

## IN THE FAIR WORK COMMISSION

Matter No.: AM2024/6

Matter: Variation of modern awards to include a delegates' rights term

### Submissions of the CPSU (PSU-Group)

#### Background

1. On 14 December 2023, the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 received Royal Assent. The Closing Loopholes Act introduced new general protections for workplace delegates in the Fair Work Act 2009 (Cth) (FW Act) and required all modern awards, enterprise agreements and workplace determinations to include a delegates' rights term by 1 July 2024.
2. On 18 January 2024, FWC President Hatcher issued statement [2024] FWC 150 (President's Statement) in relation to variation of modern awards to include a delegates' rights term for workplace delegates. The FWC is required to make determinations varying modern awards by 30 June 2024.
3. At Paragraph [14], the FWC invited interested parties to lodge submissions and proposed workplace delegates' rights terms by 1 March 2024.
4. The CPSU made a submission on 1 March 2024 outlining the CPSU's interests in modern awards, the Commonwealth public sector context (APS and non-APS) and proposed a draft delegates' rights term. The proposed draft terms were negotiated and agreed with the Australian Public Sector Commissioner (APSC).
5. On 10 May 2024, FWC President Hatcher issued a statement [2024] FWC 1214 (President's Statement) in which a draft delegates' rights term (**FWC Draft Term**) was included at Attachment A. At paragraph [10] the President invited interested parties to make submissions concerning the draft term by 12.00 pm on Friday 17 May 2024. The CPSU makes the following submissions in accordance with the President's Statement.

## Proposed Delegates Rights Terms

6. The CPSU's submission dated 1 March 2024 included at Attachment A and B (**Proposed Terms**) proposed draft delegates' rights terms for the Australian Public Sector Enterprise Award 2015 (APS Award) and the Australian Government Industry Award 2016 (AGIA). The proposed terms were negotiated and agreed with the Australia Public Service Commission (APSC). The APSC made a submission proposing that the same delegates' rights terms be adopted. The Proposed Terms are included at Attachment A and B.
7. Since 1 March 2024, CPSU has consulted with the Australian Federal Police (AFP) and confirmed our support for the same delegates' rights terms for inclusion in the Australian Federal Police Award 2016 (AFP Award). The AFP confirmed that they made submissions on Thursday 21 March proposing the same terms with minor AFP specific changes in clause 8. The AFP's proposed term is included at Attachment C. The CPSU supports this proposed term.
8. The CPSU submits that the Proposed Terms are consistent with the legislative requirements of the FW Act.
9. The FW Act at s350C(5)(a) requires that regard must be had to the size and nature of the enterprise, the resources of the employer and the facilities available at the enterprise when determining what is reasonable access to delegates' entitlements, including to paid time for training.<sup>1</sup> The CPSU submits that the CPSU terms allow for suitable flexibility and regard to the considerations listed in s350C(5)(a) as clause 6 and 7 of the Agreed Terms both have regard to operational requirements, including impact on critical services.
10. Section 168B of the FW Act requires the Fair Work Commission to recognise that modern awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprises.<sup>2</sup>

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<sup>1</sup> FW Act section 350C(a)

<sup>2</sup> FW Act section 168B

11. The CPSU submits that the Proposed Terms in Attachment A, B and C have been negotiated and agreed between the relevant stakeholders to take into account the employment arrangements and circumstances of the public sector and should be adopted in the APS Award, the AGIA, and the AFP Award. While the terms are now formalised in all APS Enterprise Agreements and many non-APS Enterprise Agreements, they have existed in a similar form for over a decade and are well understood across the sector.

### **ACTU Amended Term**

12. The Australian Council of Trade Unions, of which the CPSU is an affiliate member, has prepared a proposed draft modern award delegates' rights term (ACTU Amended Term). Should the FWC decide not to adopt the Proposed Terms as agreed by the CPSU, APSC and AFP for the relevant modern enterprise awards, i.e., APS Enterprise Award, AGIA and AFP Enterprise Award then the CPSU supports the adoption of the ACTU Amended Term subject to award specific variations which we will outline in paragraphs [13] to [31] of this submission. The CPSU submits that the ACTU's Amended Term with variations are relevant and should be used to vary the modern awards listed at paragraph [8] of the CPSU's submission dated March 1 2024.

### **FWC Draft Term**

13. The CPSU has several priority concerns relating to the FWC Draft Term. These concerns are outlined below in paragraphs [14] to [32]. The CPSU has included suggested industry specific amendments to the ACTU Amended Term.

### **Definitions**

14. The definition of 'employer' at X.2(a) differs from the definition of employer in the FW Act at a.15(2). The definition should be amended so that it is consistent or refers to the FW Act definition.

