

Delegates' Rights in Modern Awards
NECA SUBMISSION

March 2024

Introduction

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (**Closing Loopholes Act**) received Royal Assent on 14 December 2023 and commenced operation from 15 December 2023.

The Closing Loopholes Act amends the *Fair Work Act 2009* (Cth) (**FW Act**) by introducing new rights for workplace delegates that will be incorporated as a model clause in all modern awards.

On 18 January 2024, the Fair Work Commission (**FWC**) President issued a Statement¹ commencing the process to vary all modern awards by 30 June 2024. Accordingly, Peak bodies and interested parties have been invited to lodge submissions regarding delegates' rights terms by 1 March 2024.

As the peak industry body for Australia's electrical and communications industry, the National Electrical and Communications Association (NECA) has drafted a submission, focusing on the delegates' rights model term. This submission provides feedback on areas the FWC may wish to consider when drafting the model clause.

Background

NECA is the peak body for Australia's electrical and communications industry, which employs 344,370 people and turns over more than \$82bn annually.

We represent over 6,500 businesses across Australia performing works including the design, installation, and maintenance of electrical and electronic equipment in the defence, construction, mining, air conditioning, refrigeration, manufacturing, communications, and renewable energy sectors.

NECA also plays an integral role in the development of the next generation of Australia's electrical and communications tradespeople, contractors and sub-contractors. Through its associated Group Training Organisations (GTOs) and Registered Training Organisations (RTOs), NECA offers employment and trade training to some 4,800 apprentices nationally.

¹ President's Statement, *Variation of modern awards to include a delegate's rights term* (AM2024/6) (18 January 2024)

NECA represents the interests of electrical and communication businesses to all levels of government and in regulatory, legislative and industry development forums. Our members make an essential economic contribution to the NSW economy – connecting businesses, homes, and infrastructure – encouraging investment, improving reliability and energy security, and delivering affordable, environmentally sustainable outcomes.

Submissions

Rights of workplace delegates

1. Importantly, the rights outlined in section 350C of the Closing Loopholes Act must be construed and given effect only to the extent necessary to enliven the purposes of the FW Act and the Closing Loopholes Act.
2. When considering the purposes of the FW Act, this involves balancing the objectives of Part 3-1 and the objects of the FW Act while ensuring any term(s) also meet the objective of modern awards.
3. On this basis, the FWC when drafting the model term for modern awards should also consider the following objectives (as well as any other objectives listed in FW Act):
 - a) the protection of workplace rights and freedom of association (Part 3-1 s 336 of the FW Act);
 - b) providing conditions that are flexible for business, promote productivity and economic growth for Australia's future (s 3(a) of the FW Act);
 - c) when making award terms, the FWC takes into account the needs of small and medium sized business (s 3(a) of the FW Act); and
 - d) ensuring that in making terms, the FWC takes into account the impact of exercising modern award powers on business, employment costs and the regulatory burden (s 134(1)(f)).
4. Section 350C of the Closing Loopholes Act sets out the rights of workplace delegates that will need to be considered in a model clause in modern awards, including:
 - a) **Right to represent employees** - entitlement to represent the industrial interests of members and eligible persons, including in disputes with their employer;
 - b) **Right to communicate with employees** – entitlement to reasonable communication with members (and eligible non-members) (of an employee organisation) in relation to representing employees' industrial interests;
 - c) **Right to access the workplace and workplace facilities** – entitlement to reasonable access to workplace and workplace facilities where the enterprise is

being carried on, for the purpose of representing the industrial interests of employees; and

- d) **Right to access to paid time for training** – except for small businesses (employs fewer than 15 employees), entitlement to reasonable access to paid time, during normal working hours, for the purpose of training, related to representing the industrial interests of employees.
5. If the FWC’s model term(s) goes beyond the terms necessary to meet these aims, then it is likely that such terms will be incongruent with the objectives outlined above and will influence how the FWC can exercise its functions in this regard.
6. NECA submits that any delegates’ rights term should be limited to the above four rights.

