CFMEU Manufacturing
Level 2, 165 Bouverie St
CARLTON VIC 3053
Freecall: 1800 060 556
ABN: 34 183 611 895

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

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

(2 April 2024)

CFMEU (Manufacturing Division)	**Contact Person:** Vivienne Wiles Senior National Industrial Officer	**Address:** Level 2, 165 Bouverie Street Carlton VIC 3053	**Tel:** **Email:**	0419 334 102 vwiles@cfmeumd.org industrial@cfmeumd.org

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VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES' RIGHTS TERM

(AM2024/6)

REPLY SUBMISSION OF THE CFMEU-MANUFACTURING DIVISION

1. On 5 Mach 2024 the CFMEU-Manufacturing Division (**CFMEU-MD**) filed a submission in these proceedings on which it continues to rely (**First Submission**).[1]

2. The CFMEU-MD files these brief Reply Submissions with respect to the directions provided in the President's Statement issued 30 January 2024[2] and the further extension provided by the Commission in correspondence to the CFMEU-MD on 28 March 2024.

MODERN AWARDS IN WHICH THE CFMEU-MD HAS AN INTEREST

3. 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)**

4. In the CFMEU-MD's First Submission we outlined our primary position with respect to the awards in which we have an interest.

APPROACH TAKEN BY THE CFMEU-MD IN ITS REPLY SUBMISSIONS

5. The CFMEU-MD, by way of general application, supports and adopts the Reply Submissions filed by the Australian Council of Trade Unions (**ACTU**) on 28 March 2024[3], otherwise where indicated/modified below.

[1] (AM2024/6) Submission of the CFMEU-Manufacturing Division (5 March 2024)
[2] (AM2024/6) Statement [2024] FWC 241 (30 January 2024)
[3] (AM2024/6) Reply Submission of the ACTU (28 March 2024)

JOINERY AWARD

6. The CFMEU-MD supports and adopts the submissions the Reply Submissions filed by the CFMEU – Construction and General Division (**CFMEU-C&G**) on 28 March 2024 specifically with respect to the 4 construction industry awards, including the Joinery Award in which we have an interest.[4]

ADDITIONAL COMMENTS IN RESPONSE TO EMPLOYER SUBMISSIONS

7. The submissions filed by the Ai Group (**AIG**)[5], BNSW & ABI (**BNSW**)[6] and Australian Chamber of Commerce and Industry (**ACCI**)[7] have been comprehensively addressed in the Reply Submissions of the ACTU and the CFMEU-C&G. We provide the following additional submissions with particular relevance to a number of awards in which the CFMEU-MD has an interest.

Submissions of the Ai Group

8. In these proceedings, the AIG variously urge this Full Bench (in undertaking its task to include a delegates' rights terms in modern awards) to 'adopt a cautious and conservative approach towards its task'[8], 'to be circumspect in its approach'[9] and to be 'careful in its approach.'[10]

9. In the submission of the CFMEU-MD there is nothing in the new statutory delegates rights framework (either in the text of the provisions themselves or in any ancillary materials, including the Revised Explanatory Memorandum) which indicate or even infer that the Commission should take such an approach or otherwise consider itself so constrained. On the contrary, it is evident that the Parliament intended that the new statutory delegates rights are to be enabling, that they are to be positive rights and expressly designed to practically support employee representation in workplaces, consistent with its international obligations including with respect to freedom of association.

10. By way of comparison, unlike the process where an individual party seeks a variation of a particular modern award/s on a merits basis, the Parliament has already determined and legislated that (i) new and improved statutory delegates rights are to be included in the *Fair Work Act 2009* (FW Act); and (ii) a delegates rights term must be included in each modern award by 1 July 2024. This is the task before the Commission. In our submission, there is no warrant for the Commission to feel compelled to read

[4] (AM2024/6) Reply Submission of the CFMEU – Construction & General Division (28 March 2024)
[5] (AM2024/6) Submission of the Ai Group (4 March 2024)
[6] (AM2024/6) Submission BNSW and ABI (29 February 2024)
[7] (AM2024/6) Submission of ACCI (1 March 2024)
[8] (AM2024/6) Submission of the Ai Group (4 March 2024) at [30]; [35]
[9] (AM2024/6) Submission of the Ai Group (4 March 2024) at [36]
[10] (AM2024/6) Submission of the Ai Group (4 March 2024) at [42]

constraints into the provisions where none exist or otherwise read down the positive rights as they have been drafted.

