

FAIR WORK COMMISSION Matter Nos. 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 MARITIME OFFICERS UNION

INTRODUCTION

1. The Australian Maritime Officers Union (“**the AMOU**”) represents maritime officers, including Ship’s Masters, Deck Officers, and Marine Pilots, and many others working in port services and other aspects of the maritime industry in Australia.
2. The AMOU 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 AMOU’s submissions address the content of the proposed standard term. In doing so, the AMOU 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.
4. The AMOU’s submissions draw on and support the submissions of the ACTU in this matter.

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CONTENT OF DRAFT AWARD DELEGATES' RIGHTS TERM

5. 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 AMOU broadly supports the proposed approach subject to specific matters raised below.

Proposed Variations to the Definition of Eligible Employee / Eligible Worker

6. The AMOU 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 required¹ broadening of the application of the award entitlements of workplace delegates to include members, and any other persons eligible to be such members, in the relevant enterprise beyond employees of the workplace delegates' employer.
7. The AMOU 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.²
8. For completeness, the AMOU 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"

9. The AMOU 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 straightforward 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

10. The AMOU 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.

¹ *Delegates' Rights Decision* at paragraph at [109].

² *Delegates' Rights Decision* at [32] to [51].

Proposed Variation to Obligations of Workplace Delegates' Duties etc

11. The AMOU supports the provisional view of the Full Bench to amend clause XX.9(a) to remove subparagraphs (i) and (iii). The AMOU 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.
12. 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.
13. The AMOU 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.

14. The AMOU primary position is therefore that no reference is made to the matters contained in subparagraphs (i) and (iii) of the proposed XX.9(b).
15. 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

16. 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 AMOU 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.
17. 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).
18. 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 AMOU submits that if

the delegates' rights term is to "make available"³ 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.⁴ In that respect, the provisional clause XX.7 falls short.⁵

19. The AMOU acknowledges the urgency and nature of the task before the Commission and that the exigencies of the current Full Bench⁶ have necessarily foreshortened the consultation process that the Commission has adopted in order to formulate an appropriate and jurisdictionally sound replacement award delegates' rights term. In the particular circumstances confronting the Full Bench, the AMOU 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 AMOU'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.⁷ 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

³ The term make available being adopted by the Court in *Delegates' Rights Decision* at [16].

⁴ *Ibid.*

⁵ *Ibid* at [16], [66] and [109].

⁶ Outlined in the Full Bench's Statement at [10] and [11].

⁷ 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.

are engaged in the same business, activity, project or undertaking as the workplace delegate.

20. The AMOU 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.⁸ 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.
21. Accordingly, should the Full Bench adopt the AMOU 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

22. For the foregoing reasons, the AMOU 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.
23. Finally, the AMOU 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 Maritime Officers Union
16 January 2026

⁸ See the Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 paragraphs [23], [85] and [791].