What is reasonable

7. NECA note that the four workplace delegates’ rights set out in section 350C of the Closing Loopholes Act, specifically in relation to 4(b), 4(c) and 4(d) above are dependent on a degree of reasonableness.
8. Section 350C(5) of the Closing Loopholes Act provides that:

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.*

9. Further, the Revised Explanatory Memorandum to the Closing Loopholes Act sets out the following:

at [827]:

... for most employees, modern awards and enterprise agreements would provide greater detail for particular industries, occupations and enterprises. In relation to communication and access, in many cases this may require nothing more than the general access to communications or premises that an employee would normally have by virtue of working for an enterprise; and

at [830] in relation to subsection 350C(4)

This would ensure that, where a fair work instrument provides more detailed information about the rights of workplace delegates, employers can rely on that term as a complete statement of their obligations under new subsection 350C(3).

10. In determining what is “reasonable” for the purposes of a delegates’ rights clause, NECA submits that it will be difficult for the FWC to draft a modern award term(s) that

contemplates what constitutes 'reasonable' for each award, employer or scenario and would only act to limit the application of the test.

11. NECA further submits that the following factors should be taken into consideration as part of, or in addition to, those identified in section 350C(5) of the Closing Loopholes Act:
 - a. the impact on the employer's output and operations;
 - b. that work often undertaken by a workplace delegate might distract from the employee's usual duties as an employee and may require additional resourcing to be put in place if excessive provision is made for workplace delegates' activities;
 - c. financial, time, resources or other pressures on the employer;
 - d. the employer's size;
 - e. the ease and timeframe with which facilities and services can be provided (and at what cost);
 - f. the maximum number of employees likely to be represented by the relevant workplace delegates (if known); and
 - g. the right of any employee not to be represented by a workplace delegate;
12. NECA further submits that the modern award term(s) should facilitate an assessment of what is reasonable by providing guidance (where necessary) to be applied to each individual organisation, industry and situation.

Right to represent employees

Who can be a workplace delegate

13. Under section 350C(1) of the Closing Loopholes Bill, a workplace delegate is defined as

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.
14. This definition does not appear to change the meaning of workplace delegate which has always been employees of the relevant employer.
15. 'Employee organisation' is defined in section 12 of the FW Act as an organisation of employees. Although this does not explicitly refer to a registered organisation such as a trade union, the wording "*in accordance with the rules of an employee organisation*" infers that it does mean a registered organisation.
16. Notably, this wording has the practical effect of giving the union the right to appoint or elect workplace delegates.

17. A common approach taken by Commonwealth tribunals is that the workplace delegate should not interfere with the effective working of the employer and the employee must continue to follow directions from their employer². This confirms that although an employee may be a workplace delegate, they are an employee first and foremost and as such must comply with any lawful and reasonable directions of their employer.
18. When giving consideration to the delegates' rights in model award term(s), NECA asks that the FWC consider:
- a. including in the model term that a workplace delegate is an employee of the relevant employer;
 - b. including in the model term the definition of a workplace delegate as defined at section 350C(1) of the Closing Loopholes Act;
 - c. does not expressly include that the employee organisation is required to be registered; and
 - d. keep the approach in paragraph 17 above in mind so the model term does not act to limit an employers' right to direct an employee (who is also a workplace delegate) to follow lawful and reasonable directions from the employer.

Number of workplace delegates

19. We note that section 350C of the Closing Loopholes Bill does not limit how many workplace delegates can be appointed or elected for any one workplace or by any one employee organisation.
20. When giving consideration to the delegates' rights in model award term(s), NECA asks that the FWC consider limiting the number of delegates that may be appointed at a given worksite, with particular reference and consideration to enterprise size. Notably, NECA submits that this limitation should be by worksite and not by employee organisation.
21. NECA would not be opposed to the workplace delegate numbers set out below.

