individual meetings within the workplace;

    b) Provide that collective meetings should be in unpaid before and after work time and/or in rest and meal breaks similar to Right of Entry discussions;

    c) Any such collective meetings during work hours should require the approval of the company with reasonable notice. Approval should extend to delegates who seek to hold a collective meeting during working hours and for employees wishing to attend;

    d) Provide that any collective meetings must be in relation to broad employer-wide matters that relate to the industrial interests of the employees, as a group, only. Collective meetings should not be allowed to descend into union or political rallies; and

    e) Clarify that enterprise agreement dispute settlement procedures must be followed prior to issues being raised at collective meetings. Employers must have the opportunity to address a collective grievance prior to it being subject to a collective meeting.

Concerns specific to FIFO / remote operations

78. Where FIFO or similarly remote work camps exist, complex accommodation, transport and other logistics issues arise:

    a) Before and after work meetings may create issues for delayed transport. Work buses may be used by several employers and any delay would affect multiple employers and work groups. Not only should operational inconveniences be avoided but so too any cost implications (over cycle claims for delays etc).

    b) Before work and after work meetings cannot be permitted to take place in FIFO accommodation facilities or common areas. The clear separation between “work and non-work” for employees who reside at remote site accommodation must be maintained and respected.

        - FIFO accommodation areas in the resources and energy sector are considered “neutral” zones. FIFO village rules usually prohibit union activities within accommodation, and this must be extended to workplace delegates’ rights.

        - If this prohibition was not enforced, there would be no means to limit the attendees of collective meetings at accommodation villages to the employees of a specific employer.

    c) Where reasonable communication is declined based on operational requirements, such reasons should be considered enduring. The resources sector involves 24/7 working arrangements in at times high-risk facilities, and safety critical environments. With all employees required to perform work in support of safe reliable operations (mining above and below ground, gas supply platforms etc), any stoppage in work for industrial interest discussions would be a threat to production and potentially site safety.

        For this reason, the draft term must not allow for industrial interest discussions to take place during normal working hours in the resources and energy sector.

5. Entitlement to reasonable access to the workplace and workplace facilities (X.7)

79. The entitlement to reasonable access to the workplace and workplace facilities must be further qualified to ensure the obligations on employers to provide such access does not adversely impact on the usual running of the employer's business.

80. The primary function of a business is not to provide stationery and office supplies and the use of office resources that interfere with the normal running of the business. This entitlement cannot be without limitation and must be expressed to include a definition of reasonable access.

X.7(a) – Room or area to hold discussions

81. A room should not need to be "fit for purpose", but rather be considered "suitable to hold discussions". This would ensure any multi-use room that an employer puts forward as its nominated place to hold discussions would be considered reasonable provided it is a suitable space in which discussions could be held. Any room that could be adjusted to accommodate different requirements of delegates' meetings should fit this description.

82. In the case of remote operations such as FIFO mine sites and offshore hydrocarbons platforms, it is unlikely there would be multiple alternative spaces in which an employer would have available to designate as a "fit for purpose" meeting place for delegates' conversations.

83. The potential for disputes over the high benchmark of "fit for purpose" is largely avoided by allowing suitable multi-use spaces to be designated as the appropriate and reasonable meeting place for delegates' conversations.

84. Attempts by union delegates to nominate or otherwise seek for FIFO accommodation areas to be the designated space for delegates' discussions must be proscribed.

85. Accommodation and meal areas must be maintained as non-work neutral spaces. Employers must have the ability to designate such spaces as off limits for workplace delegates to hold discussions around employees' industrial interests.

86. There need to be specific protections guaranteed for any eligible employees who do not wish to be involved in discussions with workplace delegates. It is critical these employees have their freedom to association rights upheld, including by protecting them from victimisation for non-participation.

X.7(b) – A physical or electronic noticeboard

87. It has been a longstanding practice in the resources and energy industry to not allow for any political, religious or industrial marketing within workplace facilities or residential accommodation to respect employees' freedom of association.

