

FAIR WORK COMMISSION Matter No.s AM2024/6 and AM2025/28

Re Variation of modern awards to include a delegates' rights term

Re Variation of delegates' rights term in modern awards

SUBMISSIONS OF THE AUSTRALIAN COUNCIL OF TRADE UNIONS¹

INTRODUCTION

1. The Australian Council of Trade Unions (“**the ACTU**”) is Australia’s recognised peak council for trade unions, consisting of 36 affiliated unions and 7 State and regional trades and labour councils. ACTU affiliated unions have almost 2 million members who are engaged across a broad spectrum of industries and occupations in the Australian economy.
2. The ACTU makes these submissions pursuant to the Statement and Direction (“**the Full Bench’s Statement**”) of the Full Bench of 23 December 2025. The Full Bench’s Statement concerned the recent Full Federal Court decision to make orders quashing determinations made by an earlier, differently constituted, Full Bench of the Fair Work Commission (“**the Initial Full Bench**”) to vary 9 modern awards to include a delegates’ rights term: *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187 (“**the Delegates’ Rights Decision**”). In the Full Bench’s Statement, the Fair Work Commission (“**the Commission**”) has indicated a provisional view that it proposes to vary modern awards to include a new delegates’ rights term with an operative date of 1 July 2024. A copy of a draft variation is included in the Full Bench’s Statement.
3. The ACTU’s submissions address the scope and operation of the Commission’s powers to vary modern awards to include a delegates’ rights term, the appropriate operative date for such variations, and the content of the proposed standard term. In doing so, the ACTU responds to the Full Bench’s Statement and the issues arising from the *Delegates’ Rights Decision*. Our submissions also identify necessary amendments to the proposed draft delegates’ rights term to ensure compliance with the legislative scheme and the Federal Court’s reasoning, while supporting the Commission’s provisional approach to the urgent and effective implementation of these rights across all relevant modern awards.

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POWERS OF THE FULL BENCH TO MAKE THE PROPOSED VARIATIONS AND OPERATIVE DATE

4. For the reasons that follow, the ACTU submits that the Commission may rely on powers in clause 95 of Schedule 1 and/or sections 160 and 165 to make the necessary variations to modern awards following the *Delegates' Rights Decision*.

Clause 95 of Schedule 1

5. The ACTU strongly supports the Full Bench's proposal to exercise its power under clause 95 of Schedule 1 to the *Fair Work Act 2009* ("the FW Act") with respect to the 9 modern awards the subject of the *Delegates' Rights Decision*, in accordance with the writ of mandamus issued by the Federal Court. Clause 95 of Schedule 1 provides:

Clause 95 of Schedule 1 to FW Act

95 FWC to vary certain modern awards

- (1) This clause applies in relation to a modern award if the award:
 - (a) is made before 1 July 2024; and
 - (b) is to be in operation on that day.
- (2) The FWC must, by 30 June 2024, make a determination varying the modern award to include a delegates' rights term.
- (3) A determination made under subclause (2) comes into operation on (and takes effect from) 1 July 2024.
- (4) Section 168 applies to a determination made under subclause (2) as if it were a determination made under Part 2 - 3.

6. We note that while subclause (2) refers to determinations being made prior to 30 June 2024, in our submission the Commission has a continuing power under clause 95 to vary a modern award of the type referred to in subclause (1). In this respect, the requirement to act before 30 June 2024 may be construed, in the language of earlier decisions of tribunals and courts, as directory rather than mandatory. Applying the High Court's more recent and preferred purposive approach, subclause (2) when considered in the context of the FW Act does not disclose any legislative intent to impose an inviolable jurisdictional limitation on making a determination *after* 30 June 2024.² Such a construction must follow from both the words of the provision and its content:

² *Project Blue Sky v. ABA* [1998] HCA 28 from paragraph [91] to [93] and *Minister for Immigration and Citizenship v SZIZO* [2009] HCA 37 at paragraphs [35] and [36].

- (a) Clause 95 directs timely action but does not attach any express bar, or similar “cannot act after” consequence.
 - (b) The surrounding legislative scheme, in particular, ss.149E & 205A of the FW Act, depend functionally on awards containing a valid delegates’ rights term; reading clause 95 as lapsing by *implication* after the date would frustrate the statute’s broader purpose.
 - (c) Section 205A(3) of the FW Act contemplates the variation of delegates’ rights terms in awards.
7. Further, support for a construction which recognises an ongoing availability of power may be drawn from s.33(3) of the *Acts Interpretation Act 1901*:
- (3) Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
8. For the above reasons, the ACTU submits that the Commission retains power not only with respect to the 9 awards the subject of the writ of mandamus to remake the delegates’ rights term but *also* with respect to the variation of any other award meeting the criteria described in subclause 95(1).
9. In terms of the operation of any determination, subclause (3) of clause 95 appears intended to afford the Commission no discretion concerning when a determination comes into effect, stipulating that a determination made under subclause (2) comes into operation on (and takes effect from) 1 July 2024. The ACTU therefore respectfully submits that it is appropriate and in context, likely necessary, that the Commission proceed on the basis that any determination made under clause 95 will be taken to have come into operation from 1 July 2024.