11. At **paragraphs [51] to [56] of the AIG submission**, contentions are made with respect to the expression "entitled to represent the industrial interests" in s.350C(2). AIG observe that the expression is not defined in s.350C(2), other than it includes 'disputes with their employer'. However, AIG proceed to urge the Commission to include in a new model award term, examples of what does not constitute the representation of industrial interests , or at least such examples being acknowledged in any future full bench decisions issued but this Full Bench. This is despite AIG acknowledging that that Commission cannot alter the meaning of s.350C or its practical application.[11]

12. The CFMEU-MD strongly rejects these submissions. It is to be assumed that if Parliament had intended to include a new definition of "entitled to represent the industrial interests" it would have done so in the formulation of the provision. In this regard, we concur with the reply submissions of the CFMEU-C&G submissions at paragraphs [19] – [20] (in response to BNSW submission regarding the same point).

13. At **paragraph [55] of the AIG submission**, it contends that the new delegates rights term should also expressly state that workplace delegates do not have a right to represent anyone who does not wish to be represented. We reject this contention. It ignores the practical reality that commonly workplace disputes are collective in nature and/or impact on particular cohorts of employees within an employer's operations. For example, disputes regarding standdowns across a workplace; changes to shift structures and arrangements; workers concern regarding health and safety affecting multiple employees (e.g., unsafe levels of heat; asbestos in the factory ceiling). Is it really to be expected that a workplace delegate undertaking their role in these types of disputes would need to speak with, and obtain the permission of each and every worker affected as to whether they wish to be represented in relation to that issue?

14. Such a requirement would negatively impact on a delegates' representative role as a workplace leader. This is particularly relevant in workplaces where there may not be high union density and/or there is a level of fear and concern amongst workers for being seen to raise a grievance of dispute. It is not difficult to foresee that such as requirement could easily be used by employers to fundamentally undermine the role of workplace delegates in their representative capacity and facilitate union busting at the site level.

[11] (AM2024/6) Submission of the Ai Group (4 March 2024) at [51] – [52]

15. At **paragraphs [57] – [70] of the AIG submission**, it makes a number of contentions with respect to delegates' access to paid time for training as provided under s350C(3)(b)(ii).

16. At the outset, it is important to recognise that many awards, including a number in which the CFMEU-MD has an interest, already contain terms providing an entitlement to paid dispute resolution training leave (of up to 5 paid days per calendar year) for eligible employee representatives on the giving of 6 weeks' notice. Importantly, these existing award terms apply in awards to <u>all</u> workplaces covered by the particular award with no exemptions for small business employers (for example, in the TCF Award 2020 and Timber Award 2020).

17. We submit that in fully supporting workplace delegates in their roles, any new award delegate rights term/s should build on the statutory rights and ensure that access to paid training leave is available irrespective of the size of the employer's operations. The implementation of, and furtherance of freedom of association principles, should rightly be concerned with the rights of all workplace delegates, not just those who work in medium or larger workplaces. If anything, the need for trained delegates in smaller workplaces may actually be more acute given there may only be a sole delegate for the site and/or where the profile of the workforce is such where a high percentage of employees come from a CALD and have English as their second language and/or where award non-compliance is prevalent.

18. AIG contend at **paragraphs [59] – [64]** that rather than a workplace delegate being paid a 'base rate of pay' for time off for training they should only receive a 'minimum rate of pay' as provided under the particular award. We oppose this submission. If workplace delegates are required to suffer financially for undertaking training, then this will undoubtedly act a major disincentive for workers to firstly, agree to becoming a delegate and secondly, committing to the training. Such an outcome would be inconsistent with the enabling purpose of the enactment of delegates rights provisions in the FW Act and more specifically, the inclusion of delegates rights terms in modern awards. It is significant that we are talking about workers who are covered by, and dependent on a modern award for their remuneration and conditions. Award dependent workers are by definition low paid, particularly so in the sectors in which the CFMEU-MD has members, including for example, the TCF industry, laundry industry, timber industry, soft furnishings etc.

19. We also reject the submissions of AIG at **paragraphs [65] – [70]** regarding various other limitations on delegates rights training to be included in a model award term. For instance, the requirement for 8 weeks' notice to be given to an employer of a workplace delegate seeking to access training. In our view

8 weeks is excessive and almost 25% greater than the notice period already required (6 weeks) in existing dispute resolution training leave in multiple awards. Inclusion of terms which also make delegate's training conditional upon the operational requirements of the employer should, we submit, also not be entertained ed by this full bench. Similarly, such a requirement goes way beyond what is already required in existing award training clauses and would facilitate employer refusal on spurious 'operational' grounds.

