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IN THE FAIR WORK COMMISSION

Fair Work Act 2009

Clause 95, Schedule 1 – FWC to vary certain modern awards

(AM2024/6)

Variation of modern awards to include a delegates' rights term

**SUBMISSION OF THE
CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION
(MANUFACTURING DIVISION)**

(5 March 2024)

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Fair Work Act 2009
Clause 95, Schedule 1 – FWC to vary certain modern awards

VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES' RIGHTS TERM
(AM2024/6)

SUBMISSION OF THE CFMEU-MANUFACTURING DIVISION

1. On 14 December 2023, the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (CL Act 2023)* received royal assent, operative from 15 December 2023. The CL Act 2023 amends the *Fair Work Act 2009 (FW Act)* to introduce provisions with respect to workplace delegates rights, including, inter alia:
 - the introduction of a new general protection for workplace delegates in Part 3-1 of the FW Act;¹
 - new definitions of 'workplace delegate'² and 'delegates rights term'³;
 - a new statutory statement on the 'rights of workplace delegates';⁴
 - the requirement to include workplace delegates rights terms in modern awards (to be operative by 1 July 2024);⁵
 - the requirement to include workplace rights delegates term in enterprise agreements to whom the agreement applies (applicable to enterprise agreements made after 1 July 2024);⁶
2. Following two earlier Statements⁷, on 30 January 2024, (**Second 2023 Statement**)⁸ the President issued a Statement confirming the timetable for the Commission's process regarding the inclusion of delegates' rights terms in modern awards. The second step in the timetable invited '*Parties to lodge submissions and proposed workplace delegates' rights terms including any award specific terms required*' by 1 March 2024. The CFMEU-Manufacturing Division (**CFMEU-MD** or **We**) provides these submissions in accordance with the further extension provided by the Commission on 1 March 2024.

¹ *Fair Work Act 2009* – new s.350A

² *Fair Work Act 2009* – new s.350C

³ *Fair Work Act 2009* – s.12

⁴ *Fair Work Act 2009* – s.350C(2)

⁵ *Fair Work Act 2009* – new s.149E

⁶ *Fair Work Act 2009* – new s.205A

⁷ Statement regarding the Fair Work Legislation Amendment (Closing the Loopholes) Act 2023 (20 December 2023); (AM2024/6) Statement [2024] FWC 150 (18 January 2024)

⁸ (AM2024/6) Statement [2024] FWC 241 (30 January 2024)

3. The CFMEU-MD represents workers in a wide range of sectors including timber and allied industries, furniture production, floor laying, glass and glazing, building products, soft furnishings, pulp and paper, the textile, clothing and footwear industry and the dry cleaning and laundry industry (not an exhaustive list).

MODERN AWARDS IN WHICH THE CFMEU-MD HAS AN INTEREST

4. In this matter, the CFMEU-MD has an interest in the following modern awards:
 - *Dry Cleaning and Laundry Industry Award 2020* [MA000096] (**DC&LI Award**)
 - *Joinery and Building Trades Award 2020* [MA00029] (**Joinery Award**)
 - *Manufacturing and Associated Industries and Occupations Award 2020* [MA000010] (**Manufacturing Award**)
 - *Storage Services and Wholesale Award 2020* [MA000084] (**Storage Award**)
 - *Textile Clothing and Footwear Industry Award 2020* [MA000017] (**TCF Award**)
 - *Timber Industry Award 2020* [MA000071] (**Timber Award**)

WHY DELEGATES RIGHTS CLAUSES IN MODERN AWARDS ARE IMPORTANT

5. We submit that the suite of new delegates rights provisions included in the amended FW Act (as a result of the passage of the CL Act 2023) are self-evidently intended to be enabling in nature and support freedom of association principles. The recognition and enhancement of the role of workplace or union delegates, through the inclusion of workplace delegates terms in modern awards, is critical to successfully achieving this overall enabling or beneficial purpose. The process of the inclusion of delegates rights term in modern awards should not be considered in isolation, but rather as part of the broader context of the clear and expansive legislative reform in this area.
6. The Explanatory Memorandum (**EM**) for the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (CL Bill 2023)* set out the intention of the government in seeking to enhance delegates rights in Australian workplaces, in context of its international obligations, including:

Workplace delegates' rights

[76] Part 7 of Schedule 1 would positively engage the right to the enjoyment of just and favourable working conditions by improving access to representation for workers, and the ability of workplace delegates to provide such representation. These provisions engage and promote operative articles of the *Workers' Representative Convention, 1971* (No. 135) of the ILO (ILO Convention 135), which Australia has ratified.