Section 160

10. *In addition* to its powers under clause 95, the ACTU agrees with the Full Bench’s provisional view that the Commission has power to amend the other relevant modern awards under s.160 of the FW Act. Under s.160 of the Act, the Commission is able to vary an award where, *inter alia*, an error is shown in that a provision of the award was made in a form which did

not reflect the tribunal's intention.³ The Initial Full Bench can only be taken as having intended to make a determination varying the modern awards to include a delegates' rights term pursuant to clause 95 of Schedule 1, however, in the exercise of its powers to meet that intention, the Federal Court has found the Initial Full Bench erred. The finding of error was expressly able to be made in relation to the 9 awards before the Court notwithstanding the lack of reasons published by the Initial Full Bench.⁴ In such circumstances, we submit that s.160 can only reasonably be construed as being available to the current Full Bench to correct the errors made by the Initial Full Bench. In the alternative, the ACTU submits that the operation of the purported delegates' right term in those awards not directly involved in the federal court proceedings is now uncertain in a manner that also enables, and indeed calls for, variation under s.160 of the FW Act.

11. When exercising power under s.160 of the FW Act, the Commission is able to make a determination operate retrospectively pursuant to s.165(2) if the Commission is satisfied that there are "exceptional circumstances". The Commission has given the provisional view that it is so satisfied and proposed to make the variation effective as of 1 July 2024.⁵ The ACTU respectfully agrees that exceptional circumstances exist and that making a variation effective as of 1 July 2024 is appropriate. Exceptional circumstances arise from the following:

- (a) The scheme of the Act was that a (valid) delegates' rights term would be in place by 1 July 2024.
- (b) The Initial Full Bench made determinations purportedly consistent with that scheme.
- (c) The variation of modern awards to include a delegates' right term was relevant not only to the exercise of awards rights but also to be used as a comparator in s.205A in the agreement approval process.
- (d) In broad terms, pending the decision of the Federal Court, parties and the Commission have effectively proceeded on the basis that a valid comparator term was contained in the awards.
- (e) The *Delegates' Rights Decision*, with the associated writ quashing the determinations of the Initial Full Bench, has removed that comparator term with respect to the 9 awards before the Court and cast uncertainty over the

³ See for example *Journalists Published Media Award 2020* [2022] FWC 839 at paragraph [8]; *King v Melbourne Vicentre Swimming Club Inc* [2020] FCA 1173 at paragraph [130].

⁴ The issue is averred to at paragraph [11] of the *Delegates' Rights Decision*.

⁵ Paragraph [14] of the Full Bench's Statement.

remaining materially similar award delegates' rights terms in all other modern awards.⁶

12. Such circumstances are, we submit, self-evidently exceptional and enliven the power to make a retrospective variation of the affected modern awards.
13. Further, if s.160 is to be relied upon to vary the awards, it is appropriate that the variations are made with effect from 1 July 2024 for reasons including:
 - (a) The purpose of the amendments made by the Closing Loopholes legislation was unequivocally to insert (valid) delegates' rights terms into modern awards by 1 July 2024.
 - (b) The regularising of the statutory agreement approval scheme will likely be assisted by the making of variations to the awards to take effect from 1 July 2024.
 - (c) To the extent that the variations provisionally proposed by the Commission, and the alternative variations proposed by the ACTU in these submissions expand on the substance of the current purported delegates' rights terms, the terms do so minimally to enable the exercise of rights otherwise contained in s.350C.

CONTENT OF DRAFT AWARD DELEGATES' RIGHTS TERM

14. The Full Bench's Statement indicates that the Commission has formed the *provisional* view that all modern awards should be varied to include a delegates' rights term in the form set out in **Attachment C** to the Full Bench's Statement to address the deficiencies identified by the Full Court. The ACTU broadly supports the proposed approach subject to specific matters raised below.

Proposed Variations to the Definition of Eligible Employee / Eligible Worker

15. The ACTU supports the provisional view of the Full Bench to substitute the word "employees" with "workers" in clause XX.2(c). The substitution is appropriate to facilitate the required⁷ broadening of the application of the award entitlements of workplace delegates to include

⁶ See *Applications by John Holland Pty Ltd and Bouygues Construction Australia Pty Ltd* [2025] FWCFB 294 at [74] to [88].