20. The **AIG at paragraphs [71] – [82]** make a number of contentions with respect to clarifying what is 'reasonable' in context of the rights contained in s350C(3) as per 'reasonable communication', 'reasonable access to the workplace and workplace facilities' and 'reasonable access to paid time', Specifically, they urge to the Commission to provide guidance as to the matters to be taken into account in determining reasonableness for paid time training (see proposed factors in paragraphs 74(a) – (g)). In our submission, the introduction of such factors into an award model term are unnecessary, are not contemplated by the parliament's reform amendments and would significantly undermine the right to paid training for delegates. It should not be for an employer to unilaterally decide which delegates receive paid training, when they receive it and how often. The factors proposed by AIG assume erroneously, that once a delegate is trained, they nay never need or require training again.

21. The **AIG submissions at paragraphs [77] – [80]** regarding 'reasonable communication', are also problematic in that they seek to curtail the practical operation of the rights which are afforded workplace delegates. For example, AIG submit at **paragraph [79]** that it is reasonable that delegates only seek to speak with employees during breaks. Such a restraint would require (an erroneous) reading down of the newly legislated rights contained in in s350C,and we submit there is no warrant to do so.

22. For the reasons outlined above we do not support the proposed model term provided by the AIG at paragraph [83] of their submission.

ACCI Submission

23. The ACCI submission proceeds on the basis of 4 principles, discussed further below.

24. **ACCI at paragraphs [5] – [11]** makes certain contentions in regard to **Principle 1: A Workplace Delegate is First and Foremost an Employee**. ACCI appears to labor the distinction between workplace delegates who are elected by employees at their workplace and those who are appointed by the relevant union of which they are a member/delegate. In doing so, ACCI seeks to infer that that this distinction is somehow a relevant consideration for the task before the Commission in the inclusion of delegates rights terms in modern awards. There is a barely disguised narrative in ACCI's submissions that where delegates are

appointed by their union then additional award constraints are required on their role, including how many delegates can be appointed by trade unions for a particular worksite, the scope of matters which the delegate can enliven and the time spent on such matters (see paragraph [11] of ACCI submission). We strongly reject these submissions. Section 350A(1) which defines a workplace delegate, simply confirms that:

> " A workplace delegate is a person appointed or elected, in accordance with the rules of an employee organization, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise."

25. The definition makes no distinction between delegates appointed or elected and for whom rights flow from such status under s350C(2) to s350C(5). Further there is no express or implied warrant in the new statutory provisions which support a contention that an award term should include restrictions on the number of delegates (appointed or elected) permissible for a particular workplace.

26. At **paragraphs [12] – [19]** ACCI make submissions with respect to their '**Principle 2: The Modern Award Provision(s) Should be Limited to the Delegates Rights Outlined in Section 350C'**. In substance, ACCI contend that any delegates rights term in an award should be confined to the subject matter as contained in s350C. The basis of this contention is said to be threefold (see paragraph [14]): (i) that a delegates rights term will be enforceable as a civil penalty provision under the FW Act; (ii) industrially, delegates rights have not traditionally conferred unfettered or untrammeled rights; and (iii) employers retain the managerial prerogative to generally direct when, and where how work is to be performed.

27. In response, we submit that the fact that a contravention of an award term is enforceable as a civil penalty provision is neither novel or unusual and is no reasonable basis for taking a narrow approach to regarding the inclusion of a delegates rights term/s in modern awards. Secondly, taking an expansive approach to the formulation of mandatory delegates rights clauses for awards is also not the equivalent of creating unfettered or untrammeled rights as asserted by ACCI. Such a contention is without foundation and should hold no weight. Thirdly, the contention regarding managerial prerogative is simplistic in light of numerous decisions of industrial tribunals and courts, including the High Court of Australia, as referenced by the CFMEU C&G in its submission at paragraph [30]. In this context, it is significant that the parliament has determined to legislate enforceable, substantive and positive statutory rights to support and facilitate delegates to effectively undertake their role in workplaces free of discrimination and adverse action. The concept of managerial prerogative cannot, by its very existence, extinguish those rights.

28. **ACCI's submission at paragraph [17]** regarding the Modern Award Objective in s.134, is solely employer focused and do not address the various other considerations relevant to the evaluative exercise required under s134.

29. At **paragraphs [20] – [28] of ACCI's submissions** they make contentions with respect to their **'Principle 3 - The Modern Award Provision(s) Should Include a Definition of "Industrial Interests"**. ACCI set out in paragraph [27] the categories of matters which it submits, should operate to confine the activities of a workplace delegates.