88. The physical or electronic noticeboard entitlement must be limited to circumstances where notices relate to employer/employee specific workplace issues and/or to raise general awareness of planned meetings between delegates and eligible employees. Employers should have the right to refuse any material that is branded or otherwise associated with employee associations in support of all employees' right of freedom of association.

89. Employers must also have the right to demand and enforce that any information, material or documentation (however described) posted on such noticeboards be consistent with the delegate's obligations as an employee.

X.7(c) – Electronic means of communication

90. This clause needs to be clarified or qualified to define what the entitlement means. It is unclear as to whether:

a) This clause refers to “use of” phones and email systems to communicate with eligible employees; or

b) Is intended to mean providing email addresses, phone numbers and other information required for a delegate to communicate (electronically) with eligible employees in the same form as the employer.

91. The latter outcome would be entirely inappropriate and seemingly inconsistent with clause X.9(b) that says:

> *Clause X does not require the employer to provide a workplace delegate with access to electronic means of communication in a way that provides individual contact details for eligible employees.*

92. It should be made clear that an employer is not required to provide workplace delegates with tablets, computers, smartphones or other equipment specifically for their duties as a workplace delegate, but rather that existing electronic equipment can be reasonably used by a delegate to undertake their delegate duties provided that doesn’t interfere with their primary duties as an employee.

X.7(d) – A lockable filing cabinet or other secure document storage area

93. This clause needs to be clarified to define what the entitlement means. Is it:

a) An entitlement to be provided with a dedicated (i.e. empty for their use) filing cabinet or other secure document storage area, in which the delegate can store documentation (such as notes from meetings or union documents) that the delegate does not wish to be accessible to the employer; or

b) Access to *existing* lockage filing cabinets or other secured document storages areas in which the delegate can access *existing files* on record.

94. Employers would find the first interpretation to be acceptable and the second interpretation to be entirely unacceptable due to privacy, commercial-in-confidence and security reasons.

X.9(e) – Office facilities and equipment including printers, scanners et al

95. It should not be the employer’s obligation to supplement or fund the stationery needs of a union delegate.

96. To that end this clause should be qualified to ensure that:

a) The use of any such official facilities and equipment must be within approved times for which a delegate can undertake their role as a delegate;

b) Any use of office facilities and equipment must be consistent with the delegates’ obligations as an employee and not interfere with the normal performance of work;

c) The repairs for any damage or abuse of the equipment by the delegate should be borne by the delegate and/ or union. Additionally, a misuse of the office facilities and equipment should entitle the employer to revoke their use; and

d) Employer-provided stationery and equipment must not be removed from the workplace by the delegate for any reason unless express written authorisation is provided by the employer.

6. Entitlement to reasonable access to training

X.8(a) – Provision of five days (first year) / one day (subsequent years) training

97. As detailed on page 6, the ratio within clause X.8(a) in relation to provision of paid training time (no more than "one workplace delegate per 50 eligible employees") is problematic:

    a) Without clarity elsewhere in the draft term, it is foreseeable this ratio will be interpreted as setting guidance on the maximum number of workplace delegates considered reasonable within an enterprise; and/or

    b) If that is not the case, and delegates in certain enterprises number greater than 1-in-50, this might result in an outcome where workplace delegates are operating without adequate training and without an understanding of their rights or responsibilities.

98. This can be avoided by the modern award term setting guidance on the maximum number of workplace delegates allowed per enterprise (as per our recommendations on pages 6-7) and the entitlement to paid training time to align with this maximum number.

99. It further needs to be clearly stated that an employer is not obligated to pay for travel, stationery, meals, fuel or any such associated or other miscellaneous costs. For the benefit of industries with FIFO workforces, this will mean an employer is not required to provide special travel arrangements for FIFO workers who request delegate training leave in the middle of a rostered swing.

100. Reasonableness and inconvenience should factor into access to delegate training in all circumstances. For industries with shift work and FIFO/DIDO swings, training in an employee's rostered time off is the most practical way work can continue as normal.

