



DETERMINATION

Fair Work Act 2009

s.160—Variation of modern awards to remove ambiguity or uncertainty or correct error

Variation of delegates' rights term in modern awards

(AM2025/28)

NURSERY AWARD 2020

[MA000033]

Nursery industry

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT GIBIAN
COMMISSIONER MATHESON

SYDNEY, 23 JANUARY 2026

Variation of delegates' rights term in modern awards – Commission acting on its own initiative – s.160 – consideration of award delegates' rights term in [2025] FCAFC 187 – award varied – retrospective operation to 1 July 2024.

A. Further to the decision issued by the Full Bench on 23 January 2026 [[2026] FWCFCB 5], the above award is varied as follows:

1. By deleting the definition of “**employee organisation**” in clause 2 and inserting the following:

employee organisation has the meaning given by section 12 of the Act.

2. By deleting clause 27A and inserting the following:

27A. Workplace delegates' rights

27A.1 Clause 27A 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 is taken to have afforded a workplace delegate the rights mentioned in section 350C(3) if the employer has complied with clause 27A.

27A.2 In clause 27A:

(a) **employer** means the employer of the workplace delegate;

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

27A.3 Before exercising entitlements under clause 27A, a workplace delegate must give the 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.

27A.4 An employee who ceases to be a workplace delegate must give written notice to the employer within 14 days.

27A.5 Right of representation

A workplace delegate may represent the industrial interests of eligible workers who wish to be represented by the workplace delegate in matters including:

- (a) consultation about major workplace change;
- (b) consultation about changes to rosters or hours of work;
- (c) resolution of disputes;
- (d) disciplinary processes;
- (e) 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
- (f) any process or procedure within an award, enterprise agreement or workplace policy under which eligible workers are entitled to be represented and which concerns their industrial interests.

27A.6 Entitlement to reasonable communication

- (a) A workplace delegate may communicate with eligible workers in relation to their industrial interests under clause 27A.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.

27A.7 Entitlement to reasonable access to the workplace and workplace facilities

- (a) The employer must provide a workplace delegate with 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 is not required to provide access to or use of a workplace facility under clause 27A.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.

27A.8 Entitlement to reasonable access to training

Unless the employer is a small business employer, the employer 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, the 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 the 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 the employer, the workplace delegate must provide the employer with an outline of the training content.
- (f) The employer 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 the employer with evidence that would satisfy a reasonable person of their attendance at the training.

27A.9 Exercise of entitlements under clause 27A

- (a) A workplace delegate's entitlements under clause 27A are subject to the conditions that the workplace delegate must, when exercising those entitlements:
 - (i) comply with the reasonable policies and procedures of the 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.
- (b) When exercising any entitlements under clause 27A, a workplace delegate must, other than in the reasonable exercise of those entitlements:
 - (i) comply with their duties and obligations as an employee; and
 - (ii) not hinder, obstruct or prevent the normal performance of work.
- (c) Clause 27A does not require the employer to provide a workplace delegate with access to electronic means of communication in a way that provides individual contact details for eligible workers.
- (d) Clause 27A does not require an eligible worker to be represented by a workplace delegate without the worker's agreement.

NOTE: Under section 350A of the Act, the employer 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 27A.

3. By updating the table of contents accordingly.

B. This determination is made retrospectively and comes into operation on 1 July 2024. In accordance with s 165(3) of the *Fair Work Act 2009* (Cth) this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after 1 July 2024.



PRESIDENT

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