

IN THE FAIR WORK COMMISSION

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

Case no.: **AM2024/6 & AM2025/28**

SUBMISSIONS OF THE CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION, CONSTRUCTION AND GENERAL DIVISION

Background

1. On 23 December 2025, the Full Bench of the Fair Work **Commission** issued a **Statement and Direction** (*Variation of modern awards to include a delegates' rights term* [2025] FWCFB 293):
 - a. acknowledging the decision and orders of the Full Court of the Federal Court in *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187 (the **Full Court Decision**):
 - i. quashing determinations made by the Commission (in case number AM2024/26) pursuant to *Fair Work Act 2009* (Cth) sch 1 cl 95 to vary the modern awards the subject of those proceedings to include a delegates' rights term; and
 - ii. requiring the Commission to re-exercise its function under sch 1 cl 95 according to law;
 - b. indicating that the Commission had:
 - i. re-constituted the Full Bench to further deal with the proceedings in case number AM2024/26 with respect to the modern awards the subject of the Full Court proceeding; and
 - ii. initiated proceedings on its own initiative under FW Act s 160 (case number AM2025/28) to consider varying all other modern awards to address ambiguity, uncertainty or error arising from the deficiencies in the standard award delegates' rights term identified by the Full Court;
 - c. indicating the Full Bench's provisional views that:
 - i. all modern awards should be varied to include a delegates' rights term in the form set out in Attachment C to the Statement and Direction (the **draft variation**);

- ii. with respect to the modern awards the subject of the Full Court proceeding, the determination(s) varying those modern awards will come into operation (and take effect from) 1 July 2024; and
 - iii. with respect to the 146 other modern awards, determinations varying those awards should specify that the variations come into operation on 1 July 2024 under s 165(2) of the FW Act on the basis that exceptional circumstances exist justifying that course; and
 - d. inviting interested parties to make submissions concerning the course proposed by the Full Bench, the draft variation and the operative date of any variation by 4:00 pm AEDT on Friday 16 January 2026.
2. The Construction, Forestry and Maritime Employees Union, Construction and General Division (**CFMEU C&G**) makes these submissions in response to that invitation.
3. CFMEU C&G has had the opportunity to review, in draft form, the submissions of the Australian Council of Trade Unions (**ACTU**) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (**CEPU**).
4. We support and adopt those submissions, including and especially the submission endorsing the Full Bench’s provisional view that the variations to the award terms will and should take effect from 1 July 2024. Among other things, this will ensure that enterprise agreements that have been previously approved on the basis that the award delegates’ rights term is taken to be a term of the agreement under s 205A(2)(b) are not susceptible to challenge on the basis that the previous award term was invalidly made and a nullity, and hence that the agreement was invalidly approved for failure to include a mandatory term under s 205A(1).¹
5. For the reasons set out below, CFMEU C&G respectfully submits that the Full Court Decision also requires that the Full Bench to make the further amendments to the award term that are set out in Attachment A to these submissions, namely:
 - a. Amend cll XX.5 and XX.6 to clarify or confirm that eligible workers who are employees have corresponding rights under the award term to be represented by, and communicate with, the workplace delegate;
 - b. Amend cl XX.7 to provide for the workplace delegate’s right to “access to the workplace”, not only “access to workplace facilities”, and an obligation on the employer of an eligible worker to provide such access to enable the eligible

¹ That a failure to include a mandatory delegates’ rights term in an enterprise agreement results in the agreement being incapable of approval by the Commission is at least contemplated by the Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (see at [1616]–[1617]), but cf *John Holland Pty Ltd* [2025] FWCFB 294, [87], where the Full Bench reached the opposite conclusion without reference to the Explanatory Memorandum.

worker to exercise their corresponding rights and entitlements under the award term; and

- c. Amend cl XX.9 to either:
 - i. remove any provision as to the workplace delegate’s compliance with their obligations as an employee and hindering, obstructing or preventing the normal performance of work; or
 - ii. if such provisions are to be included at all, reinstate them as conditions on the workplace delegate’s exercise of their entitlements under the clause, subject to a filter of reasonableness, and not as standalone award obligations enforceable on pain of civil penalties.

