

## **IN THE FAIR WORK COMMISSION**

**Matter No.: AM2024/6**

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

### **Submissions of the CPSU (PSU-Group)**

#### **Background**

1. On 14 December 2023, the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* received Royal Assent. The Closing Loopholes Act introduced new general protections for workplace delegates in the *Fair Work Act 2009* (Cth) (FW Act) and required all modern awards, enterprise agreements and workplace determinations to include a delegates' rights term.
2. Section 350A of the Closing Loopholes Act introduces new general protections specific to workplace delegates while s350C introduces a definition of 'workplace delegate' and a set of rights to which a workplace delegate is entitled to. Division 1 at s149E required the Fair Work Commission (FWC) to ensure, as part of its approval process, that modern awards include a delegates' rights term. Division 4 at s94 sets out that the amendments to the FW Act in relation to delegates' rights terms take effect on 1 July 2024.
3. On 18 January 2024, FWC President Hatcher issued statement [2024] FWC 150 (President's Statement) in relation to variation of modern awards to include a delegates' rights term for workplace delegates due to the Closing Loopholes Act amendments to the FW Act that commenced on 15 December 2023.
4. The President's Statement identified the FWC's approach to implementing the Closing Loopholes Act amendments which included an outline of the changes, a proposed timeline in which consultation and engagement with stakeholders would take place. The timeline considered the 30 June 2024 deadline by which time the FWC must make the determinations varying modern awards.
5. At paragraph [3] to [8] of the President's Statement, the FWC outlined the key changes set out in Division 1 of Part 7 in Schedule 1 of the FW Act relating to delegates' rights.

6. At Paragraph [14], the FWC invited interested parties to lodge submissions and proposed workplace delegates' rights terms by 1 March 2024. The CPSU makes the following submissions in accordance with the President's Statement.
7. The CPSU has a primary interest in the *Australian Public Service Enterprise Award 2015* (APS Award) and the *Australian Government Industry Award 2016* (AGIA) and makes the following submission in the context of these awards. Included in this submission at Attachment A and Attachment B are draft terms in relation to the APS Award and AGIA for the consideration of the FWC.
8. The CPSU also has an interest in the variation of the following modern awards to include a delegates' rights term:
  - Airlines Australia Enterprise Award 2016;
  - Australian Broadcasting Corporation Enterprise Award 2016;
  - Australian Bureau of Statistics (Interviewers) Enterprise Award 2016;
  - Australian Capital Territory Public Sector Enterprise Award 2016;
  - Australian Federal Police Enterprise Award 2016;
  - Australian Nuclear Science and Technology Organisation (ANSTO) Enterprise Award 2016;
  - Australia Post Enterprise Award 2015;
  - Broadcasting, Entertainment, Entertainment and Cinema Award 2016;
  - CSIRO Enterprise Award 2016;
  - Northern Territory Public Sector Enterprise Award 2016;
  - Parliamentary Departments Staff Enterprise Award 2016;
  - Telecommunications Services Award 2016; and
  - Telstra Award 2015;
9. While this submission does not specifically address the awards listed in paragraph [8] above, we consider that the draft term at Attachment B has broader applicability to Commonwealth and Territory public sector awards.
10. The CPSU has reviewed the ACTU's submission and draft model clause. We support those submissions and agree the ACTU draft model clause should serve as a model term in this process for modern awards generally, except where more industry specific terms have been sought.

11. As parties with a primary interest in awards that apply in the APS and broader federal public sector, the CPSU and the APSC have reached an agreed position on industry-specific terms for the APS Enterprise Award and the Australian Government Industry Award that we submit meet the legislative requirements.

### **Legislating delegates rights and variation of awards**

12. Union delegates have an important and legitimate role in supporting and representing members in the workplace and providing employee views to their employer. In doing so, delegates help build productive relationships with employers and unions and contribute to workplace harmony.

13. Improving delegates' rights and protections encourages a culture of mutual respect and ensures that delegates are better able to perform their representative roles. The Closing Loopholes Bill recognised this by establishing delegates rights in the FW Act. Such rights need now to be included in modern awards.