[77] Currently, the FW Act provides limited protection to workplace delegates of an employee organisation acting within the workplace. Divisions 3 and 4 of Part 3-1 of the FW Act prohibit adverse action against employees who are officers or members of industrial associations and

allows for freedom of association and involvement in lawful industrial activities. However, these protections do not provide workplace delegates with positive rights that protect and enable them to exercise their roles in the workplace. A key function of a workplace delegate is to be a point of contact for members within the workplace and to represent the concerns of workers to the employer or business. The Bill would positively engage the right to just and favourable conditions of work by ensuring that workplace delegates have substantive rights to represent the industrial interests and concerns of their and their fellow workers.

[78] The Bill would further support this right by requiring that the details of various supporting rights for workplace delegates be included in modern awards and enterprise agreements, which would allow them to be tailored to particular industries and enterprises. The introduction of a new general protection to enforce these rights would also positively engage rights in work, including by implementing Article 1 of the ILO Convention 135.

[79] Introducing rights for workplace delegates would also positively impact the right to just and favourable conditions of work for all workers in a workplace. By providing explicit rights for workplace delegates, other workers in the workplace are empowered to raise workplace concerns to the workplace delegate and therefore improve their ability to cooperatively resolve any disputes that may arise in the workplace. Workers can also more effectively engage in bargaining to negotiate fair wages and conditions.⁹ [emphasis added]

7. It is apparent from the section of the EM extracted above, that key objectives in introducing delegates rights provisions into the FW Act included:
- the positive engagement of the right to the enjoyment of just and favourable working conditions by improving access to representation for workers, and the ability of workplace delegates to provide such representation;
 - the enhanced protection of workplace delegates from discrimination and adverse action when undertaking their role in the workplace;
 - a statutory recognition that a key function of a workplace delegate is to be a point of contact for members within the workplace and to represent the concerns of workers to the employer or business;
 - ensuring that workplace delegates have *substantive* rights to represent the industrial interests and concerns of their and their fellow workers;
 - the inclusion of various supporting rights in modern awards and enterprise agreements and which would allow them to be tailored to particular industries and enterprises;
 - By providing explicit rights for workplace delegates, other workers in the workplace are empowered to raise workplace concerns to the workplace delegate and therefore improve their ability to cooperatively resolve any disputes that may arise in the workplace.

⁹ Explanatory Memorandum (House of Representatives), *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* at [76] – [79]

- Workplace delegates rights also result in workers being more able to effectively engage in bargaining to negotiate fair wages and conditions.
8. It is an obvious statement, but no one workplace in Australia is the same as another. The variety, size, principal business, composition and demographic of employees in workplaces vary significantly across sectors and industries and occupation; between blue collar and white collar, service businesses or manufacturing, warehousing or construction for example. Some workplaces operate 9 to 5, others operate within shift structures which extend beyond traditional hours of work arrangements, for others there is no usual physical workplace at all. In some workplace, this variation of operations, size and shift arrangements will likely impact on how easily and effectively a workplace delegate can undertake their role (for example, the time it takes a delegate to walk or travel to another part of the factory) . This context of workplace variance supports the parliament's intention that workplace delegates terms in modern awards should be capable of being tailored to suit the particular needs of particular industries and sectors.
 9. The importance of the inclusion of delegates rights terms in modern awards occurs in the current circumstances where award dispute resolution procedures do not contain arbitration as of right, but only by consent. This significant limitation on the powers of the FWC to deal substantively with disputes to final determination under modern awards disputes procedures, highlights why the role of workplace delegates in representing and assisting employees is so critical to maximising the potential for the resolution of disputes at the workplace level.
 10. In the sectors in which the CFMEU-MD has an industrial interest, it is common to find workplaces which operate across more than one site (sometimes not directly co-located) and/or which operate under structured shiftwork arrangements (for example, medium to larger scale commercial laundries; timber production and manufacturing; building products; textile operations). Alternatively, there is a tendency to smaller workplaces in the clothing industry and furnishings sector.
 11. Across all of the industries in which the CFMEU-MD has industrial coverage, there is typically a significant percentage of workers who come from a Culturally and Linguistically Diverse Background (CALD) and/or for whom English is their second language. In some cases, workers are employed in workplaces which are low paid, award dependent and subject to poor employer compliance with minimum safety net wages and conditions and health and safety standards.
 12. Fear by workers of speaking up about issues of concern is commonplace. Such fear is exacerbated when workers are employed in employment forms with a high level of insecurity and financial precarity

(for example, casual employment or low hours part-time employment); and/or are engaged on work visas which provide no permanent rights of residence in Australia.