Delegates’ rights to represent (and communicate with) eligible workers not employed by the delegate’s employer and corresponding rights of those eligible workers

- 6. As the Full Court held:
 - a. the Commission’s task under sch 1 cl 95 is “to make a determination varying an award to include a term that furnishe[s], supplie[s] or ma[kes] available the rights provided for by s 350C” of the FW Act;²
 - b. accordingly, “the Commission is not authorised to limit or detract from the workplace delegates’ rights provided for by s 350C”;³
 - c. under s 350C(2), “those rights entitle the delegate to represent the interests of members, and those eligible to be members” of the delegate’s organisation “including in disputes with the employer ... concerned”, that is, in disputes “with the *member’s* employer, being the employer concerned in the dispute that involves the member”, and that s 350C(2) “does not confine the delegate to representing only those employed by the delegate’s employer”;⁴
 - d. similarly, s 350C(3)(a) “refers to reasonable communications” to which a workplace delegate is entitled” with the members and with other persons eligible to be members of relevant organisations, and does not refer to any ‘employer’”;⁵
 - e. likewise, s 350C(3)(b)(i) entitles the workplace delegate to “reasonable access to the workplace and workplace facilities where the enterprise concerned is being carried on”, again without reference to any particular employer, and where the use of the defined term “enterprise” is “capable of capturing persons

² [2025] FCAFC 187, [14].

³ Ibid [18].

⁴ Ibid [40]–[41].

⁵ Ibid [42].

who work for different employers but are engaged in the same business, activity, project or undertaking”;⁶

- f. the only right for which s 350C provides that is confined to the delegate’s employer is s 350C(b)(ii) (or s 350C(b)(iii) in the version of the FW Act after 1 July 2024), which “refers to reasonable access to paid time off for the delegate”, and which “necessarily must be a reference to the delegate’s employer” but “does not concern or restrict the scope of the delegate’s representation”;⁷ and
 - g. for those reasons (among others), the previous Full Bench was in error to order a term that limited the workplace delegate to representing employees of the employer of the delegate, rather than all employees who work in the enterprise, which amounted to jurisdictional error.⁸
7. Given the above, CFMEU C&G supports the provisional view of the Full Bench that cl XX should be amended to refer to “eligible workers ... who work in a particular enterprise”, rather than “eligible employees ... who are employed by the employer [of the workplace delegate] in the enterprise”.
 8. This amendment substantially corrects the previous Full Bench’s error in limiting the workplace delegate’s right of representation under cl XX.5 to employees of the delegate’s employer only, rather than all workers who are members or eligible to be members of the delegate’s organisation and who work in the enterprise.
 9. It also substantially corrects a separate error committed by the previous Full Bench (which was not raised in the Full Court proceeding) in also limiting the workplace delegate’s entitlement to communication under cl XX.6 to employees of the delegate’s employer only, rather than all workers who are members or eligible to be members of the delegate’s organisation and who work in the enterprise. For the reasons given by the Full Court in relation to the errors raised in the proceeding before it, that error was also jurisdictional in nature and must be corrected in this proceeding.
 10. Plainly, the Full Court Decision requires that the rights conferred by the award delegates’ rights term not be confined to the employer of the workplace delegate in this way.
 11. However, further amendments are also required to ensure that the award term “furnishes, supplies or makes available” the rights provided by s 350C without being impermissibly confined to the employer of the workplace delegate.
 12. First, cl XX.5(f), which currently limits the workplace delegate’s right to represent eligible workers to

⁶ Ibid [34], [42].

⁷ Ibid [42].

⁸ Ibid [30]–[72], [103]–[107].

any process or procedure within an award, enterprise agreement or policy of the employer [i.e., “the employer of the workplace delegate”] under which eligible workers are entitled to be represented and which concerns their industrial interests. [emphasis added]

13. Clearly, the Full Court Decision requires that a workplace delegate may also represent an eligible worker in any process or procedure within a policy of the employer of the eligible worker, where the eligible worker is not employed by the same employer as the workplace delegate.
14. Although cl XX.5(f) appears in a non-exhaustive list of the matters in which a workplace delegate may represent eligible workers, and so does not expressly exclude a workplace delegate’s entitlement in this respect, it would be preferable for the clause to be amended to reflect the Full Court Decision, rather than for it to remain in its current form which is at least facially contrary to the Full Court’s reasoning.
15. If the restrictive definition of “employer” in cl XX.2 to mean only the employer of the workplace delegate is removed (as to which, see further below), this can be easily achieved by replacing the phrase “the employer” in cl XX.5(f) with the phrase “an employer”, i.e.:

any process or procedure within an award, enterprise agreement or policy of an employer under which eligible workers are entitled to be represented and which concerns their industrial interests.⁹

