

# CFMEU

## CONSTRUCTION

### IN THE FAIR WORK COMMISSION

*Fair Work Act 2009*

cl.95, Schedule 1– FWC to vary certain modern awards

**Variation of modern awards to include a delegates' rights term  
(AM2024/6)**

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**SUBMISSION OF THE CONSTRUCTION, FORESTRY AND  
MARITIME EMPLOYEES UNION (CONSTRUCTION & GENERAL DIVISION)  
ON THE DRAFT DELEGATES' RIGHTS TERM**

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22<sup>nd</sup> May 2024

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## Introduction

1. On the 10<sup>th</sup> May 2024, the President, Justice Hatcher, issued a Statement ([2024] FWC 1214) in AM2024/6 – Variation of modern awards to include a delegates’ rights term, on the draft delegates’ rights term (the **draft term**) developed by the Fair Work Commission (the **Commission**) following the consultation process undertaken by the Full Bench.
2. Attachment A to the Statement set out the draft term that the Commission intended to be included in all modern awards, and the Commission invited interested parties to file submissions concerning the draft term by 12.00 pm (AEST) on Friday 17<sup>th</sup> May 2024. The CFMEU (Construction and General Division) (the **CFMEU C&G**), along with the ACTU and other unions, was subsequently granted an extension until 5.00pm (AEST) on Wednesday 22<sup>nd</sup> May 2024 to file our submission and makes this submission in accordance with that extension.
3. For the assistance of the Commission our comments will be made using the clause numbers of the draft term.

## Clause X.2

4. Clause X.2 of the draft term contains definitions of “employer”, “delegate’s organisation” and “eligible employees”. The CFMEU submits that the Commission should **not** adopt these definitions as they are inconsistent with the definitions in the Fair Work Act (the FW Act) and the provisions of s.350C of the FW Act.
5. The combined effect of the proposed definitions would be to limit the representational rights of workplace delegates to the employees of the workplace delegates’ employer. It would prevent for example the workplace delegate from representing members, or workers who are eligible to be members, who may be employed by a labour hire firm, a group training company or who are regulated workers and working in the same workplace or enterprise. This limitation does not apply under s.350C.
6. As clarified in the Explanatory Memorandum<sup>1</sup>,

*“724. ....The definition of ‘workplace delegate’ would recognise the role of workplace delegates in representing the interests of all workers, not just employees, who work at the relevant enterprise and who are eligible to be a member of the relevant employee organisation.”*
7. This recognition (of the role of workplace delegates representing all workers who are members or eligible members) in the definition of workplace delegate explains why the different words “enterprise” and “employer” are used in s.350C. The two words are not interchangeable and clearly mean different entities.
8. The note under the definition of “delegates’ rights term” in s.12 states that “*The rights of workplace delegates are set out in section 350C, and a delegates’ rights term must provide at least for the exercise of those rights*”, therefore a failure to differentiate between an “enterprise” and an “employer” or to limit “members or eligible members” to employees of the employer in the draft term would not meet this requirement.
9. The CFMEU C&G therefore submits that to ensure consistency with the definitions in the FW Act and the rights of workplace delegates under s.350C, clause X.2 should be deleted and the definitions to be included in clause 2- Definitions of each award be expanded to the following:

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<sup>1</sup> [Explanatory memorandum](#)

**Employee organisation** has the meaning given by section 12 of the Act.

**Employer** has the same ordinary meaning given by section 15(2) of the Act.

**Enterprise** has the meaning given by section 12 of the Act;

**Members or eligible members** mean the members or persons eligible to be members of the organisation that appointed or elected a workplace delegate.

**Organisation** has the meaning given by section 12 of the Act.

**Small business employer** has the meaning given by section 23 of the Act.

**Workplace delegate** has the meaning given by s.350C(1) of the Act

### **Clause X.3**

10. The CFMEU C&G submits that as most appointments or elections of workplace delegates are notified to the employer by the relevant union rather than the workplace delegate themselves, placing an additional obligation on the workplace delegate is unnecessary. We propose that this clause be changed to the following:

If requested, the workplace delegate must provide the employer with evidence that would satisfy a reasonable person of their appointment or election as a workplace delegate, if the workplace delegate or the delegate's employee organisation has not done so already.

### **Clause X.5**

11. In light of our comments above on clause X.2 and to ensure consistency with s.350C(2), the words "eligible employees" in the opening paragraph should be replaced by the words "members or eligible members,".

### **Clause X.6**

12. For the reasons set out in paragraphs 5 to 9 above, and to ensure consistency with s.350C(3)(a), similar changes should be made to clause X.6. We also submit that the words "including at meetings" be inserted in X.6(b) to remove any ambiguity as to the form of communication that may occur, and that an additional paragraph be inserted to protect the privacy of communications. The specific changes we propose are set out below:

#### **X.6 Entitlement to reasonable communication**

- (a) A workplace delegate may communicate with members and eligible members, ~~eligible employees~~ for the purpose of representing their 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 providing representation ~~representing employees~~.
- (b) A workplace delegate may communicate with members and eligible members ~~eligible employees~~ individually or collectively, including at meetings, during working hours or work breaks, or before the start or after the end of work.
- (c) The employer must not survey, monitor, record or otherwise infringe the privacy of communications between workplace delegates, members and eligible members and their employee organisation.