X.8(b) – Normal working hours / rostering considerations

101. This clause needs substantial amendment or qualifying to properly cater for complex shift work and FIFO/DIDO roster swings as are commonplace in the resources and energy sector:

    a) It should be clarified that "a day of paid time" means 7.6 ordinary hours of work. This will provide for equity and consistency across industries where shifts can vary from 7.6 hours to 12 hours. Should this clarity not be provided, resource sector employers would routinely be paying workplace delegates 60 ordinary hours (five days x 12-hour shifts) compared to other industries paying 38 hours (five days x 7.6-hour shifts).

    b) Paid time must be limited to ordinary hours on base salary only. An employer should not be required to pay site allowances, overtime or other payments that would be predicated on the employee attending site and working a full shift. Where an enterprise agreement or workplace policy provides for a training rate (as opposed to an all-purpose rate), that is the rate that should be payable.

    c) If a delegate attends delegate training on a day they would not be working (such as a FIFO worker attending training during their off-swing), the employer should not be required to compensate them with additional time worked, leave or any other form of recognition.

102. Where a dispute or conflict may arise in relation to the availability of workplace delegate training and their rostered-on period at a remote worksite (i.e. FIFO mining or hydrocarbons operations) an employer should have the right to require:

    a) That the workplace delegate attends the training in an online capacity where that option is provided for by the training provider; or

    b) Where online attendance is not possible, that the delegate attend training on certain days connected with a roster to avoid flight, accommodation and travel costs and general disruption.

X.8(c) – Five weeks' notice requirement

103. Employers must be able to decline any delegate training request where five weeks' notice is not provided.

104. Notice periods should be extended where a roster cycle is extended. For example, roster cycles of 10 weeks' duration are common in the resources sector and should require at least 12 weeks' notice of workplace delegate training requests.

X.8(d) – Providing employer, on request, outline of training content

105. Employers should have the right to decline request for up to 5 days' training if the syllabus and training outcomes do not justify up to 5 days of training.

    a) Note: such disputes could be avoided in future if there was an agreed minimum standard training syllabus or course delivered by an RTO. This could have other benefits such as training recognition transferable between employers.

106. Training when approved and completed shall not be required to be repeated with future requests to attend delegate training. An employer should have the right to require reasonable evidence that a training course is sufficiently different or updated from a course that a delegate had completed within the past five years.

X.8(e) – Employer approval requirements (two weeks' minimum / not unreasonable)

107. Employers should have the right to reasonably refuse training requests where that training would require an employee's release from onshore/offshore FIFO facilities. As per above, an employer should be able to require training be undertaken online or in an employee's off-swing.

X.8(f) – Evidence of training requirement (7 days)

108. If training is less than seven days from the end of a pay period, an employer should be able to request more urgent evidence of attendance if that evidence is required to ensure it is appropriate to pay an employee for the time taken to complete delegate training.

109. If evidence of attendance is not provided within the required timeframe (be it within 7 days, a shorter time if required to match pay cycles or otherwise), an employer should have the right to designate an employee absent without pay and recover the overpayment.

7. Exercise of entitlements under clause X (X.9)

110. This clause requires substantial additions to clarify and strengthen how it interacts with clauses X.5 to X.7. For example, it is unclear at what stage a workplace delegate exercising their clause X.6 right to communicate with eligible employees individually or collectively during working hours to discuss membership of the delegate's organisation would "hinder, obstruct or prevent the normal performance of work" under clause X.9(iii).

111. Further, this clause requires a new subclause providing employer protections in relation to the entitlement to provide delegates with paid time off work to attend training.

112. It must be made clear that during delegate training the delegate remains subject to their employer's policies, procedures (including drug and alcohol testing if applicable) and the obligations on an employee pursuant to applicable WHS legislation continue to apply.

113. Where the delegate training is provided by a union, that union must indemnify the employer for workers' compensation or other injury that may arise during the training for which the employee delegate makes a claim.