16. Second, although the provisionally proposed wording of cll XX.5 and XX.6 correctly extends the rights of workplace delegates under those subclauses to all eligible workers in the relevant enterprise, and not only employees of the delegate’s employer, a further difficulty arises concerning the application and enforcement of the rights conferred under those subclauses in relation to entities other than the delegate’s employer.
17. The provisionally proposed wording of cll XX.5 and XX.6 confers rights and entitlements on workplace delegates that are not expressed to only be owed to the workplace delegate by, or otherwise confined to, the employer of the workplace delegate. That is consistent with and required by the Full Court Decision.
18. The question then arises, who is bound by the duties which correspond to the workplace delegates’ rights under the award term? How are the delegates’ rights under the award term enforceable, and against whom?

⁹ In these submissions, the amendments to the award term provisionally proposed by the Full Bench are marked up with a single underline, while the further amendments proposed by CFMEU C&G are marked up with a double underline.

19. The immediately obvious answer, which the previous Full Bench incorrectly determined to be the only answer (and which view is partially retained by the restrictive definition of “employer” in the provisionally proposed wording of cl XX.2(c)), is that it is the delegate’s employer. That the workplace delegate’s employer is bound to afford the workplace delegate the rights conferred by s 350C, and the award term, is clear from the express wording of s 350C(4):

The employer of, or associated regulated business for, the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer or regulated business has complied with the delegates’ rights term in the fair work instrument that applies to the workplace delegate.

20. However, an equally obvious difficulty arises with respect to application and enforcement if the delegate’s employer is the only entity that is bound by obligations which correspond to the delegate’s rights under the award term.
21. Say the relevant enterprise is a construction project, and the workplace delegate is an employee of the head contractor, but the enterprise also includes various specialist subcontractors with their own employees who are “eligible workers”. The workplace delegate has rights under the award term to represent the subcontractors’ employees, and to communicate with them. Self-evidently, the delegate’s employer is bound by corresponding duties to (for example) not prevent the delegate from representing or communicating with those workers. But it may not be solely within the power of the delegate’s employer to ensure that those rights are not infringed. Say one of the subcontractors has been underpaying its employees and is refusing to deal with the workplace delegate, to the point of refusing to permit employees to communicate with the delegate at all, or to permit the delegate to represent the employees in the dispute with their employer. In that scenario, the delegate’s attempt to exercise their rights to represent and communicate with the eligible workers has been completely thwarted, notwithstanding that the delegate’s employer may be doing everything within *its* power to afford the delegate the relevant rights. As such, were the award term only to confer obligations on the delegate’s employer, then the delegate’s rights may be rendered nugatory. The award term would fail to “furnish, supply or make available” the rights provided for by s 350C as the Full Court Decision requires. Plainly, the award term must also confer corresponding obligations on, at least, the employers of eligible workers.
22. That possibility is already contemplated by the extension, on the Full Bench’s provisional view, of the workplace delegate’s rights of representation and communication to all eligible workers and not only employees of the delegate’s employer. Already on the provisional view, an eligible worker to whom an award applies (i.e., who is an employee) would have standing under s 539 to bring proceedings for breach of s 45 against their employer for preventing the workplace delegate from exercising the rights to represent and/or communicate with the eligible

worker, regardless of the existence of an employment relationship between the eligible worker’s employer and the workplace delegate.