### **Clause X.7**

13. Clause X.7 is intended to deal with the matters in s.350C(3)(b) however, apart from the reference in the title of the clause, there is nothing of substance in the clause that deals with the issue of “access to the workplace” where the enterprise is being carried out. This omission can be corrected by changing the opening paragraph to the following:

“The employer must provide a workplace delegate with access to the workplace and access to or use of the following workplace facilities where the enterprise is being carried out, unless the employer does not have them.”

14. Also, for the reasons set out in paragraphs 5 to 9 above, and to ensure consistency with s.350C(3)(a) and (b), the words “eligible employees” should be replaced with the words “members or eligible members” in paragraphs X.7(a) and (c).
15. Further in recognition that an employer may be operating in a workplace or site, where the access to the workplace and/or the workplace facilities are under the control of another person we submit that it would be appropriate to add the following paragraph:

(b) Where reasonable access to the workplace or workplace facilities requires securing the consent of another person the employer will take all reasonable steps to secure such consent.

### **Clause X.8**

16. The CFMEU C&G has a number of concerns with this clause. Firstly, there is the issue of the quantum of leave available. Limiting the leave entitlement to 5 days for initial training and then 1 day each subsequent year is inadequate and completely ignores the range of issues that a workplace delegate may encounter in their role. These issues can include questions related to the basic wages and conditions set by the relevant award and the NES, or workplace grievances in regard to hours of work, changes in rosters, disciplinary matters, superannuation entitlements, long service leave entitlements, bullying and other unacceptable conduct in the workplace. This list is not exhaustive but is intended to put some perspective on the range of issues a workplace delegate may have to deal with.
17. Further, this limitation presumes that there will be little or no changes to awards, the FW Act or other relevant legislation (e.g., covering superannuation, long service leave, workers compensation, etc) from year to year. The recent number of award variation matters initiated by the Commission over the last 12 months alone puts a lie to this presumption.
18. Limiting the quantum of leave to one day in subsequent years will be detrimental to the workplace delegates ability to be up to date with recent legislative and award changes and their ability to properly represent and assist members or eligible member in the workplace. Accordingly, they should have the same quantum of leave in the first and subsequent years.
19. The second issue with this clause is the limitation on the number of delegates that can access the leave. Under clause X.8(a) of the draft term the leave is only available to one workplace delegate for every 50 eligible employees. This limitation fails to recognise that the employer may operate their workforce on a shift system and/or have a workforce that is spread across many sites or depots some of which may be in another State or Territory. If for example a company has an employee who is a workplace delegate at a site/depot/enterprise in Sydney and another employee

who is a workplace delegate at a site/depot/enterprise in Adelaide why should only one of the delegates have access to training? Further who is to decide who receives the training?

20. The quantum of training that can be accessed by a workplace delegate should be the same for all workplace delegates who represent workers.
21. In the alternative the Commission could adopt the table that was used in pre-modern awards for trade union training leave. The *National Building and Construction Industry Award 1990* contained the following table in clause 28B(c):

Number of employees covered by this award	Maximum number of employees per year	Maximum number of days permitted
Up to 15	1	5
16-30	2	10
31-50	3	15
51-100	4	20
101 and over	5	25

22. The third issue is the exemption for small business employers to provide access to paid training for workplace delegates. As the CFMEU has already identified in its written submissions of 1<sup>st</sup> March 2024 and 28<sup>th</sup> March 2024, there is an existing entitlement in clause 39.10 of the *Building and Construction General On-site Award 2020* to paid dispute resolution procedure training leave for an eligible employee representative (defined as an employee who is a shop steward, a delegate, or an employee representative duly elected or appointed by the employees in an enterprise or workplace or part of an enterprise or workplace). Under this award clause there is no exclusion for small business employers. Similar provisions exist in a number of other modern awards (see Attachment A to the Full Bench Statement of 19<sup>th</sup> March 2024 ([2024] FWCFB 166)).
23. The CFMEU recognises that the Commission is seeking to replicate the entitlements of workplace delegates under s.350C, however this does not require the Commission to disturb existing entitlements to eligible employee representatives that already exist in an award. The CFMEU C&G therefore submits that the following note should be added to the draft term:

NOTE: The exemption for small business employers to provide workplace delegates with access to paid training time in clause X.8 does not override any existing entitlement of an eligible employee representative to paid dispute resolution training leave as provided in clause XX – Dispute Resolution of this Award.

### **Clause X.9**

24. The CFMEU C&G is extremely concerned with the drafting of clause X.9 of the model term. Save for the matter dealt with in clause X.9(c) which is an alternate way of addressing the note under s.350C(2) (and which makes the inclusion of X.9(a)(iv) unnecessary), none of the other matters are specifically raised in s.350C or in s.350A of the FW Act. Although mention is made in the draft term of the protections for workplace delegates under s.350A, this is relegated to a Note rather than included as a substantive provision of the clause.