14. Section 149E of the FW Act provides that, 'A modern award must include an delegates' rights term for workplace delegates covered by the award'. As provided in paragraph [2] above, the FWC must vary modern awards to include a delegates' rights term by 30 June 2024, with effect from 1 July 2024.<sup>1</sup>

15. 'Delegates rights term' means 'a term in a fair work instrument that provides for the exercise of the rights of workplace delegates'.<sup>2</sup>

16. A note to the definition clarifies that 'The right of workplace delegates are set out in section 350C, and a delegates rights' term must provide for *at least* for the exercise of those rights' (emphasis added).<sup>3</sup>

17. Additionally, the Explanatory Memorandum makes clear that the intention for delegates rights in modern awards to be 'more detailed' and 'at least' provide for the content of the new statutory rights.<sup>4</sup>

---

<sup>1</sup> FW Act Schedule 1 clause 95.

<sup>2</sup> FW Act section 12.

<sup>3</sup> FW Act section 12.

<sup>4</sup> Explanatory Memorandum [791], [794] 134.

18. With this in mind, the FWC in varying modern awards (including enterprise awards) to include a delegates' rights term (or terms) must ensure the relevant term (or terms) meet or exceed the rights intended by the legislated provision.

### **Commonwealth public sector context (APS and non-APS)**

19. On 6 October 2022, the Australian Public Service Commission (APSC) released the Circular 2022/09: Union representation in Commonwealth agencies. This circular set out the Australian Government's expectations that agencies will support and facilitate the important role of union delegates in their workplaces through providing reasonable access to paid time, facilities for union communication with employees and training. The CPSU was involved in negotiating the new circular which later formed the basis of the agreed delegates' rights clause outlined in paragraph [20] and [21] of this submission.

20. On 28 March 2023, the *Public Sector Workplace Relations Policy 2023* was released, setting down expectations for bargaining in the Commonwealth public sector (APS and Non-APS). The policy seeks to move away from a decentralised approach to bargaining in the sector which has been the practice over recent decades. In adopting a more centralised, including a service-wide approach in APS, the policy seeks to address existing pay and conditions fragmentation in the sector.

21. On 30 March 2023, service-wide bargaining commenced in the APS and has been a comprehensive process conducted over more than 9 months. Following this process, a Statement of Common Conditions (SOCC) was produced by the Australian Public Service Commission (following extensive negotiation with unions and bargaining representatives) outlining the outcomes of negotiations in relation to over 90 matters raised in service-wide bargaining, with over 50 matters achieving an agreed outcome. A common clause on delegates' rights is a matter where an agreed outcome was achieved. The SOCC was finalised on 30 November 2023.

22. The delegates' rights common clause has been incorporated or will be incorporated into all APS agency enterprise agreements, i.e., 103 APS agency agreements will adopt the common clause at the conclusion of the current service-wide bargaining round. As at 1 March 2024, 47 APS enterprise agreements had been approved by employees, and 15

of those approved by the FWC. Access periods for the remaining proposed instruments must commence on or by 14 March 2024.

23. Non-APS agencies should have regard to the SOCC (including the delegates rights common clause) when bargaining. Several non-APS agencies who are bargaining, or have concluded bargaining, have adopted the delegates rights common clause.
24. The CPSU submits that the delegates' rights terms in Attachment A and B should be adopted in the Australian Public Service Enterprise Award 2016 and the Australian Government Industry Award 2016. The draft terms in Attachment A exactly replicate the SOCC common clause, while draft term in Attachment B provides for minor changes to better reflect the context of the AGIA.
25. The CPSU has engaged with the Australian Public Service Commission (APSC) and the parties agree on the proposed terms in Attachment A and B and their application to each of the relevant awards.