23. That also illustrates the manner in which the award term should be amended to confirm or clarify that it does “furnish, supply or make available” the rights provided for by s 350C in this way. Modern awards only (relevantly) cover and apply to, and hence impose obligations on, employers and employees, the latter only in respect of particular employment.¹⁰ Accordingly, rather than seek to impose obligations on employers of eligible workers that are owed to and enforceable by the workplace delegate, the award term should confirm that eligible workers who are employees have rights to be represented by and communicate with the workplace delegate which correspond to the rights of the delegate.
24. Apart from its already being necessarily implied by the scheme of the draft variation, as set out above at paragraph 22, such a provision would, in any event, be incidental to this aspect of the required term and “essential for the purpose of making [it] operate in a practical way” for the purposes of s 142(1). As set out above at paragraph 21, the delegates’ rights term would not be capable of practical enforcement in respect of eligible workers not employed by the delegate’s employer in the absence of an express or implied term confirming that such workers — or, at least, those who are employees to whom the award is capable of applying — have corresponding rights.
25. Accordingly, the award term should be further amended to confirm that eligible workers who are employees have corresponding rights to be represented by, and entitlements to communication with, workplace delegates in accordance with cll XX.5 and XX.6, regardless of whether the eligible worker is employed by the same employer as the workplace delegate. This also has the benefit of reflecting the existing structure of cll XX.5 and XX.6, as follows:
- (a) _____ A workplace delegate may represent the industrial interests of eligible workers who wish to be represented by the workplace delegate in matters including:*
- (i) _____ consultation about major workplace change;*
- (ii) _____ consultation about changes to rosters or hours of work;*
- (iii) _____ resolution of disputes;*
- (iv) _____ disciplinary processes;*
- (v) _____ enterprise bargaining where the workplace delegate has been appointed as a bargaining representative under section 176 of the Act or is assisting the delegate’s organisation with enterprise bargaining; and*
- (vi) _____ any process or procedure within an award, enterprise agreement or policy of an employer under which eligible*

¹⁰ FW Act ss 46–48.

workers are entitled to be represented and which concerns their industrial interests.

(b) For the avoidance of doubt, an eligible worker who is an employee has a corresponding right to be represented by a workplace delegate in accordance with clause XX.5(a), regardless of whether the employer of the eligible worker is also the employer of the workplace delegate.

...

(c) For the avoidance of doubt, an eligible worker who is an employee has a corresponding entitlement to communication with a workplace delegate in accordance with clauses XX.6(a) and (b), regardless of whether the employer of the eligible worker is also the employer of the workplace delegate.

26. As foreshadowed above, those amendments require the removal of the restrictive definition of “employer” in cl XX.2(c) to mean only the employer of the workplace delegate. That, in turn, requires further consequential amendments to cll XX.1, XX.3, XX.4, XX.7, XX.8 and XX.9, as set out below and in Attachment A.

Entitlement to reasonable access to the workplace and workplace facilities

27. As noted above, the Full Court Decision confirms that s 350C(3)(b)(i) entitles the workplace delegate to “reasonable access to the workplace and workplace facilities where the enterprise concerned is being carried on”, without reference to any particular employer, and where the use of the defined term “enterprise” is “capable of capturing persons who work for different employers but are engaged in the same business, activity, project or undertaking”.¹¹
28. Further, the use of the phrase “access to the workplace and workplace facilities” in s 350C(3)(b)(i) indicates that “access to the workplace” and “access to ... workplace facilities” are distinct.¹²
29. Despite this, the draft variation (which is relevantly identical to that determined by the previous Full Bench) only makes provision for “access to workplace facilities” to be granted by the employer of the workplace delegate, and makes no provision at all for “access to the workplace”.
30. With respect, that approach is obviously incorrect. The draft variation does not “furnish, supply or make available” each of the rights provided for by s 350C as the Full Court Decision requires.

¹¹ [2025] FCAFC 187, [34], [42].

¹² Cf *ibid* [36], where the Full Court held that the use of the phrase “employer’s enterprise” in the FW Act “suggests that ‘employer’ and ‘enterprise’ have distinct meanings” and that the use of the phrase “the employer’s enterprise, or at the workplace” in s 446(2)(a) indicates “that ‘the employer’s enterprise’ and the ‘workplace’ are distinct”.

31. This is most clearly illustrated by the scenario where the workplace delegate's employer furnishes the delegate with each of the specific workplace facilities listed in cl XXA.7(a), but prevents the delegate from accessing the part of the workplace where bargaining meetings, or disciplinary meetings, are held.
32. In such a case, because the employer has complied with the award term, it will be taken under s 350C(4) to have afforded the delegate the right of "reasonable access to the workplace and workplace facilities where the enterprise concerned is being carried on" under s 350C(3)(b)(i), despite that the employer has quite clearly breached that right. That is a perverse outcome and one that subverts the statutory scheme.
33. To avoid that outcome, and to ensure that the award term "furnishes, supplies or makes available" each of the rights provided for by s 350C as the Full Court Decision requires, a new paragraph (aa) should be inserted before cl XX.7(a) in the following terms:

(aa) The employer of a workplace delegate must provide the workplace delegate with reasonable access to the workplace and workplace facilities to enable the workplace delegate to exercise their rights and entitlements under clause XX.

