

Level 13, 175 Liverpool Street
SYDNEY NSW 2000

Vice President Asbury
Deputy President Binet
Commissioner Lim

Subject: Variation of Modern Awards to Include a Delegates' Rights Term (AM2024/6)

Dear Vice President Asbury, Deputy President Binet and Commissioner Lim,

I refer to the Statements issued by Justice Hatcher, President of the Fair Work Commission (the **Commission**), on 18 January 2024 and 30 January 2024, relating to the variation of modern awards to include a delegates' rights term (AM2024/6), arising from the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (the **Closing Loopholes Act**).

I seek leave to tender this correspondence as a submission in my capacity as the Fair Work Ombudsman (the **FWO**) in the award variation proceedings, outside of the timetable for written submissions. This correspondence provides an overview of the approach I intend to take in relation to the FWO's education and enforcement role with respect to the new legislative provisions, informed by our considerable experience as the national workplace regulator. If leave is granted, I would also welcome the opportunity for a FWO senior lawyer to attend one or more of the scheduled consultation sessions as an observer.

The new statutory workplace delegates' rights and protections

The Closing Loopholes Act introduced new rights for workplace delegates to:

- represent the industrial interests of union members and potential union members, including in disputes with their employer,
- reasonable communication with members and potential members, in relation to their industrial interests,
- for the purpose of representing those interests:
 - reasonable access to the workplace and workplace facilities, and
 - for workplace delegates employed by non-small businesses, reasonable access to paid time, during normal working hours, for related workplace delegates' training.

The Closing Loopholes Act also introduced new general protections for workplace delegates when carrying out their role at the workplace.

The FWO's statutory functions

The FWO is an independent statutory office established by the *Fair Work Act 2009* (Cth) (**FW Act**) that promotes harmonious, productive and cooperative workplace relations, including through providing

education, assistance and advice about Australian workplace laws. The FWO's statutory functions include monitoring compliance with those workplace laws, inquiring into and investigating alleged breaches of the FW Act, and taking impartial and appropriate enforcement action when necessary.

Cooperation between employers and workplace delegates

In the FWO's regulatory experience of dealing with workplace issues, it is clear that existing consultative bodies, measures and processes can be an important element in preventing and mitigating contraventions of workplace laws.

Particularly over the last 4 years, the FWO has become aware of a significant number of large underpayments affecting businesses of all sizes and across all sectors. We continue to receive around 100 self-reports of non-compliance and underpayments each year. A key focus of our work in this area is on employers building a culture of compliance within their businesses and an important element of this is having effective communication and consultation mechanisms with workers and their representatives. In the FWO's experience, these consultative mechanisms can be an effective and efficient way to exchange information, identify, discuss and resolve issues within the workplace, and can help ensure ongoing and future compliance with workplace laws. Leveraging workplace consultation mechanisms as a means to secure future compliance is an area of focus for the FWO that we are increasingly incorporating into enforceable undertaking obligations.

In my view, a proposed delegates' rights term for modern awards should support the continued use of these types of consultative mechanisms, including to promote discussions between workplace delegates and employers about pay assurance systems and processes to ensure employees are paid correctly. It will also be important that workplace delegates receive training about their role in the workplace to ensure that their contribution is constructive and cooperative.

This is a theme that I discussed in my published [Regulator Statement of Intent \(SoI\)](#), whereby I outlined the benefits of collaboration and tripartite approaches that harness workers' voices, especially as it relates to achieving and ensuring compliance with workplace laws. Specifically, my SoI committed the FWO to promoting workplace level mechanisms that encourage respectful dialogue and behaviour between all workplace parties and representatives.

Our role in advising on and enforcing the new workplace delegates' rights and protections

The FWO will publish tailored educational resources on our website on the new workplace delegates' rights for workplace participants and make information and advice available through channels including our Fair Work Infoline and via MyAccount. The FWO will work collaboratively with our stakeholders, including through our recently established tripartite Advisory Group, to develop and deliver educational materials on the new workplace delegates' rights that are practical, informative, and reflect the broad needs of the workplace community.

The FWO also has the role of enforcing the workplace delegates' rights provisions, including delegates' rights terms of awards, agreements and workplace determinations. The provision of accurate, accessible and relevant education material will assist workplace participants to understand and apply the new delegates' rights, with compliance and enforcement action in appropriate circumstances, guided by our publicly available [Compliance and Enforcement Policy](#).

I trust the information in this submission is of assistance.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A Booth' with a checkmark at the end.

Anna Booth

Fair Work Ombudsman

5 April 2024