#### **Draft terms for APS EA and AGIA**

26. The CPSU considers each of the proposed delegates' rights terms for the APS Enterprise Award and the AGIA in Attachment A and B meet the requirements of the Fair Work Act as amended by the Closing Loopholes Bill.
27. Section 350C of the FW Act outlines union delegates' rights:

##### ***Rights of workplace delegates***

*(2) The workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer.*

*Note: This section does not create any obligation on a person to be represented by a workplace delegate.*

*(3) The workplace delegate is entitled to:*

*(a) reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and*

*(b) for the purpose of representing those interests:*

*(i) reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and*

*(ii) unless the employer of the workplace delegate is a small business employer— reasonable access to paid time, during normal working hours, for the purposes of related training.*

*(4) The employer of the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate.*

*(5) Otherwise, in determining what is reasonable for the purposes of subsection (3), regard must be had to the following:*

*a. the size and nature of the enterprise;*

*b. the resources of the employer of the workplace delegate;*

*c. the facilities available at the enterprise.*

28. Section 350C(2) of the FW Act provides union delegates with a broad right to represent constituents. The proposed terms in Attachment A and B reflect this broad right to representation. The draft terms recognise union delegates play an important and legitimate role in the workplace that is to be respected and supported by employers (clause 1 and 2). This includes in representing members and supporting employees to access union officials and providing employee views to their employer (clause 2). An employer's role in supporting union delegates is further articulated in clause 4 of each of the draft terms. Clause 6 of the draft terms goes further to specify that reasonable paid time will be available to union delegates to perform their representative duties, subject to operational requirements and avoiding disruption to critical services.

29. Section 350C(3)(a) provides workplace delegates with a right to reasonable communications with members and persons eligible to be members. Clause 7.3 of the draft terms reflects the statutory provision of a broad right to reasonable communication, stipulating that the employer will allow reasonable official union communication from union delegates to employees. The clause goes further to list activities that fall within the broader right, such as through emails, intranet pages and notice boards. The proposed clause does not permit employers to veto reasonable communications. We further note the list of activities is not exhaustive.

30. Section 350(3)(b)(i) provides that workplace delegates have reasonable access to the workplace and workplace facilities where the enterprise is being carried on. The right to reasonable access to workplace facilities is reflected in clause 7.1 of the draft terms.

31. Section 350C(3)(b)(ii) of FW Act requires reasonable access to paid time for the purposes of training during normal working hours. The legislative provisions exempt small business. We note APS and non-APS agencies are not small businesses for the purposes of these provisions. Clause 7.5 of the draft terms provide reasonable access to union delegates to attend paid time training during normal working hours.
32. Section 350C(5) of the FW Act requires consideration to be made regarding the size, nature and facilities of the enterprise and the resources of the employer when determining what is reasonable under s350C(3) of the FW Act. Clauses 5, 6 and 7 of the proposed terms contain considerations such as impact on a delegate's regular duties, disruption to critical services and operational requirements.
33. Under s 350C(4) of the FW Act, where employers comply with the delegates' rights terms the Fair Work instrument that applies to the union delegate, they will be taken to have complied with s 350C(3) of the FW Act. The proposed terms in Attachment A and B or in APS and non-APS agency EAs meet the FW Act requirements and even provide additional entitlements. The draft terms provide union delegates with access to reasonable paid time to undertake their representative duties, access to paid or unpaid time in which to hold meetings between employees and their union, access to new employees as part of inductions into their workplaces and prevents an employer from vetoing reasonable communications.
34. The CPSU submits that the proposed terms set out in Attachment A and B meet and exceed the legislative requirements of the FW Act and should be included in the APS Award and the AGIA.

### **Associated matters**

35. The FWC has identified existing clauses in awards which contain provisions relevant to workplace delegates. The CPSU submits that awards with more beneficial arrangements including in relation to union representation be preserved, and that any model term adopted by the FWC should not unintentionally disturb union rights within existing facilitative provisions.

Arundhati Tandel

Senior Industrial Officer, CPSU

1 March 2024

## **Attachment A**

### **Proposed term for the *Australian Public Service Enterprise Award 2015***

#### **Delegates' rights**

1. Union delegates play an important and legitimate role in the workplace. This includes representing their members and supporting employee access to union officials, and providing employee views to the agency.
2. The role of union delegates is to be respected and supported.
3. The employer and union delegates will work together respectfully and collaboratively.