34. It is unnecessary to make further provision as to what "reasonable access to the workplace" requires, although it would be within power for the Commission to do so. It would also be undesirable, having regard to the necessity that the Commission deal expeditiously with these proceedings. What reasonableness requires will vary significantly in practice, but will be informed by the surrounding text of the provision and the context in which it appears: for example, having regard to the purposes for which such access must be provided (i.e., to enable the workplace delegate to exercise their other rights and entitlements under the award term).
35. By contrast, cl XX.7(a) already makes provision for what the obligation to provide "reasonable access to workplace facilities" requires of the employer of a workplace delegate. To make this explicit (and avoid redundancy), and for consistency with the other amendments proposed in these submissions, cll XX.7(a) and (b) should be amended as follows:

(a) For the purposes of clause XX.7(aa), reasonable access to workplace facilities means access to or use of the following workplace facilities:

- (i) a room or area to hold discussions that is fit for purpose, private and accessible by the workplace delegate and eligible workers;
- (ii) a physical or electronic noticeboard;
- (iii) electronic means of communication ordinarily used in the workplace by the employer to communicate with eligible workers and by eligible workers to communicate with each other, including access to Wi-Fi;

- (iv) *a lockable filing cabinet or other secure document storage area; and*
 - (v) *office facilities and equipment including printers, scanners and photocopiers.*
- (b) *The employer of a workplace delegate is not required to provide access to or use of a workplace facility under clause XX.7(a) if:*
- (i) *the workplace does not have the facility;*
 - (ii) *due to operational requirements, it is impractical to provide access to or use of the facility at the time or in the manner it is sought; or*
 - (iii) *the employer does not have access to the facility at the enterprise and is unable to obtain access after taking reasonable steps.*

36. Further, for the same reasons as those set out above in relation to the corresponding rights of eligible workers to representation and communication, the award term should also include a provision confirming that the employer of an eligible worker has an obligation to provide a workplace delegate reasonable access to the workplace and workplace facilities to enable the eligible worker to exercise those rights, as follows:

(c) The employer of an eligible worker who is an employee must provide the workplace delegate with reasonable access to the workplace and workplace facilities to enable the eligible worker to exercise their rights and entitlements under clause XX.

37. Such a provision is necessary to ensure that the award term “furnishes, supplies or makes available” the delegates’ rights in s 350C(3)(b)(i) to reasonable access to the workplace and workplace facilities where the enterprise concerned is being carried on, without reference to any particular employer, and where “the enterprise concerned” may comprise numerous employers, in such a way that it is capable of practical enforcement by or on behalf of the eligible worker to whom the award term applies in respect of their employment. As above, it is unnecessary and undesirable to attempt to stipulate what “reasonable access to the workplace and workplace facilities” requires of the employer of an eligible worker, including by replicating the requirements of cl XX.7(a). Again, what reasonableness requires in that context is likely to vary significantly in practice, although it will typically be substantially less than what is required of the delegate’s employer.

Proposed cl XX.9(b)

38. As indicated above, CFMEU C&G supports and adopts the submissions of the ACTU and the CEPU that the wording of cl XX.9(b) in the draft variation should not be adopted.

39. We submit that the preferable approach, which is clearly embraced by the Full Court’s reasoning,¹³ is that the award term make no provision at all with respect to the delegate’s obligations as an employee, or hindering, obstructing or preventing the normal performance of work.
40. The FW Act already makes extensive and detailed provision with respect to the obligations of employees and representatives of registered organisations not to hinder, obstruct or prevent the normal performance of work, most obviously in the legislative scheme governing unprotected industrial action and the consequences of taking such action. The Commission should not interfere with the legislative scheme by gratuitously making further provision in relation to this subject matter in the delegates’ rights term, particularly where there is no requirement to do so arising expressly or by implication from the text or context of ss 305C or 149E or sch 1 cl 95. The potential for this approach to have unintended consequences is obvious.
41. Equally, including a clause seeking to preserve the duties and obligations of a workplace delegate as an employee carries with it obvious unintended consequences that are unlikely to be desired. Foremost among these is the consequence that each and every one of the workplace delegate’s duties and obligations as an employee, regardless of source, is given the character of a “workplace right” for the purpose of s 341(1)(a), since the delegate has a “responsibility” under the award to comply with those duties and obligations, either as a standalone requirement (as in the draft variation) or as a condition on the exercise of their rights.¹⁴ While this may be desirable from the standpoint of providing workplace delegates with the maximum possible degree of protection against coercion and adverse action, it is extremely difficult to conceive that Parliament could have intended that the Commission would so provide in determining the delegates’ rights term to be inserted into modern awards. Again, that is especially so given there is no requirement arising expressly or by implication from the text or context of ss 305C or 149E or sch 1 cl 95 that the award delegates’ rights term make any provision whatsoever in relation to this subject matter.
42. For those reasons, cl XX.9(b) in the draft variation should be deleted, and the award term should instead make no provision in relation to the delegate’s duties and obligations as an employee, or hindering, obstructing or preventing the normal performance of work, as the Full Court Decision contemplates.
43. Alternatively, and assuming the inclusion of cl XX.9(b) is reflective of the Full Bench’s provisional view that clauses dealing with those subject matters are to be included in the award term, they should be reinstated as conditions on the exercise of the delegate’s entitlements under the award term, subject to a filter of reasonableness,