13. Worker vulnerability also arises when a particular workplace is located in a small regional or country town with limited alternative employment opportunities (i.e., the only employer of note in the town syndrome). In this context, the role of a workplace delegate in effectively assisting and representing workers from diverse backgrounds and workplaces to raise issues of concern and formally raise disputes, again speaks to their critical role at the workplace level.
14. Further, the relevance of a workplace delegates being able to undertake their role in paid time (and without any loss of their usual rate of pay, including shift loadings and regular overtime) is key to the effective design and implementation of delegates rights award terms in awards. It is not commonly considered, but there is a gendered prism to the capacity of workers to consider becoming a workplace delegate in the first instance. If workplace delegates cannot undertake their role within paid time, it acts as a disincentive for workers to do nominate to nominate for the role.
15. Similarly with the opportunity to under workplace delegates training in paid time. In the union's experience this has a disproportionate impact on women workers who commonly have primary care for children and other family members and often do not have the option to remain (to deal with workplace matters) at the site after their normal working day has finished. By way of illustration, during the period of the Work Choices legislation when union training leave was removed as an allowable matter from awards, the former TCFUA observed a noticeable decrease in the preparedness of members to become workplace delegates, most noticeably women workers.
16. The ACTU Draft Model Clause – Delegates Rights contains at section 3, proposed provisions with respect to 'Right to paid training leave' including a minimum entitlement of no less than 5 days training per annum per delegate. We concur that this should be the minimum entitlement for awards in order to ensure that workplace delegates are comprehensively trained and skilled in order to effectively undertake what are often difficult roles. We note that a number of the awards in which the CFMEU-MD have an interest currently contain dispute resolution training leave which provide an entitlement of 5 days training leave for a shop steward, delegate or employee representative.¹⁰

¹⁰ See *Manufacturing and Associated Industries and Occupations Award 2020*, clause s44; *Textile, Clothing, Footwear and Associated Industries Award 2020*, clause 41; *Timber Industry Award 2020*, clause 37.

APPROACH TAKEN BY THE CFMEU-MD

17. The CFMEU-MD, by way of general application, supports and adopts the submissions and draft workplace delegates clause filed by the Australian Council of Trade Unions (**ACTU**)¹¹ on 1 March 2024, otherwise where indicated/modified below.

JOINERY AWARD

18. The CFMEU-MD supports and adopts the submissions and draft union delegates clause filed by the CFMEU – Construction and General Division (**CFMEU-C&G**) on 1 March 2024 specifically with respect to the 4 construction industry awards, including the Joinery Award.¹²

MANUFACTURING AWARD

19. The CFMEU-MD supports and adopts the submissions filed by the AMWU and amended ACTU model clause on 1 March 2024,¹³ including in relation to the Manufacturing Award. The AMWU make a number of cogent contentions regarding why the nature and characteristics of manufacturing workplaces require additional recognition in a proposed model delegates rights clause, particularly the challenges and needs faced by delegates working on shift work in undertaking and being effectively trained in their delegate role.

DC&LI AWARD, TCF AWARD, TIMBER AWARD and STORAGE AWARD

20. The CFMEU-MD supports the adoption of the ACTU model delegates rights clause for these awards, adapted/varied as follows:
- (a) The inclusion of the 3 *additional* terms as outlined in the AMWU submission at paragraphs [9]-[11] and [17], that is:
- Right to Represent [section]**
- ‘If a delegate is attending the Fair Work Commission, a Court or Tribunal at a time when they would not usually be rostered on to work, they will not be required to attend for a shift that commences late that day without any loss of pay.’
- Right to Paid Training Leave [section]**
- ‘If a delegate is attending Training at a time when they would not usually be rostered on to work, they will not be required to attend for a shift that commences later that day without any loss of pay.’

¹¹ (AM2024/6) Submission and draft clause filed by the ACTU (1 March 2024)

¹² (AM2024/6) Submission and draft clause filed by the CFMEU – Construction & General Division (1 March 2024)

¹³ (AM2024/6) Submission and amended ACTU draft clause filed by the AMWU (1 March 2024)

[Additional clause to the training clause]

'(c) For the avoidance of doubt, the onus shall rest with the employer to demonstrate unjustifiable hardship to grant leave when an eligible workplace delegate is otherwise entitled.'

Submitted on behalf of the:

**Construction, Forestry and Maritime Employees Union
(Manufacturing Division)**

(5 March 2024)