#### *Supporting the role of union delegates*

4. The employer respects the role of union delegates to:
  - 4.1 provide information, consult with and seek feedback from employees in the workplace on workplace matters;
  - 4.2 consult with other delegates and union officials, and get advice and assistance from union officials;
  - 4.3 represent the interests of members to the employer and industrial tribunals; and
  - 4.4 represent members at relevant union forums, consultative committees or bargaining.
5. The employer and union delegates recognise that undertaking the role of a union delegate is not the primary purpose of an employee's engagement, and must work with and not unreasonably impact their regular duties. Honorary officials may request additional time and facilities from time to time.
6. Union delegates will be provided with reasonable paid time during their normal working hours to perform their union delegate role. The paid time provided should not result in disruption to critical services or operational requirements.
7. To support the role of union delegates, the employer will, subject to legislative and operational requirements, including privacy and security requirements:
  - 7.1 provide union delegates with reasonable access to agency facilities and resources, including for paid or unpaid meetings between employees and their unions and to communicate with union officials;



7.2 advise union delegates and other union officials of the agency facilities and resources available for their use, which may include telephone, photocopying, internet, and email;

7.3 allow reasonable official union communication appropriate to the agency from union delegates with employees, including through email, intranet pages and notice boards. This may include providing a link to a union website for employees to access union information. Any assistance in facilitating email communications does not include an agency vetoing reasonable communications;

7.4 provide access to new employees as part of induction; and

7.5 provide reasonable access to union delegates to attend appropriate paid time training in workplace relations matters, during normal working hours.

8. Where employees are elected as officials of a trade union or professional association, they are not required to seek permission from the workplace or employer before speaking publicly in that capacity, subject to the APS Code of Conduct and legislative requirements.

## **Attachment B**

### **Proposed term for the *Australian Government Industry Award 2016***

#### **Delegates' rights**

1. Union delegates play an important and legitimate role in the workplace. This includes representing their members and supporting employee access to union officials, and providing employee views to the employer.
2. The role of union delegates is to be respected and supported.
3. The employer and union delegates will work together respectfully and collaboratively.

#### *Supporting the role of union delegates*

4. The employer respects the role of union delegates to:
  - 4.1 provide information, consult with and seek feedback from employees in the workplace on workplace matters;
  - 4.2 consult with other delegates and union officials, and get advice and assistance from union officials;
  - 4.3 represent the interests of members to the employer and industrial tribunals; and
  - 4.4 represent members at relevant union forums, consultative committees or bargaining.
5. The employer and union delegates recognise that undertaking the role of a union delegate is not the primary purpose of an employee's engagement, and must work with and not unreasonably impact their regular duties. Honorary officials may request additional time and facilities from time to time.
6. Union delegates will be provided with reasonable paid time during their normal working hours to perform their union delegate role. The paid time provided should not result in disruption to critical services or operational requirements.
7. To support the role of union delegates, the employer will, subject to legislative and operational requirements, including privacy and security requirements:
  - 7.1 provide union delegates with reasonable access to agency facilities and resources, including for paid or unpaid meetings between employees and their unions and to communicate with union officials;

7.2 advise union delegates and other union officials of the agency facilities and resources available for their use, which may include telephone, photocopying, internet, and email;

7.3 allow reasonable official union communication appropriate to the agency from union delegates with employees, including through email, intranet pages and notice boards. This may include providing a link to a union website for employees to access union information. Any assistance in facilitating email communications does not include an agency vetoing reasonable communications;

7.4 provide access to new employees as part of induction; and

7.5 provide reasonable access to union delegates to attend appropriate paid time training in workplace relations matters, during normal working hours.

8. Where employees are elected as officials of a trade union or professional association, they are not required to seek permission from the employer before speaking publicly in that capacity, subject to any relevant Code of Conduct and legislative requirements.