¹³ See *ibid* [93], [95] and especially [111]–[112] (emphasis added): “if a clause seeking to preserve those duties and obligations [or] a clause directed at not hindering or obstructing the normal performance of work **is to be included at all** ...”.

¹⁴ Clause XX.9(a)(i), which provides that the delegate has a responsibility under the award term to comply with the employer’s “reasonable policies and procedures” as a condition of exercising their entitlements under the term, is to like effect and should probably also be removed for the same reason.

not as standalone award obligations enforceable against the delegate on pain of civil penalty (as in the draft variation).

44. With respect, it is obviously contrary to the Full Court’s approach, which expressly and repeatedly contemplates the outright removal of these provisions, for the Commission to instead convert them from mere conditions on the exercise of the delegate’s entitlements under the award term to freestanding obligations carrying the threat of civil penalties. That is particularly so where the clauses embrace the entire universe of the delegate’s duties and obligations as an employee on the one hand, and provide for a standalone and novel prohibition against taking industrial action on the other. The approach taken in the draft variation is onerous and should not be adopted.
45. Rather, as indicated above, if clauses dealing with those subject matters are to be included at all, they should be reinstated as conditions on the exercise of the delegate’s entitlements under the award term, subject to a filter of reasonableness, as follows. A note referring to the Full Court’s consideration of the issue should be included to provide guidance as to what is reasonable for the purposes of the clause.

- (a) *A workplace delegate’s entitlements under clause XX are subject to the conditions that the workplace delegate must, when exercising those entitlements:*
- (i) *comply with the reasonable policies and procedures of their employer; including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources;*
- (ii) *not hinder, obstruct or prevent eligible workers exercising their rights to freedom of association;*
- (iii) *not unreasonably fail to comply with their duties and obligations as an employee; and*
- (iv) *not unreasonably hinder, obstruct or prevent the normal performance of work.*

NOTE: For example, in Construction, Forestry and Maritime Employees Union v Australian Industry Group [2025] FCAFC 187, [93]–[95], the Full Court of the Federal Court held that it was “[i]ntrinsic” to the role of a workplace delegate to represent the industrial interests of employees “that the workplace delegate may act in the interests of the employees rather than the employer”, notwithstanding the workplace delegate’s duty as an employee to act in the interests of their employer, and that

inherent in the workplace delegate’s normal performance of their functions in that capacity is the hindering, obstructing or preventing the normal performance of work, of themselves or others ... when reasonably exercising their rights as delegate.

Further consequential amendments

46. As noted above, the necessary removal of the restrictive definition of “the employer” to mean only the workplace delegate’s employer requires consequential amendments to the other parts of the award term where that phrase appears. The correct amendment (i.e., whether the relevant clause should continue to refer to the delegate’s employer only, or employers generally) is obvious from the context in each instance, as per the below table:

Clause number	Proposed amended wording
Note to cl XX.1	<i>NOTE: Under section 350C(4) of the Act, the employer <u>of a workplace delegate</u> is taken to have afforded <u>the</u> workplace delegate the rights mentioned in section 350C(3) if the employer has complied with clause XX.</i>
Clause XX.3	<i>Before exercising entitlements under clause XX, a workplace delegate must give the <u>relevant</u> employer written notice of their appointment or election as a workplace delegate. If requested, the workplace delegate must provide the employer with evidence that would satisfy a reasonable person of their appointment or election.</i>
Proposed cl XX.5(a)(v)	<i>any process or procedure within an award, enterprise agreement or policy of <u>an</u> employer under which eligible <u>workers</u> are entitled to be represented and which concerns their industrial interests.</i>
Proposed cl XX.7(aa) (cf cl XX.7(a) of the draft variation)	<i><u>The employer of a workplace delegate must provide</u> [etc]</i>
Clause XX.7(b)	<i>The employer <u>of a workplace delegate</u> is not required to provide access to or use of a workplace facility under clause XX.7(a) if [etc]</i>
Chapeau to cl XX.8	<i>Unless the employer is a small business employer, the employer <u>of a workplace delegate</u> must provide a workplace delegate with access to up to 5 days of paid time [etc]</i>
Clause XX.8(a)	<i>In each year commencing 1 July, <u>an</u> employer is not required to provide access to paid time [etc]</i>
Clause XX.8(d)	<i>The workplace delegate must give <u>their</u> employer not less than 5 weeks’ notice [etc]</i>
Clause XX.8(e)	<i>If requested by <u>their</u> employer, the workplace delegate must provide the employer with an outline of the training content.</i>
Clause XX.8(f)	<i>The employer <u>of the workplace delegate</u> must advise the workplace delegate [etc]</i>
Clause XX.8(g)	<i>The workplace delegate must, within 7 days after the day on which the training ends, provide <u>their</u> employer with evidence [etc]</i>

47. Lastly, cl XX.9(d) of the draft variation provides that “Clause XX does not require an eligible worker to be represented by a workplace delegate without **the employee’s** agreement” (emphasis added). The reference to “the employee” is evidently an error,

reflecting the use of the phrase “eligible employee” in the previous term, and should be corrected to “the eligible worker”.

CFMEU C&G

16 January 2026

Attachment A

XX. Workplace delegates' rights

XX.1 Clause XX provides for the exercise of the rights of workplace delegates set out in section 350C of the Act.

NOTE: Under section 350C(4) of the Act, the employer of a workplace delegate is taken to have afforded the workplace delegate the rights mentioned in section 350C(3) if the employer has complied with clause XX.

XX.2 In clause XX:

- (a) **delegate's organisation** means the employee organisation in accordance with the rules of which the workplace delegate was appointed or elected;
- (b) **eligible workers** means members and persons eligible to be members of the workplace delegate's organisation who work in a particular enterprise;
- (c) **workplace delegate** means a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise.

XX.3 Before exercising entitlements under clause XX, a workplace delegate must give the relevant employer written notice of their appointment or election as a workplace delegate. If requested, the workplace delegate must provide the employer with evidence that would satisfy a reasonable person of their appointment or election.

XX.4 An employee who ceases to be a workplace delegate must give written notice to their employer within 14 days.

XX.5 Right of representation

- (a) A workplace delegate may represent the industrial interests of eligible workers who wish to be represented by the workplace delegate in matters including:
 - (i) consultation about major workplace change;
 - (ii) consultation about changes to rosters or hours of work;
 - (iii) resolution of disputes;
 - (iv) disciplinary processes;
 - (v) enterprise bargaining where the workplace delegate has been appointed as a bargaining representative under section 176 of the Act or is assisting the delegate's organisation with enterprise bargaining; and
 - (vi) any process or procedure within an award, enterprise agreement or policy of an employer under which eligible workers are entitled to be represented and which concerns their industrial interests.
- (b) For the avoidance of doubt, an eligible worker who is an employee has a corresponding right to be represented by a workplace delegate in accordance

with clause XX.5(a), regardless of whether the employer of the eligible worker is also the employer of the workplace delegate.

XX.6 Entitlement to reasonable communication

- (a) A workplace delegate may communicate with eligible workers in relation to their industrial interests under clause XX.5. This includes discussing membership of the delegate's organisation and representation with eligible workers.
- (b) A workplace delegate may communicate with eligible workers during working hours or work breaks, or before or after work.
- (c) For the avoidance of doubt, an eligible worker who is an employee has a corresponding entitlement to communication with a workplace delegate in accordance with clauses XX.6(a) and (b), regardless of whether the employer of the eligible worker is also the employer of the workplace delegate.