⁷ *Delegates' Rights Decision* at paragraph at [109].

members, and any other persons eligible to be such members, in the relevant enterprise beyond employees of the workplace delegates' employer.

16. The ACTU also supports the provisional view of the Full Bench to include the words "who work in a particular enterprise" in the definition of clause XX.2(c) as necessary and appropriate to capture the relevant cohort described in s.350C.⁸
17. For completeness, the ACTU further supports the associated consequential changes to the remainder of the clause substituting "eligible employee" with "eligible worker" and "eligible employees" with "eligible workers".

Proposed Variation from "for the Purpose of" to "in Relation to"

18. The ACTU supports the provisional view of the Full Bench to amend clause XX.6 to substitute the words "for the purpose of" with "in relation to". The change is a straight-forward and necessary amendment to broaden the award entitlements of workplace delegates in accordance with paragraphs [79] to [87] of the *Delegates' Rights Decision*.

Proposed Variation to Insert Definition of Workplace Delegate

19. The ACTU supports the provisional view of the Full Bench to amend clause XX.2 to insert the definition of a workplace delegate from s.350C(1). The insertion of the definition will assist parties in appropriately construing, applying and, where necessary, enforcing the award term.

Proposed Variation to Obligations of Workplace Delegates' Duties etc

20. The ACTU supports the provisional view of the Full Bench to amend clause XX.9(a) to remove subparagraphs (i) and (iii). The ACTU does not however, support the Full Bench's provisional view to insert a new clause XX.9(b). The proposed insertion is as follows:
 - (b) A workplace delegate must, other than in the reasonable exercise of the entitlements under clause XX:
 - (i) comply with their duties and obligations as an employee; and
 - (ii) not hinder, obstruct or prevent the normal performance of work.

⁸ *Delegates' Rights Decision* at [32] to [51].

21. There can be no question that amendment of the clause is necessary following the *Delegates' Rights Decision*. The Court usefully summarised the required amendment at paragraphs 111 and 112:

111. *Third*, cl 29A.9(a)(i) and cl 29A.9(a)(iii) impermissibly limit the scope of workplace delegate's rights that are otherwise provided for by the delegates' rights term. Clause 29A.9(a)(i) does this by making those rights subject to an obligation on the part of the delegate to comply with their duties and obligations as an employee. If a clause seeking to preserve those duties and obligations is to be included at all, it should ensure that the delegates' rights provided for by cl 29A may be exercised in a way that is inconsistent with those other duties and obligations of an employee only where the delegate is reasonably exercising the delegates' rights provided by the clause.

112. Clause 29A.9(a)(iii) is beyond power because it requires the workplace delegate not to hinder, obstruct or prevent the normal performance of work, regardless of whether to do so is a reasonable exercise of the delegate's rights. If a clause directed at not hindering or obstructing the normal performance of work is to be included at all, it should ensure that the delegate's rights provided for by cl 29A may be exercised in a way that is inconsistent with that obligation not to hinder or obstruct only where the delegate is reasonably exercising the delegates' rights.

22. The ACTU submits, consistent with the above passage, that neither an obligation on the part of the delegate to comply with their duties and obligations as an employee nor a requirement that the workplace delegate not to hinder, obstruct or prevent the normal performance of work should be included as award terms at all. Such obligations, which potentially expose workplace delegates to award contravention proceedings, had not been present in modern awards prior to the Initial Full Bench's purported delegates' award term and have little or no foundation in Division 3 of Part 2-3 of the Act. Respectfully, elevating unspecified non-award duties and obligations of a workplace delegate or an obligation to not affect normal performance of work to award obligations is neither necessary nor incidental to the Commission's function under cl. 95 of Schedule 1 to the Act, nor mandated by s.149E.

23. The ACTU primary position is therefore that no reference is made to the matters contained in subparagraphs (i) and (iii) of the proposed XX.9(b).

24. In the alternative, if the Full Bench is minded to make the entitlement of a workplace delegate to exercise their entitlements under the clause partially limited by their duties and obligations as an employee or a duty not to hinder, obstruct or prevent the normal performance of work, such limitation should be confined to the boundaries of the entitlement only, not the subject of additional award obligations. We submit that, a more appropriate example of a clause drafted pursuant to the alternative approach described in the *Delegates' Rights Decision* would be:

- (b) A workplace delegate may exercise the rights conferred by cl.XX, even if that exercise is inconsistent with:
- (i) other duties or obligations of the employee; or
 - (ii) any requirement not to hinder, obstruct or prevent the normal performance of work;
- provided the delegate is acting reasonably in exercising those rights.