30. For the reasons outlined at paragraphs [11] – [12] above in response to a similar submission made by the AIG we reject ACCI's submission on this point. We reiterate that there is no necessity (either in principle or practically) for the term ''industrial interests" to be defined in an award delegates terms arising from s350C. Further, to do so in the manner urged by ACCI would unfairly limit the substantive and positive rights given to delegates from the new statutory provisions and would create circumstances where delegates could not undertake their role of representation in respect to important industrial matters.

31. At paragraphs [29] – [41] of ACCI's submissions they make contentions with respect to their **'Principle 4: The Modern Award Provision(s) should ensure that any right introduced aligns with what is reasonable , as contemplated by section 350C**.' In support of its contentions on this issue ACCI refer (at paragraph [35]) to a decision of the Full Bench of the Commission in the Annual Leave proceedings in the Four Yearly Review. In that decision, the issue of what is reasonable was considered in the context of a new award term which facilitated an employer directing an employee to take a period of (excessive) annual leave.

32. In our submission the reference to the Annual Leave decision does not assist the current full bench in any material or probative sense, in how to approach its task in the formulation of a delegates rights term/s for awards. The respective scenarios are not the same and cannot even be said to be relatively similar.

33. The Annual Leave proceedings occurred in the context of competing claims from industrial parties with respect to a wide range of annual leave terms in the context of a mandatory 4 Yearly Review. The consideration of a model excessive annual leave term for awards also had to directly take into account the NES on Annual Leave which expressly provided (and continues to provide) that a modern award or enterprise agreement may only include such terms (direction to take a period of annual leave) only if

the requirement is *reasonable* (see section 93(3)). The reasonableness requirement is essentially directed to the protection of an employee's entitlement to annual leave for the purpose of rest and recreation (supported by the other ancillary provisions in s 88(1) - period of annual leave may be taken by agreement, and s88(2) – an employer must not unreasonably refuse to agree to a request by an employee to take annual leave.

34. We submit the current proceedings are clearly distinguishable. ACCI seeks to rely on the Annual Leave decision as somehow grounding their argument that that the concept of what is reasonable for the purposes of a delegates rights clause should be qualified by a number of factors set out in paragraph [36] (a) to (f). Factors (a) to (d) are all focused on the interests of the employer; factors (e) and (f) go to the number of persons likely to be represented by the relevant delegates and factor (f) again raises the issue of the method in which delegates came to delegates i.e., whether delegates appointed or elected. Apart from their express preferencing of employer interests over those of delegates, more fundamentally, we submit the proposed factors are an attempt to insert irrelevant conditions on the rights contained in s350C(3) and should be rejected.

35. **ACCI at paragraph [42]** provide a proposed modern award provision(s). For the reasons outlined above we oppose ACCI's proposed model term.

BNSW & ABI Submission

36. The BNSW submission contends 4 primary submissions underpinned by an approach that the Commission 'should enter this process with a degree of restraint and should focus on simply giving effect to the new rights rather than amplifying or adding to them.'[12] In our submission, as a matter of principle, we oppose the minimalist, cautious approach urged by BNSW, and instead argue for a process which gives meaningful and practical effect to the new enabling delegates rights provisions, consistent with Australia's international obligations.

37. **BNSW at paragraph [2.7]** also raises unfounded assertions that unions may use the new provision to 'game' the system by appointing large numbers of employees as delegates as an 'industrial tactic'. This is pure scaremongering and should be rejected outright. Similar to the ACCI submission, such contention raises an irrelevant consideration as to the method by which a delegate becomes a delegate (appointment versus election). Again, we reiterate, the new provisions make no distinction in the level

[12] (AM2024/6) Submission of BNSW and ABI (29 February 2024) at [1.14(c)]

or type of rights afforded to a delegate determined by the method of appointment or election and the Commission should not feel compelled to create one, where none exists.

38. **BNSW at paragraphs [3.1] to [3.4]** make submission regarding 'What is a Workplace Delegate? BNSW submit that a workplace delegate is first and foremost an employee and warns against delegates becoming 'some form of quasi union official'.[13] The BNSW submissions on this issue seem to ignore the fact that even prior to the insertion of the recent provisions into the FW Act, delegates already had various statutory rights and protections, including general protections in Part 3-1 of the Act. Delegates both historically and under the new provisions, clearly remain both an employee of their employer but also undertake the activities as a delegate consistent with their union's rules and the provisions of the FW Act. That is, the purported conflict between the 2 – employee or delegate, is purely speculative given that employees have acted in the role of delegates for many decades.