XX.7 Entitlement to reasonable access to the workplace and workplace facilities

- (aa) The employer of a workplace delegate must provide the workplace delegate with reasonable access to the workplace and workplace facilities to enable the workplace delegate to exercise their rights and entitlements under clause XX.
- (a) For the purposes of clause XX.7(aa), reasonable access to workplace facilities means access to or use of the following workplace facilities:
 - (i) a room or area to hold discussions that is fit for purpose, private and accessible by the workplace delegate and eligible workers;
 - (ii) a physical or electronic noticeboard;
 - (iii) electronic means of communication ordinarily used in the workplace by the employer to communicate with eligible workers and by eligible workers to communicate with each other, including access to Wi-Fi;
 - (iv) a lockable filing cabinet or other secure document storage area; and
 - (v) office facilities and equipment including printers, scanners and photocopiers.
- (b) The employer of a workplace delegate is not required to provide access to or use of a workplace facility under clause XX.7(a) if:
 - (i) the workplace does not have the facility;
 - (ii) due to operational requirements, it is impractical to provide access to or use of the facility at the time or in the manner it is sought; or
 - (iii) the employer does not have access to the facility at the enterprise and is unable to obtain access after taking reasonable steps.
- (c) The employer of an eligible worker who is an employee must provide the workplace delegate with reasonable access to the workplace and workplace

facilities to enable the eligible worker to exercise their rights and entitlements under clause XX.

XX.8 Entitlement to reasonable access to training

Unless the employer is a small business employer, the employer of a workplace delegate must provide a workplace delegate with access to up to 5 days of paid time during normal working hours for initial training and at least one day each subsequent year, to attend training related to representation of the industrial interests of eligible workers, subject to the following conditions:

- (a) In each year commencing 1 July, an employer is not required to provide access to paid time for training to more than one workplace delegate per 50 eligible workers.
- (b) 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.
- (c) Payment for a day of paid time during normal working hours is payment of the amount the workplace delegate would have been paid for the hours the workplace delegate would have been rostered or required to work on that day if the delegate had not been absent from work to attend the training.
- (d) The workplace delegate must give their employer not less than 5 weeks' notice (unless the employer and delegate agree to a shorter period of notice) of the dates, subject matter, the daily start and finish times of the training, and the name of the training provider.
- (e) If requested by their employer, the workplace delegate must provide the employer with an outline of the training content.
- (f) The employer of the workplace delegate must advise the workplace delegate not less than 2 weeks from the day on which the training is scheduled to commence, whether the workplace delegate's access to paid time during normal working hours to attend the training has been approved. Such approval must not be unreasonably withheld.
- (g) The workplace delegate must, within 7 days after the day on which the training ends, provide their employer with evidence that would satisfy a reasonable person of their attendance at the training.

XX.9 Exercise of entitlements under clause XX

- (a) A workplace delegate's entitlements under clause XX are subject to the conditions that the workplace delegate must, when exercising those entitlements:

- (i) comply with the reasonable policies and procedures of their employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources; [*or delete the paragraph*]
- (ii) not hinder, obstruct or prevent eligible workers exercising their rights to freedom of association;
- (iii) not unreasonably fail to comply with their duties and obligations as an employee; and [*or delete the paragraph*]
- (iv) not unreasonably hinder, obstruct or prevent the normal performance of work. [*or delete the paragraph*]

NOTE: For example, in *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187, [93]–[95], the Full Court of the Federal Court held that it was “[i]ntrinsic” to the role of a workplace delegate to represent the industrial interests of employees “that the workplace delegate may act in the interests of the employees rather than the employer”, notwithstanding the workplace delegate’s duty as an employee to act in the interests of their employer, and that

inherent in the workplace delegate’s normal performance of their functions in that capacity is the hindering, obstructing or preventing the normal performance of work, of themselves or others ... when reasonably exercising their rights as delegate.

[*or delete the note*]

- (b) Clause XX does not require an employer to provide a workplace delegate with access to electronic means of communication in a way that provides individual contact details for eligible workers.
- (c) Clause XX does not require an eligible worker to be represented by a workplace delegate without the eligible worker’s agreement.

NOTE: Under section 350A of the Act, the employer of a workplace delegate must not:

- (a) unreasonably fail or refuse to deal with a workplace delegate; or
- (b) knowingly or recklessly make a false or misleading representation to a workplace delegate; or
- (c) unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate under the Act or clause XX.

XX.10 Interaction with other clauses of this award

Other clauses of this award may give additional or more favourable entitlements to workplace delegates (however described). If an entitlement of a workplace delegate under another clause of this award is more favourable to the delegate than an entitlement under clause XX, the entitlement under the other clause applies instead of the entitlement under clause XX.