25. The CFMEU submits that the Commission has this provision the wrong way around. Clause X.9 should first of all state in (a) that:

- (a) In accordance with s.350A of the Act, where an employee acts in their capacity as a workplace delegate the employer of a workplace delegate must not:
  - (i) unreasonably fail or refuse to deal with the workplace delegate; or
  - (ii) knowingly or recklessly make a false or misleading representation to the workplace delegate; or
  - (iii) unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under the Act or clause X.

26. In (b) the matters dealt with in X.9(a) of the draft term should be included in the following way:

- (b) In exercising their rights under this clause, a workplace delegate must as far as is reasonably practical (and to the extent it does not impinge upon their rights as a workplace delegate):
  - (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; and
  - (iii) not unreasonably hinder, obstruct or prevent the normal performance of work;

27. Paragraph X.9(b) of the draft term should be deleted as it conflicts with the requirement to provide electronic means of communication as set out in clause X.7(c) of the draft term. Also, if the means of electronic communication in the workplace is by email or SMS how indeed can this be done without providing individual contact details for employees who are members or eligible members.

28. Adopting the CFMEU C&G proposals identified in this submission would then result in the following clause:

#### **X. Workplace delegates' rights**

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

**X.2** If requested, the workplace delegate must provide the employer with evidence that would satisfy a reasonable person of their appointment or election as a workplace delegate, if the workplace delegate or delegate's organisation has not done so already.

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

#### **X.5 Right of representation**

A workplace delegate may represent the industrial interests of members or eligible members in matters including but not limited to:

- (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;
- (d) performance management and disciplinary processes;
- (e) enterprise bargaining; and
- (f) any process or procedure in which the members or eligible members are entitled to be represented.

**X.6 Entitlement to reasonable communication**

- (a) A workplace delegate may communicate with members and eligible members for the purpose of representing their industrial interests under clause X.5. This includes discussing membership of the delegate's organisation and consulting the delegate's organisation in relation to matters in which the workplace delegate is providing representation.
- (b) A workplace delegate may communicate with members and eligible members individually or collectively, including at meetings, during working hours or work breaks, or before the start or after the end of work.
- (c) The employer must not survey, monitor, record or otherwise infringe the privacy of communications between workplace delegates, members and eligible members and their employee organisation.

**X.7 Entitlement to reasonable access to the workplace and workplace facilities**

- (a) The employer must provide a workplace delegate with access to the workplace and access to or use of the following workplace facilities where the enterprise is being carried out, unless the employer does not have them:
  - (i) a room or area to hold discussions which is fit for purpose, private and accessible by the workplace delegate and members and eligible members;
  - (ii) a physical or electronic noticeboard;
  - (iii) electronic means of communication that are ordinarily used by the employer to communicate with members and eligible members in the workplace;
  - (iv) a lockable filing cabinet or other secure document storage area; and
  - (v) office facilities and equipment including printers, scanners, photocopiers and wi-fi.
- (b) Where reasonable access to the workplace or workplace facilities requires securing the consent of another person the employer will take all reasonable steps to secure such consent.

**X.8 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 per year of paid time during

normal working hours to attend training related to representation of the industrial interests of members or eligible members, subject to the following conditions:

- (a) The number of workplace delegates and the entitlement to paid leave will be in accordance with the following table:

Number of employees covered by this award	Maximum number of workplace delegates per year	Maximum number of days permitted per year
Up to 15	1	5
16-30	2	10
31-50	3	15
51-100	4	20
101 and over	5	25

- (b) A day of paid time during normal working hours is the number of hours 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 dates, subject matter and the daily start and finish times of the training.
- (d) The workplace delegate must, on request, provide the employer with an outline of the training content.
- (e) The employer must advise the workplace delegate as soon as is practicable, and not less than 3 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) If requested, 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.

#### **X.9 Exercise of entitlements under clause X**

- (a) In accordance with s.350A of the Act, where an employee acts in their capacity as a workplace delegate the employer of a workplace delegate must not:
- (i) unreasonably fail or refuse to deal with the workplace delegate; or
  - (ii) knowingly or recklessly make a false or misleading representation to the workplace delegate; or
  - (iii) unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under the Act or clause X.



- (b) In exercising their rights under this clause, a workplace delegate must as far as is reasonably practical (and to the extent it does not impinge upon their rights as a delegate):
  - (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; and
  - (iii) not unreasonably hinder, obstruct or prevent the normal performance of work.
- (c) Clause X does not require an eligible employee to be represented by a workplace delegate without the employee's agreement.

NOTE 1: Under section 350C(4) of the Act, the employer is taken to have afforded a workplace delegate the rights mentioned in section 350C(3) if the employer has complied with clause X.

NOTE 2: The exemption for small business employers to provide workplace delegates with access to paid training time in clause X.8 does not override any existing entitlement of an eligible employee representative to paid dispute resolution training leave as provided in clause XX – Dispute Resolution of this Award.

29. The CFMEU C&G submits that Commission should adopt the clause set out in paragraph 28 above and the definitions set out in paragraph 9 above for inclusion in all the modern awards that the CFMEU C&G has an interest in.

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