15. The definition of 'delegates organisation' is inconsistent with s350C(1) of the FW Act and should be amended so that it is consistent with the FW Act.

16. The definition of 'eligible employees' has a narrower scope than that under the FW Act at s350C(2) which describes delegates as representing members and persons eligible to

become members of the organisation who work in a particular enterprise. The FW Act terminology is appropriate to the Australian Public Sector (APS) context where CPSU delegates are not limited to only representing APS employees.

### **Notice**

17. The requirement in X.3 that a workplace delegate give the employer written notice of their appointment or election as a union delegate before they can exercise their entitlements could result in unintended consequences. If the delegate fails to give notice, or where there is no record of the notice being given, a delegate could be denied access to the entitlements set out in the award. The CPSU proposes that the requirement to give written notice is removed and the requirement that, upon request of the employer, the delegate must provide evidence that would satisfy a reasonable person, is retained.

### **Right of Representation**

18. In the Commonwealth public sector context, CPSU union delegates represent the interests of members in broader ways than that listed in X.5. Union delegates frequently represent members' interests when recruiting new members, or when they attend workplace consultative committees that are commonplace across the sector. At union forums, union delegates represent members' industrial interests and consult with and seek advice from other delegates and union officials.
19. The non-exhaustive list at Clause X.5 should include additional matters that constitute representing industrial interests such as:
  - a. Representation of industrial interests of members at consultative committees and union forums
  - b. Consultation with other delegates and union officials at union forums

### **Reasonable communication**

20. It is vitally important that at an early stage in their career, employees are advised of their ability to be represented by a workplace delegate and other union information. The entitlement to reasonable communication must include access to new employees as part of inductions. The entitlement relating to inductions is contained in the delegates' rights terms

that form part of all new APS Enterprise Agreements and should be reflected in the modern award.

21. The CPSU submits that it is essential that the FWC draft terms prevent the employer from having the ability to veto or otherwise interfere with reasonable union communications. A delegate's ability to gather feedback and provide information to eligible members is a critical part of fulfilling their duties as a workplace representative. Any veto of reasonable communication by the employer would diminish a delegate's capacity to perform their role. The protection against an employer vetoing reasonable communication is contained in the delegates' rights terms that form part of all new APS Enterprise Agreements and should be reflected in the modern award.

#### **Reasonable access to the workplace and workplace facilities**

22. Should the Fair Work Commission decide not to adopt the delegates' rights term agreed by the CPSU and the APSC, the ACTU Amended Terms should be adjusted to provide additional flexibility to allow delegates to request additional time and facilities from time to time, which reflects the current practice in the industry.
23. As noted in paragraph [22] above, it is essential that the delegates' rights terms prevent the employer from having the ability to veto or otherwise interfere with reasonable union communications when providing access to communication facilities.

#### **Reasonable access to training**

24. The FWC draft terms at clause X.8 contain a limitation on the number of days of paid time to attend training that an employer is required to provide a workplace delegate. The limitations are that a delegate will only be provided with 5 days for initial training, then 1 day each subsequent year. The employer is not required to provide 5 days or 1 day for more than one workplace delegate per 50 eligible employees.
25. The limitations on delegate training are incompatible with established practices in the industry. In the public sector, a limit of 1 day per subsequent year and a cap of one delegate who is provided training per 50 eligible employees would be well below what is currently considered reasonable. There are many workplaces, including smaller agencies with 50 or fewer employees, within the union's coverage where there is more than one delegate who

each undertake important delegate work, require training in the same year or who may attend training together.

26. At a recent three-day CPSU delegate training session in Tasmania, 30 delegates from multiple employers were in attendance. Under the FWC Draft Terms, 18 delegates in this cohort would not have been able to undertake two of the three days of training and, depending on the size of the enterprise, some may not have been able to attend at all due to the cap of one employee per 50 eligible employees.
27. Through attending in-depth training, union delegates can carry out their duties responsibly and effectively. Without appropriate training, an employee's right to be represented by a delegate is diminished. The CPSU encourages CPSU delegates to attend one training session each per year, if required. The CPSU's delegate training usually runs for two or three days per training session. As delegates develop their skills and experience or where particular workplace incidents arise, the CPSU provides specialised workplace relations, agency specific or issues-based training to meet their needs. Every few years, union delegates also attend state or territory regional delegates' conferences where they may be trained on updates to industrial legislation, policy and/or industrial instruments.
28. The model term reflects a significant departure from established practices in the industry. The proposed term suggests that if a delegate utilises the yearly training allocation but leaves the workplace or steps down, new delegates would be unable to access training until a following year. Where delegates retire or step down and new delegates put their hands up, it is important that new delegates access the training that they require. There are circumstances where a longstanding delegate who transitions to retirement or reduces their delegate duties would attend training with a new delegate so that they can impart knowledge and workplace specific experience to the new delegate. This provides invaluable continuity of representation and support for members.
29. There have been very few instances where having multiple delegates attending training from the same enterprise has negatively affected employers. The opposite effect is often true, because when multiples delegates are trained and ready to assist members in their workplaces, the day-to-day workload is spread across multiple delegates and teams and has less impact upon the employer. Union members also benefit from multiple trained delegates

