

16 January 2026

The Honourable Justice Adam Hatcher
President
Fair Work Commission
Terrace Towers
80 William Street
East Sydney NSW 2011

Email: awards@fwc.gov.au

Dear Justice Hatcher,

RE: Variation of modern awards to include a workplace delegates' rights term – Response to Statement [2025] FWCFB 293 following the Full Federal Court decision

The Australian Resources and Energy Employer Association (AREEA) welcomes the opportunity to provide brief submissions in response to the Full Bench's Statement ([2025] FWCFB 293) issued following the Full Federal Court's decision (FCAFC 187) quashing the Commission's June 2024 workplace delegates' rights award term.

AREEA's submission is intentionally confined. We recognise the Commission has indicated it will finalise a revised award term on an expedited basis and without reopening the broader consultation process undertaken in 2024.

In those circumstances, it is both appropriate and necessary that the Commission's task be limited to making only those changes required to give effect to the Court's findings.

1. Scope of the Commission's task following the Court's decision

The Full Federal Court identified three jurisdictional errors in the Commission's original award term. The consequence of that finding is not to invite reconsideration of the policy merits, structure or operation of the workplace delegates' rights regime more generally, but to require the Commission to correct those specific errors.

AREEA submits that, given:

- the Court's clear articulation of the nature of the errors identified;
- the Commission's stated intention to proceed on a truncated basis; and
- the extensive consultation already undertaken during the original award variation process,

the Commission should confine itself strictly to making the minimum amendments necessary to bring the award term into conformity with the *Fair Work Act 2009* (FW Act), as construed by the Court.

Any broader reconsideration of drafting choices, scope, or balance would sit uneasily with both the procedural posture of this matter and the Court's reasons.

2. AREEA's fundamental concerns remain (but not pressed here)

AREEA reiterates that it continues to hold serious concerns about the workplace delegates' rights provisions introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, including their breadth, the reverse onus imposed on employers, and the significant compliance and dispute risks they create - particularly in complex, safety-critical and remote resources and energy operations.

Those concerns extend equally to the delegates' rights award term.

However, AREEA accepts this process is not the appropriate forum for ventilating those broader objections and will reserve its substantive policy feedback for the statutory review of the Closing Loopholes legislation currently on foot.

On broader issues in relation to the delegates rights' modern award term that are not immediately relevant to this proceeding, AREEA relies upon its previous 2024 submissions.

3. Retrospective operation and compliance risk

AREEA notes the Full Bench's provisional view that the revised delegates' rights term must operate retrospectively from 1 July 2024.

While AREEA recognises that the Court's orders and the FW Act may require this outcome as a matter of law, we wish to draw attention to the practical and compliance risks this creates for employers.

The delegates' rights provisions in s 350C of the FW Act are civil remedy provisions. Employers may face significant penalties if found to have unreasonably hindered or prevented a workplace delegate in the exercise of their rights. Since 1 July 2024, employers have been entitled - and indeed required - to order their conduct by reference to the award term as it then stood.

It is possible, and in AREEA's view likely, that some employers refused or limited certain representation, communication or facilities access requests in reliance on the original award term that has now been quashed. While AREEA is not presently aware of specific enforcement action affecting its members, the risk is not theoretical.

AREEA submits that the Commission should take all available steps to ensure that employers are not exposed to penalties or adverse findings for conduct undertaken in good faith compliance with the law as it stood at the relevant time. At a minimum, the Commission should make clear - whether in the award term, an accompanying note, or its reasons - that compliance with the original term prior to its quashing should not give rise to penal consequences.

4. Technical matters arising from the provisional draft

AREEA is the national employer association for Australia's resources and energy sector and is the industry representative member of the Australian Chamber of Commerce and Industry (ACCI).

As such, AREEA has reviewed and provided input into ACCI's submission to the Commission, including in relation to a number of detailed technical and drafting matters arising from the Full Bench's provisional view.

In those circumstances, AREEA does not propose to repeat or restate ACCI's submissions in full. Rather, AREEA supports ACCI's analysis on those matters and confines the observations below to a small number of key points.

- **Terminology changes:** AREEA accepts that amendments expanding coverage from "eligible employees" to "eligible workers" are required to reflect the Court's findings and the language of s 350C of the FW Act.

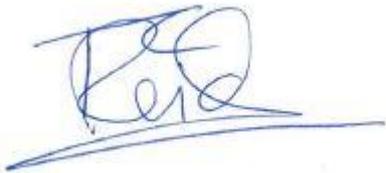
- **Communication rights:** AREEA acknowledges that the shift from communications “for the purpose of representing” to communications “in relation to” industrial interests is necessary to address the Court’s second ground of error.
- **Exercise of rights and employee obligations:** AREEA is concerned that aspects of the provisional drafting may be read as positively authorising non-compliance with employee duties or obstruction of work, rather than recognising such outcomes only where strictly necessary to the reasonable exercise of statutory rights. Clear drafting that preserves employee duties as the default requirements of that individual is essential.
- **Definitions:** AREEA queries the need to introduce award-level definitions where the FW Act already supplies a statutory definition, absent a clear explanation as to why such duplication is required to remedy the errors identified by the Court.

Conclusion

AREEA supports a measured and legally orthodox response to the Full Federal Court’s decision. In our submission, that response should be confined to correcting the specific jurisdictional errors identified, without reopening broader policy or drafting questions that were extensively contested in 2024.

AREEA appreciates the opportunity to provide these submissions and would be pleased to assist the Commission further if required.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Tom Reid', written over a horizontal line.

TOM REID
Director, Industry & Advocacy
AREEA