Corresponding Obligations on Employers for Workplace Delegates Employed by Other Employers

25. While the Full Bench’s provisional draft clause deals primarily with the changes referred to in the Federal Court’s summary paragraphs in [108] to [113] of the *Delegates’ Rights Decision*, the ACTU respectfully submits that a necessary consequential amendment must also be made to provide for the exercise of entitlements contained in s.350C in relation to an employer who is not the employer of a workplace delegate. Such rights were not included in the impugned term determined by the Initial Full Bench in the context of that Full Bench confining the rights of workplace delegates to the industrial interests of employees employed by the same employer. Plainly however, that approach has been rejected by the Federal Court.
26. A key drafting mechanism for the Initial Full Bench confining the rights of the workplace delegate was to define “employer” for the purposes of the clause to being an employer of the workplace delegate. The definition has again been in the provisional draft delegates’ rights term in the now proposed XX.2(a).
27. That definition however means that the reference to “employer” in clause XX.7, which deals with types of access to be provided to a workplace delegate, does not extend to an employer who is not the workplace delegate’s own employer. The ACTU submits that if the delegates’ rights term is to “make available”⁹ the entitlements in s.350C in relation to eligible workers employed by another employer at the same enterprise, the term must also impose a corresponding, or correlative, duty on those other employers to allow for the exercise of those rights.¹⁰ In that respect, the provisional clause XX.7 falls short.¹¹
28. The ACTU acknowledges the urgency and nature of the task before the Commission and that the exigencies of the current Full Bench¹² have necessarily foreshortened the consultation process that the Commission has adopted in order to formulate an appropriate and

⁹ The term make available being adopted by the Court in *Delegates’ Rights Decision* at [16].

¹⁰ *Ibid.*

¹¹ *Ibid* at [16], [66] and [109].

¹² Outlined in the Full Bench’s Statement at [10] and [11].

jurisdictionally sound replacement award delegates' rights term. In the particular circumstances confronting the Full Bench, the ACTU proposes the inclusion of a supplementary clause that (subject to the changes necessitated by the Federal Court) leaves in place the bulk of the framework established by the Initial Full Bench with respect to workplace delegates and their employers while referring specifically to s.350C in relation to employers in the same enterprise who do not however employ the workplace delegate. The ACTU's proposed supplementary subclause, provided below, utilises the wording of the civil penalty provisions in s.350A as a supporting scaffold for the exercise of the workplace delegates' rights contained in s.350C in modern awards.¹³ The "Note" is posited to assist those covered by the award in understanding the intended coverage of the clause.

XX. 11 Workplace Delegates Not Employed by Employer

- (a) This subclause applies to an employer who is not the employer of a workplace delegate in circumstances where that workplace delegate seeks to exercise rights in relation to the industrial interest of eligible workers.
- (b) The workplace delegate is entitled to exercise the rights provided in section 350C of the Act.
- (c) An employer must not:
 - (i) unreasonably fail or refuse to deal with a workplace delegate; or
 - (ii) knowingly or recklessly make a false or misleading representation to a workplace delegate; or
 - (iii) unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate under this award.

Note: the eligible workers referred to in paragraph (a) above are members and persons eligible to be members of the workplace delegate's organisation who are engaged in the same business, activity, project or undertaking as the workplace delegate.

¹³ Noting that s.350A provides corresponding rights on employers of workplace delegates only, an enforcement mechanism is necessary within the award itself in relation to other employers.

29. The ACTU does not advance the subclause above as a permanent or comprehensive solution to the Commission's obligation to provide for the exercise of rights in awards. We acknowledge that it appears likely that Parliament did not intend s.350C to be replicated verbatim within the award system.¹⁴ However, in the present circumstances, adoption of the clause may assist in expeditiously providing for an award delegates' rights terms in a manner that is jurisdictionally sound whilst involving minimal change in the context of the time available and appropriate application of the clause.
30. Accordingly, should the Full Bench adopt the ACTU proposal, we respectfully submit that any decision of the Commission explain the circumstances in which the clause has been included and note that its terms may be subject to future review, including on application by an interested party.

CONCLUSION

31. For the foregoing reasons, the ACTU submits that the Commission should proceed to vary all relevant modern awards to include a delegates' rights term, subject to the amendments and clarifications advanced in these submissions. The ACTU further submits that such variations should operate retrospectively from 1 July 2024, in accordance with the statutory framework and, if s.160 is relied upon, the exceptional circumstances identified in these submissions.
32. Finally, the ACTU appreciates the opportunity to make submissions on these matters and would seek to participate in any further process the Commission may consider appropriate to ensure the effective implementation of delegates' rights terms in modern awards.

Australian Council of Trade Unions
16 January 2025

¹⁴ See the Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 paragraphs [23], [85] and [791].