where some delegates are part-time, are away from the workplace on leave, or where their capacity is limited for any reason.

30. It is crucial that among the cohort of workplace delegates, the diversity of CPSU membership and the wider Australian public is reflected. Where multiple delegates can access appropriate training and are able to build the skills and knowledge required to undertake their role, this diversity is encouraged. Where there is a cross-section of delegates from various sections of an enterprise means that members can approach a delegate who is familiar with their role or team. A member who is facing gender discrimination may feel more comfortable approaching a delegate who identifies with the same gender. In one workplace, a CPSU delegate who is visually impaired required a second delegate at the workplace to complete sighted tasks, such as maintaining noticeboards. Both delegates attended the same training.
  
31. The CPSU submits that access to training should not be subject to training limits per delegate or per 50 eligible employees. Instead, reasonable access to training should be flexible, consider the operational requirements of the enterprise, whether there have been significant changes in industrial relations or commonwealth government landscape, and the needs of the members and delegates in the enterprise. The FW Act at s350C(5)(a) requires that regard must be had to the size and nature of the enterprise, the resources of the employer and the facilities available at the enterprise when determining what is reasonable access to delegates' entitlements, including to paid time for training.<sup>3</sup> If the FWC decides not to adopt the Proposed Terms outlined in Attachments A, B and C, the CPSU submits that the ACTU terms should be amended to remove limitations on delegate training and instead reflect the operational requirements, impact on critical services, and impact on the delegates' regular duties. These considerations provide suitable flexibility for the APS and have regard to the considerations listed in s350C(5)(a).
  
32. The CPSU submits that the Proposed Terms in Attachment A, B and C have been negotiated and agreed between the relevant stakeholders. The proposed terms have the appropriate regard to the public sector context and established practices and should be adopted in the APS Award, the AGIA, the AFP Award and the list of awards that CPSU has an interest in.<sup>4</sup> The

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<sup>3</sup> FW Act section 350C(5)(a)

<sup>4</sup> CPSU (PSU-Group) Submission AM2024/6 [8] 1 March 2024

CPSU submits that the Proposed Terms are consistent with the legislative requirements of the FW Act.

## **Attachment A**

### **Proposed term for the *Australian Public Service Enterprise Award 2015***

#### **Delegates' rights**

1. Union delegates play an important and legitimate role in the workplace. This includes representing their members and supporting employee access to union officials, and providing employee views to the agency.
2. The role of union delegates is to be respected and supported.
3. The employer and union delegates will work together respectfully and collaboratively.

#### *Supporting the role of union delegates*

4. The employer respects the role of union delegates to:
  - 4.1 provide information, consult with and seek feedback from employees in the workplace on workplace matters;
  - 4.2 consult with other delegates and union officials, and get advice and assistance from union officials;
  - 4.3 represent the interests of members to the employer and industrial tribunals; and
  - 4.4 represent members at relevant union forums, consultative committees or bargaining.
5. The employer and union delegates recognise that undertaking the role of a union delegate is not the primary purpose of an employee's engagement, and must work with and not



unreasonably impact their regular duties. Honorary officials may request additional time and facilities from time to time.

6. Union delegates will be provided with reasonable paid time during their normal working hours to perform their union delegate role. The paid time provided should not result in disruption to critical services or operational requirements.

7. To support the role of union delegates, the employer will, subject to legislative and operational requirements, including privacy and security requirements:

7.1 provide union delegates with reasonable access to agency facilities and resources, including for paid or unpaid meetings between employees and their unions and to communicate with union officials;

7.2 advise union delegates and other union officials of the agency facilities and resources available for their use, which may include telephone, photocopying, internet, and email;

7.3 allow reasonable official union communication appropriate to the agency from union delegates with employees, including through email, intranet pages and notice boards. This may include providing a link to a union website for employees to access union information. Any assistance in facilitating email communications does not include an agency vetoing reasonable communications;

7.4 provide access to new employees as part of induction; and

7.5 provide reasonable access to union delegates to attend appropriate paid time training in workplace relations matters, during normal working hours.