39. **BNSW at paragraphs [4.1] – [4.5]** make submissions regarding 'freedom of association' but in essence are directed at attacking the legitimate rights of unions to represent workers in workplaces across Australia. These submissions are premised on a repeated assumption (at paragraphs 4.2 and 4.3) that the new s350C provides 'limited' rights and protections. Of course, this may be a matter of opinion, but what is clear from the text of the provisions themselves and the various Explanatory Memorandum, is that the new provisions are intended to provide positive and substantive rights for delegates. To reiterate, the provisions are enabling and beneficial in effect, consistent with various ILO international conventions.

40. **BNSW at paragraphs [5.1 – 5.3]** and **[6.1] – [6.4]** make a submission directed towards urging the Commission to take a minimalist approach to formulating a model delegates rights term(s) in modern awards, again based on its contention that s350C affords 'limited rights' to delegates. For the reasons outlined above, we reject this contention.

41. **BNSW at paragraphs [7.1] – [7.4]** submit that the Commission does not need to determine what constitutes 'industrial interests'. We concur. On this issue, we also refer to the reply submissions of the CFMEU-C&G at paragraphs [19] – [20].[14]

42. **BNSW at paragraphs [8.1] – [8.5]** make submissions with respect to the 'Communication Right' in s350C, and at **paragraphs [9.1] – [9.6]** the 'Access Right' and **at paragraphs [10.1] – [10.15],** the

[13] (AM2024/6) Submission of BNSW and ABI (29 February 2024) at [3.4]
[14] (AM2024/6) Reply Submission of the CFMEU – C&G (28 March 2024) at [19] – [20]

'Training Right'. The submissions proceed on the basis that these rights exist in isolation from each other. However, it is clear from the words of the text of s350C that the rights are inter-related and should be construed in that vein.

43. That is, the right to 'reasonable communication' with members and those eligible to be members, 'in relation to their industrial interests' (s350C(3)(a)) is then given practical application (for the purposes of representing those interests) by the following rights to:

    - 'reasonable access to the workplace and workplace facilities' (s350C(3)(b)(i)) and;
    - 'reasonable access to paid time, during normal working hours, for the purpose of related training' (s350(3)(b)(ii).

44. We reject the **submission of BNSW at paragraph [8.1(c)]** that 'to be reasonable, any communication will likely need to be in non-paid time unless otherwise agreed.' Such a conclusion would be inconsistent with the rights in s350C(3) giving reasonable access to the workplace and workplace facilities, such that these rights would be severely curtailed if they could only be exercised in non-paid time (i.e., unpaid breaks or before or after ordinary working hours). Unpaid meal breaks are just that – unpaid breaks necessary for rest, recovery and food and rehydration for both employees generally and employees who also undertake the role of delegates in the workplace. They are not, and were not intended to be, a substitute for the practical implementation of the positive and substantive rights in s350C. It would also disproportionately impact on women as both employees (who need representation) and as delegates or potential delegates (to provide such representation). This is because, despite advances in gender equality, women still typically have the primary responsibility for caring for children and other family members, and do not generally have the capacity to undertaken delegate duties before or after work.

45. With respect to the issue of paid training and the small business exemption in s350C(3)(b)(ii) we reiterate that the rights in s350C were intended by Parliament to be 'at the level of principle' and that the detail for particular industries, occupations or enterprises' [15]should be provided in modern awards.

46. For the awards in which the CFMEU-MD has an interest, many workplaces are award dependent and are small to medium operations. For example, workplaces with less than 15 employees in the clothing industry and other parts of the TCF sector are very, very common. If the small business exemption in s350C(3)(b)(ii) was simply inserted into the TCF Award 2020 this would result in a number of

[15] Revised Explanatory Memorandum for the Fair Work Legislation Amendment (Closing Loopholes) Bill (Cth) at paragraph [827]

detrimental outcomes. *Firstly*, the new delegates rights term would counterintuitively diminish current entitlements to paid dispute training leave under the TCF Award which apply irrespective of the size of the employer's operation; and *secondly*, it would defeat the beneficial purpose of the new provisions in facilitating trained delegates to enhance their role in representing members and those employees eligible to be members. The critical importance of having trained delegates in TCF workplaces which are often characterised by high levels of non-compliance with award entitlements cannot be overstated.

47. **BNSW at Annexure A** of its submission provide a draft model workplace delegates rights clause, which does little more than replicate aspects of the terms in s350C. If this had been the intention of Parliament in enacting the new provisions it cold have simply legislated a model term in a form which mirrored the statutory provisions. It did not do this, but instead empowered the Commission to consider an appropriate formulation for each modern award. For the reasons outlined above we reject BNSW's minimalist approach and proposal.

Submitted on behalf of the:

Construction, Forestry and Maritime Employees Union
(Manufacturing Division)

(2 April 2024)