

# Response to Statement [2025] FWCFB 293

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## Submission to the Fair Work Commission 16 January 2025

### Introduction

1. On 17 December 2025, the Full Court of the Federal Court of Australia (**the Full Court**) made orders quashing the determinations made by the Fair Work Commission (**the Commission**) to vary nine modern awards to include a delegates' rights term. The Full Court determined that the Commission went beyond the power conferred on it in three ways.
2. First, the Full Court stipulated that the Commission *'impermissibly confined the scope of the rights of workplace delegates to represent members of the relevant employee organisation and any other persons eligible to be such members'*<sup>1</sup> by confining those representational rights to representation of employees who are employed by the same employer as the workplace delegate. The Full Court finds that the delegates' rights provided in section 350C of the *Fair Work Act 2009* (**the FW Act**) did not act to confine those rights in that manner and that the delegates' rights clause must allow workplace delegates to represent the industrial interests of all eligible employees who work in the enterprise or regulated business, irrespective of whether they are employed by the same employer as the delegate.
3. Second, the Full Court found that the Commission impermissibly confined the scope of the delegates' right to communicate with members and those eligible to be members. The Commission's term stipulated that delegates were able to communicate with members and those eligible to be members for the purpose of representing their industrial interests. The Full Court found that section 350C(3) of the FW Act allowed delegates to communicate with those people in relation to their industrial interests, which is broader in scope than the Commission's term.
4. Third, the Full Court found that the Commission impermissibly limited the scope of delegates' rights when it included in its term a caveat that delegates' rights were subject to an obligation on behalf of the delegate to comply with their duties and obligations as an employee. The Full Court determined that where the Commission sought to enforce the delegates' obligations to their employers, it must also allow for reasonable exercise of

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<sup>1</sup> [Construction, Forestry and Maritime Employees Union v Australian Industry Group \[2025\] FCAFC 187](#), 109.

the delegates' rights where such reasonable exercise may be inconsistent with the delegates' duties and obligations to their employers.

5. Following this decision, the Full Bench of the Commission (**the Full Bench**) made a Statement on 23 December 2025<sup>2</sup> setting out its provisional view to amend the delegates' rights term in all modern awards. In addition to the nine awards subject to the Full Court's decision, the Full Bench is proposing to vary all other awards on its own initiative to remove an ambiguity or uncertainty or to correct an error.
6. ACCI welcomes the opportunity to provide submissions with respect to the Commission's proposed variations.
7. ACCI notes that its submissions are confined to addressing the decision of the Full Court and considers that the Full Bench ought to similarly confine its considerations. Additionally, ACCI notes that the development of the current delegates' rights term was subject to extensive consultation with stakeholders. ACCI therefore does not consider it appropriate for any issues outside of the Full Court's decision, including those raised in that initial process, to be agitated at this time. To the extent that those issues may be raised, and in the event that the Full Bench allows consideration of those issues, ACCI relies upon its previous submissions.

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<sup>2</sup> [Statement and Direction \[2025\] FWCFB 293](#).

# Response to the Provisional View

8. ACCI first observes the Full Bench’s preliminary view to vary all modern awards, rather than those awards that were the subject of judicial review. ACCI does not oppose this course of action.
9. ACCI also observes the Full Bench’s preliminary view that the variations would come into operation on 1 July 2024, giving them retrospective operation. While ACCI holds significant concerns around employers able to potentially be found to have breached the delegates’ rights term due to variations made as a result of this process, ACCI acknowledges that the date of operation, pursuant to the Full Court’s decision, and clause 95 of Schedule 1 to the FW Act, is required to be 1 July 2024.
10. The Full Bench has helpfully provided a version of the delegates’ rights term demonstrating where the proposed changes differ from the existing standards award delegates’ rights term.
11. The Full Bench has proposed to change the defined term ‘*eligible employees*’ to ‘*eligible workers*’. ACCI accepts that the change in the definition addresses the decision of the Full Court. ACCI also notes that the change to the definition is consistent with the language of the FW Act, and on this basis does not oppose the change. ACCI does note that the language of the existing delegates’ rights term appropriately sought to impose sensible restrictions on workplace delegates, providing clarity with respect to which delegates may represent the interests of particular employees.
12. ACCI does, however, draw the Full Bench’s attention to the unintended consequence of the change in language, being that the ratio in XX.8 with reference to a workplace delegate’s entitlement to reasonable access to training, may be expanded under the new definition. By calculating the number of delegates who may be entitled to paid training time with respect to eligible workers, may greatly increase the number of workplace delegates entitled to paid training. To preserve the Commission’s original ratio, which was the subject of extensive consultation, ACCI proposes that XX.8(b) reads:

*The number of eligible workers will be determined on the day a delegate requests paid time to attend training, as the number of eligible workers who are:*

  - (i) full-time or part-time employees; or*
  - (ii) regular casual employees*

*of the employer to which the request is made.*
13. The Full Bench has included in its proposed view to add a definition of ‘*workplace delegate*’ to the delegates’ rights term. ACCI considers that it is more appropriate to provide that ‘*workplace delegate*’ is defined within the FW Act, rather than recreate the definition within the awards. The Full Court made no order indicating that the Commission had erred in its current expression of the definition of ‘*workplace delegate*’ and the Statement made by the Full Bench does not provide any explanation for the change.

14. ACCI recommends that the definition is removed from the provisional view and that the definition of 'workplace delegate' as it was provided in the existing term is retained. For completeness, ACCI supports the definition to read:

***Workplace delegate*** has the meaning given by section 350C(1) of the Act.

15. The Full Bench at clause XX.6 have amended the wording from 'for the purpose of representing their industrial interests' to 'in relation to their industrial interests'. ACCI accepts that this amendment addresses the decision made by the Full Court.
16. At clause XX.9, the Full Bench has made amendments to address the Full Court's findings by providing that a workplace delegate may, if in the reasonable exercise of their entitlements, fail to comply with their duties and obligations as an employee, and may, also in the reasonable exercise of their entitlements, hinder, obstruct or prevent the normal performance of work. ACCI considers that a failure to comply with the duties and obligations of employment and to hinder, obstruct or prevent the normal performance of work would constitute an unreasonable exercise of the entitlements afforded to a delegate.
17. ACCI also raises concerns that the wording of the provisional view appears to express what may be perceived as permission for workplace delegates to fail to comply with their duties and obligations as an employee or to hinder, obstruct or prevent the normal performance of work. XX.9(b) would benefit from clarity that workplace delegates are not in all circumstances allowed to set aside their workplace obligations and those around them.
18. ACCI proposes that a simple change in language would address its concerns to amend clause XX.9(b) to the following:

*(b) A workplace delegate must, unless it is necessary to the reasonable exercise of their rights under clause XX.9:*

*(i) comply with their duties and obligations as an employee; and*

*(ii) not hinder, obstruct or prevent the normal performance of work.*

19. The intention is that a workplace delegate would then have to demonstrate that a failure to comply with their duties and obligations or their hinderance, obstruction, or prevention of the normal performance of work was necessary for them to reasonably exercise their rights. ACCI recommends that the Full Bench also consider adding a note to clause XX.9 that the reasonable exercise of a workplace delegate's rights must in all circumstances be lawful.
20. ACCI supports the Full Bench's approach in retaining elements of the clause, rather than removing it, as it acknowledges that workplace delegates are employees first and foremost and are required to discharge their duties accordingly.

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