APPENDIX: AREEA's edits to draft modern award term

Note: The following is an example of how AREEA's recommended alterations to the draft modern awards term for delegates' rights could be executed. This is not intended to be an exhaustive reflection of the broad concerns of AREEA members as detailed above.

X.1 Clause **X** provides for the exercise of the rights of workplace delegates set out in s.350C of the Act.

X.2 In clause **X**:

a) **employer** means the employer of the workplace delegate;
b) **delegate's organisation** means the employee organisation under the rules of which the workplace delegate was appointed or elected; and
c) **eligible employees** means members and persons eligible to be members of the delegate's organisation who are employed by the employer in the enterprise.
d) **industrial interests** means any rights conferred to eligible employees via the National Employment Standards, applicable modern awards or enterprise agreements, which provide for employee representation.

X.3 Before exercising entitlements under clause **X**, a workplace delegate must give the employer written notice of their appointment or election as a workplace delegate. ~~If requested,~~ The workplace delegate must provide the employer with evidence that would satisfy a reasonable person of their appointment or election, including the rules of the delegate's organisation that allow for their appointment and provide eligibility to represent the industrial interests of certain groups of employees in the enterprise.

X.4 An employee who ceases to be a workplace delegate must give written notice to the employer as soon as practicable.

X.5 Maximum number of workplace delegates

a) The number of workplace delegates should not exceed one delegate per industrial organisation eligible to represent the industrial interests of eligible employees at an enterprise, unless additional delegates are agreed in writing with the employer or determined by the FWC.

b) The FWC can, on application by parties to a dispute, make a determination on the maximum allowable number of delegates at an enterprise, having regard to:

i. The geographical concentration of operations/sites within the enterprise;

ii. The use of rosters at the enterprise, such as combinations of day and night shifts;

iii. The number of industrial organisations eligible to represent members of the workforce (with a minimum of 15 eligible employees required per organisation); and

iv. The level of union membership at the enterprise.

X.6 Right of representation

A workplace delegate may represent the industrial interests of eligible employees in ~~matters including but not limited to~~ the following matters:

a) consultation about major workplace change;

b) consultation about changes to rosters or hours of work;

c) resolution of individual or collective grievances or disputes on matters relating to the industrial interests of eligible employees provided for under the NES, awards or application enterprise agreement/s;

d) performance management and disciplinary processes in the capacity of a support person and where an eligible employee expressly invites the delegate to act as their support person and that request is not reasonably refused;

e) enterprise bargaining, where the delegate is appointed as a bargaining representative under s.176 of the FW Act; and

f) any process or procedure within a relevant award, enterprise agreement or company policy related to the industrial interests of employees, in which the employees are entitled to be represented.

X.7 Entitlement to reasonable communication

a) A workplace delegate may communicate with eligible employees for the purpose of representing the industrial interests of the employees under clause **X.5** in accordance with X7 (b) and (c) below. This includes discussing membership of the delegate's organisation with the employees and consulting the delegate's organisation in relation to matters in which the workplace delegate is representing employees.

b) A workplace delegate may communicate with eligible employees individually ~~or collectively,~~ during ~~working hours or~~ unpaid work breaks, or before the start or after the end of work.

c) A workplace delegate may communicate with eligible employees collectively during unpaid work breaks or before the start or after the end of work, provided the following conditions are met:

i. Reasonable notice is provided to the employer of collective meetings scheduled during unpaid breaks within working hours, and approval to conduct such meetings is not unreasonable refused;

ii. Content of discussion at collective meetings is limited to the industrial interests of groups of eligible employees that could not otherwise be dealt with in individual meetings; and

iii. Any workplace grievances to be discussed during collective meetings have been subject to any applicable dispute resolution procedure prior to the collective meeting being scheduled.

