

Australian Industry Group

Delegates' Rights Term

Submission
(AM2024/6 & AM2025/28)

16 January 2026



AM2024/6 & AM2025/28

DELEGATES' RIGHTS TERM

1. On 28 June 2024, by a statement¹ issued by Vice President Asbury, the final form of a new award term concerning '*workplace delegates' rights*' (**Model Clause**) to be inserted in all modern awards was revealed. This followed extensive submissions made to the Fair Work Commission (**Commission**) by a large number of interested parties. Numerous issues were the subject of contest and in some cases, the nature and extent of the contest was significant. Having regard to the various competing submissions made, the majority of a Full Bench of the Commission determined the terms of the Model Clause. In so doing, it appears to have struck a fine balance between the creation of a raft of new rights for union delegates on the one hand, and the implementation of countervailing limitations on the other, which had the effect of placing certain fetters on the entitlements afforded by the Model Clause.
2. On 23 December 2025, the Commission expressed various '*provisional views*' in a statement (**Statement**) concerning the Model Clause.² This followed the Federal Court of Australia's (**Court's**) judgement in *Construction, Forestry and Maritime Employees Union v Australian Industry Group*³ (**Judgement**). In short, the Commission has proposed various changes to the Model Clause that are said to address deficiencies identified by the Court in its Judgement.
3. Whilst we acknowledge that the variations proposed would bring the Model Clause into conformity with ss.350A – 350C of the *Fair Work Act 2009* (**Act**) as construed by the Court, the practical effects of the changes and the Judgement are potentially deeply problematic. At the very least, the proposed changes will undermine the balance that appears to have been struck in the determination of the initial terms of the Model Clause and the utility of the parameters or limitations

¹ *Variation of modern awards to include a delegates' rights term* [2024] FWC 1699 at Attachment A.

² *Variation of modern awards to include a delegates' rights term and Variation of delegates' rights term in modern awards* [2025] FWCFB 293.

³ [2025] FCAFC 187.

on the exercise of delegates' rights determined to be necessary by the Commission.

4. The need for changes as now proposed highlight a major difficulty arising from the manner in which the relevant legislative provisions have been drafted. In particular, whilst the Act purports to give the Commission the task of setting certain parameters around the exercise of delegates' rights⁴, the expression of the rights in ss.350C(2) – 350C(3) of the Act materially limit the extent to which the Commission can in fact exercise a discretion to do so. Accordingly, the Act affords the Commission a limited and difficult task. We doubt that such strict confinement of the Commission's role in determining the content of delegates' rights terms was envisaged by the legislature. We nonetheless acknowledge that any arguable deficiency in the legislation or unintended consequence of its operation is not a matter that can be addressed by the Commission, and we do not submit that the Commission should demur from bringing the Model Clause into conformity with the reasoning in the Judgement.
5. Having regard to the context in which the Model Clause was developed (as described in the opening paragraph above) and in the interests of expeditiously addressing any current deficiency in the clause based on the reasoning of the Court, we submit that any variations made by the Commission in these proceedings should do no more than what is strictly necessary to address the deficiencies identified in the Judgement, in a manner that minimises the extent to which the revised Model Clause diverges from the balance that was struck when it was originally made. We acknowledge that the variations proposed by the Commission in the Statement appear to do so.

⁴ See for example s.350C(4) of the Act.