

17 May 2024

President Hatcher
Fair Work Commission
William Street
Sydney NSW

Email: awards@fwc.gov.au

Dear Associate to President Hatcher,

Re: Matter No:2024/6 Variation of modern awards to include a delegates' rights term

1. Maritime Industry Australia Ltd (MIAL) represents employers in the maritime industry who employ workers covered by (amongst others) the following modern Awards:
 - a. The Seagoing Industry Award 2020
 - b. The Marine Towage Award 2020
 - c. The Marine Tourism and Charter Vessel Award 2020
 - d. The Ports Harbours and Enclosed Water Vessel Award 2020
 - e. The Maritime Offshore Oil and Gas Award
 - f. The Port Authority Award
 - g. The Stevedoring Industry Award
2. MIAL has had the opportunity to review the draft modern award delegates rights clause issued as an attachment to the President's statement dated 10 May 2024 and recognises the direction contained in that Statement that submissions be filed by 17 May at 12:00pm.
3. MIAL appreciates the Fair Work Commission is somewhat constrained by its legislative imperative under the *Fair Work Act 2009* (the Act) to insert a delegates right clause in modern awards that operates from 1 July 2024. The time between which a draft clause is issued and by which parties effected must respond is short making it difficult for organisations like MIAL to properly consult on the potential effects of the clause for its members and the realities of the workplaces in which their employees perform work, notwithstanding the consultation process that occurred prior to the draft wording that was issued on 10 May 2024.

4. MIAL members largely have in place negotiated enterprise agreements, a large number of which have pre-existing entitlements afforded to duly appointed workplace delegates that take into account the particular function of the enterprise. MIAL would not wish to see the insertion of a model term which is crafted to cover a diverse range of workplaces, be seen as a preferable to what are in many cases long standing, mature, negotiated arrangements which on a plain reading are suitable if different from the proposed delegates rights term.
5. The Presidents Statement at paragraph 9 does contemplate interested parties having the opportunity to make award specific variation at the conclusion of these proceedings. While it is certainly open to parties to advance variation applications to ensure that the model clause is fit for purpose in relation to the industry covered by the award, MIAL assumes such applications will be made in the usual way and the FWC will decide any application pursuant to s157(1) of the Act on the basis it is necessary to achieve the modern award objectives. Presumably the applicant will need to demonstrate that it is necessary to meet the modern award objectives in order for the already inserted delegates rights clause to be varied.
6. Accordingly, MIAL is of the view that the draft model delegates rights terms should not exceed what is required under s350C of the Act. The draft terms in many instances will not be suitable for the maritime industry given that work is performed on a vessel where design construction specifications are unlikely to have included contemplation of private rooms or areas for use of a union delegate. Accordingly specific facilities where they do exist on board vessels are utilised specifically for the purpose for which they will be designed and may not be able to be reasonably repurposes for the use of a delegate in the ways contemplated by the model clause. It is also in industry which operationally critical work must be the priority not only from a commercial standpoint but particularly on a vessel for safety.
7. This submissions highlights parts of the model clause which may not be suitable for a range of workplaces including but not necessarily limited to the maritime environment.

Proposed clause X.6

8. This clause deals with the right of reasonable communication. Proposed Clause X.6(b) in particular is incredibly broad, notwithstanding the later limitation on the exercise of rights contained in X.9. MIAL suggests this could be made clearer in that the delegate exercising their right of reasonable communication, must do so subject to their obligations as an employee in the workplace.

9. Additionally, it is an expectation under s350 that the exercise of workplace delegate rights be reasonable. While the title of the proposed clause X.6 references reasonable communication, the clause itself contains no such qualification. MIAL submits that the s350C clearly envisages the exercise of delegates rights occur in a way that is reasonable, with the draft clause failing to capture this. The concept of reasonable must apply across each of the proposed clauses within the delegates right term, within the terms themselves, and not just in the heading. In relation to proposed clause X.6 specifically, MIAL submits this could be achieved through the following amendment:

X.6 Entitlement to reasonable communication

(a) A workplace delegate may reasonably 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.

(b) subject to clause X.9, 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 provided such communications are reasonable.

Proposed clause X.7

10. Proposed clause X.7 requires an employer to provide a workplace delegate with access to or use of a range of facilities unless the employer does not have them. In a remote small workplace such as a vessel, while it may be true to say an employer does not have them, it may be equally true to say if they employer does have them, it is completely impractical for such a facility to be repurposed for the use of a workplace delegate. As highlighted earlier in this submission, workplaces in the maritime industry are designed for operation safety, buoyancy, and efficiency, meaning it may not be practical for use, particularly if there are not appropriate constraints around this.
11. Given this is a model clause intended at least in the interim to cover a large, diverse range of workplaces, MIAL considers a closer reflection of the requirements of s350C of the Act would be to refer to the practicalities of the workplace in which the delegate is performing their delegate functions. This includes making it clear that the entitlement to access is linked to the workplace in which the workplace delegate is exercising their delegates rights, and not another workplace of the employer which may have different workplace facilities. This could be achieved through

the following amendment:

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

The employer must provide a workplace delegate with reasonable access to or use of the following workplace facilities, unless the ~~employer~~ workplace does not have them or it is impractical for access or use to be afforded to the workplace delegate due to the operational requirements of the workplace:

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

(b) a physical or electronic noticeboard;

(c) electronic means of communication that are ordinarily used by the employer to communicate with eligible employees in the workplace;

(d) a lockable filing cabinet or other secure document storage area; and

(e) office facilities and equipment including printers, scanners, photocopiers and wi-fi.

Proposed Clause X.9 Exercise of Entitlements under Clause X

12. This proposed clause sets out the conditions the workplace delegates exercise of their rights are subject to. MIAL is of the view that reasonable of the exercise of the workplace delegates rights will be dependent on the workplace in which work is being performed. Accordingly MIAL proposes the following amendment.

X.9 Exercise of entitlements under clause X

(a) A workplace delegate's entitlements under clauses X.5 to X.7 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 having regard to the operational requirements of the workplace; 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.

- 13.** Again MIAL recognises the FWC expressly contemplates variations being sought for particular modern awards to ensure the clause may capture more adequately the industry circumstances. It may be that MIAL members support such an approach once the opportunity to review the final model clause has occurred. However, MIAL is also of the view that a model clause as it applies across a range of awards should as far as possible implement the requirements of the Act and not make judgments which may or may not be reasonable in regard to particular workplaces or industries.

On behalf of Maritime Industry Australia Limited