8. Where employees are elected as officials of a trade union or professional association, they are not required to seek permission from the workplace or employer before speaking publicly in that capacity, subject to the APS Code of Conduct and legislative requirements.

## **Attachment B**

### **Proposed term for the *Australian Government Industry Award 2016***

#### **Delegates' rights**

1. Union delegates play an important and legitimate role in the workplace. This includes representing their members and supporting employee access to union officials, and providing employee views to the employer.
2. The role of union delegates is to be respected and supported.
3. The employer and union delegates will work together respectfully and collaboratively.

#### *Supporting the role of union delegates*

4. The employer respects the role of union delegates to:
  - 4.1 provide information, consult with and seek feedback from employees in the workplace on workplace matters;
  - 4.2 consult with other delegates and union officials, and get advice and assistance from union officials;
  - 4.3 represent the interests of members to the employer and industrial tribunals; and
  - 4.4 represent members at relevant union forums, consultative committees or bargaining.
5. The employer and union delegates recognise that undertaking the role of a union delegate is not the primary purpose of an employee's engagement, and must work with and not

unreasonably impact their regular duties. Honorary officials may request additional time and facilities from time to time.

6. Union delegates will be provided with reasonable paid time during their normal working hours to perform their union delegate role. The paid time provided should not result in disruption to critical services or operational requirements.

7. To support the role of union delegates, the employer will, subject to legislative and operational requirements, including privacy and security requirements:

7.1 provide union delegates with reasonable access to agency facilities and resources, including for paid or unpaid meetings between employees and their unions and to communicate with union officials;

7.2 advise union delegates and other union officials of the agency facilities and resources available for their use, which may include telephone, photocopying, internet, and email;

7.3 allow reasonable official union communication appropriate to the agency from union delegates with employees, including through email, intranet pages and notice boards. This may include providing a link to a union website for employees to access union information. Any assistance in facilitating email communications does not include an agency vetoing reasonable communications;

7.4 provide access to new employees as part of induction; and

7.5 provide reasonable access to union delegates to attend appropriate paid time training in workplace relations matters, during normal working hours.

8. Where employees are elected as officials of a trade union or professional association, they are not required to seek permission from the employer before speaking publicly in that capacity, subject to any relevant Code of Conduct and legislative requirements.

## **Attachment C**

Draft delegates' rights term for the Australian Federal Police Enterprise Award 2016

### **Delegates' rights**

1. Union delegates play an important and legitimate role in the workplace. This includes representing their members and supporting employee access to union officials, and providing employee views to the employer.
2. The role of union delegates is to be respected and supported.
3. The employer and union delegates will work together respectfully and collaboratively.

### *Supporting the role of union delegates*

4. The employer respects the role of union delegates to:
  - 4.1 provide information, consult with and seek feedback from employees in the workplace on workplace matters;
  - 4.2 consult with other delegates and union officials, and get advice and assistance from union officials;
  - 4.3 represent the interests of members to the employer and industrial tribunals;  
and
  - 4.4 represent members at relevant union forums, consultative committees or bargaining.
5. The employer and union delegates recognise that undertaking the role of a union delegate is not the primary purpose of an employee's engagement, and must work with and not unreasonably impact their regular duties. Honorary officials may request additional time and

facilities from time to time.

6. Union delegates will be provided with reasonable paid time during their normal working hours to perform their union delegate role. The paid time provided should not result in disruption to critical services or operational requirements.
7. To support the role of union delegates, the employer will, subject to legislative and operational requirements, including privacy and security requirements:
  - 7.1 provide union delegates with reasonable access to agency facilities and resources, including for paid or unpaid meetings between employees and their unions and to communicate with union officials;
  - 7.2 advise union delegates and other union officials of the agency facilities and resources available for their use, which may include telephone, photocopying, internet, and email;
  - 7.3 allow reasonable official union communication appropriate to the agency from union delegates with employees, including through email, intranet pages and notice boards. This may include providing a link to a union website for employees to access union information. Any assistance in facilitating email communications does not include the employer vetoing reasonable communications;
  - 7.4 provide access to new employees as part of induction; and
  - 7.5 provide reasonable access to union delegates to attend appropriate paid time training in workplace relations matters, during normal working hours.
8. Where employees are elected as officials of a trade union or professional association, they are not required to seek permission from the workplace or before speaking publicly in that capacity on workplace matters, subject to the AFP Code of Conduct, Commissioner's Orders, section 60A of the Australian Federal Police Act 1979 and other legislative requirements. This subclause X.8 does not permit an employee to otherwise disclose information specific

to an operational matter without appropriate authorisation.