X.8 Entitlement to reasonable access to the workplace and workplace facilities

The employer must provide a workplace delegate with access to or use of the following workplace facilities, unless the employer does not have them:

a) a suitable room or area to hold discussions which is ~~fit for purpose,~~ private and accessible, for the workplace delegate and eligible employees;

b) a physical or electronic noticeboard provided materials posted or displayed are limited to specific workplace issues and is not branded or otherwise reasonably associated with the delegate's organisation;

c) electronic means of communication that are ordinarily used by the employer to communicate with eligible employees in the workplace, provided this entitlement presents no risk of contravening clause X.8(b);

d) a lockable filing cabinet or other ~~secure~~ document storage area in which to securely store documents related to the delegate's work in representing the industrial interests of eligible employees; and

e) office facilities and equipment including printers, scanners, photocopiers and wi-fi, provided this equipment is not removed from the workplace without the employer's express permission.

X.9 Entitlement to reasonable access to training

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 1 day each subsequent year, to attend training related to representation of the industrial interests of eligible employees, subject to the following conditions:

a) The employer is not required to provide the 5 days or 1 day of paid time during normal working hours, to more than ~~one workplace delegate per 50 eligible employees.~~ the prescribed maximum number of workplace delegates in the enterprise.

b) A day of paid time during normal working hours means 7.6 ordinary hours ~~is the number of hours~~ during a day in which the workplace delegate would normally be rostered or required to work ~~on a day~~ on which the delegate is absent from work to attend the training.

c) The workplace delegate must give the employer as much notice as is practicable, and not less than 5 weeks' notice, of the training dates, subject matter and the daily start and finish times of the training, or the employer may reasonably refuse approval for the training. Employers can reasonably require additional notice having regard to particular roster cycles or operational circumstances that require greater notice.

d) The workplace delegate must, on request, provide the employer with an outline of the training content. The employer can reasonably refuse to grant the full period of requested paid time away from work if it can be reasonably determined the training syllabus and/or outcomes do not require or justify the entire period requested for paid time off work.

e) The employer must advise the workplace delegate as soon as is practicable, and not less than 2 weeks from the day on which 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.

f) The workplace delegate must provide the employer with evidence that would satisfy a reasonable person of attendance at the training, within 7 days after the day on which the training ends, or within a shorter period of time if reasonably requested by the employer, having regard to payroll and administrative matters.

X.10 Exercise of entitlements under clause X

a) A workplace delegate's entitlements under clauses ~~**X.5 to X.7**~~ **X.6-X.9** are subject to the conditions that the workplace delegate must:

i. comply with their duties and obligations as an employee;

ii. 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;

iii. not hinder, obstruct or prevent the normal performance of work; and

iv. not hinder, obstruct or prevent employees exercising their rights to freedom of association.

b) Clause X does not require the employer to provide a workplace delegate with access to electronic means of communication in a way that provides individual contact details for eligible employees.

c) Clause X does not require an eligible employee to be represented by a workplace delegate without the employee's agreement.

d) Clause X.6(d) does not allow for a workplace delegate to speak on behalf of an eligible employee in any performance management or disciplinary process, and does not require an employer release delegates from work to attend such meetings unless they have been expressly requested to attend as a support person and it is reasonable they attend.

e) Clause X.6(d) does not require an employer to provide a workplace delegate with representation rights in relation to:

i. routine performance reviews such as setting or checking progress of KPIs, that are part of standard operating procedures;

ii. any disciplinary or performance process in which the delegate is subject to the same disciplinary or performance process for the same matter or was a witness to an incident or event;

iii. workplace investigations, including in relation to reported safety incidents or alleged bullying, harassment or other psychosocial incidents in the workplace;

f) Clause X.7(a) requires workplace delegates to limit discussions to a reasonable duration and not impact on the normal work requirements of both delegate and eligible employee/s.

g) A workplace delegate's entitlement to reasonable access to training under clause X.9 is subject to conditions that:

i. an employer cannot be obligated to pay for any travel, stationery, meals, fuel or any such associated or other miscellaneous costs;

ii. the delegates participation in training does not impact on or inconvenience travel or operational requirements related to other employees or the business generally; and

iii. an employer can require the workplace delegate attends the training in an online capacity from the facilities of the employer, where that option is provided for by the training provider.