No. of full time and part-time employees	Max. no. of delegates
1-50	1
51-100	2
101 and over	3

Representation of industrial instruments

22. Section 350C(2) of the FW Act provides that:

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

² See for example, *Re F.E.D.F.A. and Garden Island Dockyard* (1964) 2107 C.A.R. 806,

23. NECA note that there is no definition of what constitutes 'industrial interests' in relation to the representation of employees by workplace delegates.
24. Notably, section 350C(2) includes representation in disputes with their employer, where previously any workplace delegate could represent an employee to a degree but could only act as a support person in other scenarios such as investigations or meetings, this wording suggests unlimited representation regardless of the nature of the dispute.
25. Further, a dispute with an employer is not what enlivens the workplace delegates' right of representation under section 350C. The right of representation only relates to industrial interests of the employees. As such, where a dispute arises that goes beyond (or falls outside of) the scope of an employee's industrial interests, the workplace delegate should not have the right of representation in these circumstances.
26. On this basis, where there is no definition of industrial interests or representation, pin pointing when a workplace delegates' right to represent is triggered may be challenging and the right could go beyond what the Closing Loopholes Act intended, thus requiring further determination by the FWC in this regard.
27. When giving consideration to the delegates' rights in model award term(s), NECA asks that the FWC consider:
 - a. including a definition of 'industrial interests' into each award that limits the scope of matters that a workplace delegate can engage in such as:
 - i. disputes involving an employee of the employer under an 'industrial law' (as defined under the FW Act), including an industrial instrument;
 - ii. consultation about major workplace change or changes to rosters or hours of work (consistent with the existing model terms which give employee representatives rights);
 - iii. bargaining; and
 - iv. matters relating to discipline and performance.
 - b. including a definition of what constitutes representation, particularly with regard to dispute activities;
 - c. including in the model term that a workplace delegates' rights do not commence until the employer has been notified in writing by the employee organisation of the election or appointment of a workplace delegate; and
 - d. including the 'Note' from the Closing Loopholes Act that states:

This section does not create any obligation on a person to be represented by a workplace delegate.
28. If the FWC elects not to limit the term to an identifiable range of industrial interests, then it is reasonable to suggest that the model term may go beyond that which is necessary to give effect to the objects of Part 3-1 of the FW Act and conflict with other FW Act objects and the objectives of modern awards as discussed in paragraph 3 above.

Right to reasonable communication with employees

29. Section 350C(3)(a) of the Closing Loopholes Act deals with the workplace delegates' right to reasonable communication with employees, specifically providing that the workplace delegate is entitled to:

reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests

30. It should be clarified that communication between the workplace delegate and other employees must be in relation to the other employees' "industrial interests" only.
31. In saying that, once again NECA notes that there is currently no definition of 'industrial interests' in modern awards but the inclusion of such a definition should be considered to alleviate ambiguity in this regard.
32. Having regard to the operational requirements and productivity of an organisation NECA suggest that the wording of the model term not act to provide the workplace delegate with unfettered communication options but instead provide guidance (and any necessary limitations) on what constitutes 'reasonable' communication (including when, where and to who communication can be made).
33. When giving consideration to the delegates' rights in model award term(s), NECA asks that the FWC consider:
- a. limiting communication to be between workplace delegates and those employees who wish to be represented by a delegate;
 - b. the timing of communication between workplace delegates and employees to be during rest breaks unless otherwise agreed by the employer (where consent cannot be unreasonably withheld);
 - c. to limit communication to the timeframe reasonably required to communicate about an employee's relevant industrial interest(s);
 - d. the location of communication, specifically communication should be conducted in a private space away from where work is being undertaken, and especially where the communication or industrial interest of an employee is sensitive or private in nature;
 - e. when considering whether a request for additional time to communicate with an employee about their industrial interests is reasonable, the following factors will be relevant:
 - a) the impact on the employer's output, operations and productivity;
 - b) that work typically undertaken as a workplace delegate might distract from the employee's usual duties as an employee and may require additional resourcing to be put in place if excessive provision is made for delegate activities;
 - c) financial, time and other cost pressures on the employer, depending on their size and other available workers;

- d) the ease and timeframe with which facilities can be provided (and at what cost);
- e) the maximum number of persons likely to be represented by the relevant delegates (if known); and
- f) the extent to which employees wish to be represented by a workplace delegate.

Right to reasonable access to workplace and workplace facilities

34. Section 350C(3)(b)(i) of the Closing Loopholes Act deals with the workplace delegates' right to reasonable access to the workplace and workplace facilities where the enterprise is being carried on, for the purpose of representing employee's industrial interests.
35. When giving consideration to the delegates' rights in model award term(s), NECA asks that the FWC consider:
- a. limiting workplace delegates from have unfettered access to the workplace and workplace facilities, and that this right only relates to situations when the workplace delegate is representing an employee's industrial interests;
 - b. providing that the use of workplace facilities by workplace delegates is only permissible to the extent that it is necessary for the delegate to represent the industrial interests of an employee who is (or is potentially) represented by the delegate;
 - c. providing that the workplace delegate consult with the employer regarding the use of suitable workplace facilities, and that if suitable facilities cannot be agreed upon then the employer must make available facilities where the workplace delegate can safely exercise their relevant delegates' rights; and
 - d. enabling employers to be able to determine the timeframes, or certain times of day, within which access to facilities will be provided to workplace delegates, having regard to the operational requirements of the enterprise. Outside those times the workplace delegate should be required to provide notice to the employer in case there is a need to facilitate additional resources.

36. Right to reasonable access to paid time for training

37. Section 350C(3)(b)(ii) of the Closing Loopholes Act deals with the workplace delegates' right to reasonable access to paid time, during normal work hours, for the purposes of related training, for the purpose of representing employee's industrial interests.
38. When giving consideration to the delegates' rights in model award term(s), NECA asks that the FWC consider:
- a. including that the training must be directly related to the representation of employees 'industrial interests' and that evidence of the relativity be provided to the employee upon request.
 - b. limiting the entitlement to a maximum number of days per year and per workplace delegate, for example, NECA would consider 2 days per delegate per year (non-cumulative) as a reasonable maximum, having regard to:

- i. the purpose of the training;
 - ii. the location of the training; and
 - iii. the duration of the training.
- c. providing that the training must be provided by a registered training organisation (**RTO**) whose scope of registration includes training on matters related to the 'industrial interests' of employees within the enterprise;
- d. providing that the delegate must provide the employer at least 6 weeks' notice of their intention to attend relevant courses and the leave to be taken. The notice to the employer must include details of the type, content, duration and RTO of the course to be attended. Upon request, the employer can ask for (and the workplace delegate must provide) further information such as the course curriculum;
- e. the employer should have a right to refuse the above notice by the workplace delegate in reasonable circumstances, having regard to:
- i. reasonable operational requirements;
 - ii. resourcing limitations at the time of the training; or
 - iii. the relevancy and quality of the training.
- f. expressly noting the small business exemption;
- g. limit the paid time to attend training based on the size of the business and according to the following scale for each worksite of an employer and prioritising the training of new workplace delegates. NECA submits that the following scale is reasonable:

No. of full time and part-time employees	Max. no. of delegates eligible to attend training per year
16-50	1
50 and over	2

- h. An employer will not be liable for any additional expenses associated with an employee's attendance at a course other than the payment of ordinary time earnings for such an absence. For the purposes of this clause, ordinary time earnings should be as defined in the *Superannuation Guarantee (Administration) Act 1992* (Cth) (as amended).
- i. provide that a leave of absence while attending training will be counted towards the workplace delegates service with the employer; and
- j. that the employee must provide the employer with proof of attendance and completion of any training course for which they have accessed paid time to attend.

NECA seeks to work constructively with the Fair Work Commission on this important topic. To arrange NECA's further participation or should you wish to discuss any matter relating to the submission, please contact Kent Johns, Head of Government Relations and Regulatory Affairs on 0467 660 110 or Kent.Johns@neca.asn.au.

Yours sincerely



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