



STATEMENT

Fair Work Act 2009
Sch 1, cl 95—FWC to vary certain modern awards

Variation of modern awards to include a delegates' rights term (AM2024/6)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 10 MAY 2024

Variation of modern awards to include a delegates' rights term for workplace delegates – Fair Work Legislation Amendment (Closing Loopholes) Act 2023 – draft modern award term issued for comment.

[1] On 14 December 2023, the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (Closing Loopholes Act) received Royal Assent. Relevantly, the Closing Loopholes Act amended provisions of the *Fair Work Act 2009* (Cth) (FW Act) relating to terms that must be included in modern awards. These amendments commenced operation from 15 December 2023 and provide that the Commission must make determinations varying modern awards so that they include a delegates' rights term for workplace delegates by 30 June 2024.

[2] On 20 December 2023, I issued a [Statement](#)¹ setting out the Commission's approach to the implementation of the Act amendments, including the requirement for the Commission to vary all modern awards to include a new delegates' rights term. In my December statement, I noted that the process to create a delegates' rights term will require significant consultation and engagement with stakeholders.

[3] On 18 January 2024, I issued a further [Statement](#)² commencing the process to make a delegates' rights term. In my January statement, I provided an overview of the legislative changes relating to workplace delegates' rights and set out a draft timetable for the consultation and engagement process to be conducted by a Full Bench consisting of Vice President Asbury, Deputy President Binet and Commissioner Lim. The statement invited parties to provide submissions and feedback regarding the proposed draft timetable by Thursday, 25 January 2024.

[4] On 30 January 2024, I issued a further [Statement](#)³ in which I confirmed the proposed timetable and allocated the matter to the above-mentioned Full Bench. The Full Bench conducted consultation sessions with interested parties in accordance with the timetable. The consultation sessions were held as follows:

- Sydney (1:30 pm Wednesday, 10 April 2024)
- Sydney (10:00 am Thursday, 11 April 2024)
- Melbourne (10:00 am Friday, 12 April 2024).

[5] The Full Bench also undertook consultations with the peak councils, namely the Australian Industry Group, the Australian Council of Trade Unions, the Australian Chamber of Commerce and Industry and the Council of Small Business Organisations of Australia on 20 and 21 February, 10 April and 1 May 2024.

[6] The Commission received 25 submissions and 22 submissions in reply from interested parties ahead of the consultation sessions. All submissions received concerning the matter were published on the Commission's website.⁴

[7] On 16 April 2024, the Full Bench issued a [Statement](#)⁵ inviting parties to comment on a matter discussed during the consultation sessions concerning the interaction between the definition of 'enterprise' in s 12 of the FW Act and the meaning of 'workplace delegate' in s 350C of the FW Act. The Commission received a further eight submissions on 17 April 2024 and three submissions in reply on 19 April 2024 addressing the matter.

[8] Following the consultation process and taking into account the views of the peak councils and other interested parties received during that process, the Commission has developed a draft delegates' rights term. The draft delegates' rights term is set out at **Attachment A** to this Statement.

[9] The draft delegates' rights term is intended to be the term inserted into all modern awards. Interested parties will have the opportunity to apply for award-specific variations to the term following the conclusion of this matter.

Next steps

[10] Consistent with the timetable in my January statement, interested parties are to file submissions concerning the draft term by **12.00 pm (AEST) on Friday 17 May 2024**. Submissions should be sent to awards@fwc.gov.au.

[11] Final determinations varying modern awards will be published by 28 June 2024. The determinations will commence operation on 1 July 2024 as required by clause 95 of Division 4 of the new Part 15 in Schedule 1 to the FW Act.



PRESIDENT

Attachment A— Draft modern award delegates’ rights term

X. Workplace delegates’ rights

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

X.2 In clause **X**:

- (a) **employer** means the employer of the workplace delegate;
- (b) **delegate’s organisation** means the employee organisation under the rules of which the workplace delegate was appointed or elected; and
- (c) **eligible employees** means members and persons eligible to be members of the delegate’s organisation who are employed by the employer in the enterprise.

X.3 Before exercising entitlements under clause **X**, 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.

X.4 An employee who ceases to be a workplace delegate must give written notice to the employer as soon as practicable.

X.5 Right of representation

A workplace delegate may represent the industrial interests of eligible employees in matters including but not limited to:

- (a) consultation about major workplace change;
- (b) consultation about changes to rosters or hours of work;
- (c) resolution of individual or collective grievances or disputes;
- (d) performance management and disciplinary processes;
- (e) enterprise bargaining; and
- (f) any process or procedure in which the employees are entitled to be represented.

X.6 Entitlement to reasonable communication

- (a) A workplace delegate may communicate with eligible employees for the purpose of representing the industrial interests of the employees under clause **X.5**. This includes discussing membership of the delegate’s organisation with the

employees and consulting the delegate's organisation in relation to matters in which the workplace delegate is representing employees.

- (b) A workplace delegate may communicate with eligible employees individually or collectively, during working hours or work breaks, or before the start or after the end of work.

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

The employer must provide a workplace delegate with access to or use of the following workplace facilities, unless the employer does not have them:

- (a) a room or area to hold discussions which is fit for purpose, private and accessible by the workplace delegate and eligible employees;
- (b) a physical or electronic noticeboard;
- (c) electronic means of communication that are ordinarily used by the employer to communicate with eligible employees in the workplace;
- (d) a lockable filing cabinet or other secure document storage area; and
- (e) office facilities and equipment including printers, scanners, photocopiers and wi-fi.

X.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 1 day each subsequent year, to attend training related to representation of the industrial interests of eligible employees, subject to the following conditions:

- (a) The employer is not required to provide the 5 days or 1 day of paid time during normal working hours, to more than one workplace delegate per 50 eligible employees.
- (b) A day of paid time during normal working hours is the number of hours the workplace delegate would normally be rostered or required to work on a day on which the delegate is absent from work to attend the training.
- (c) The workplace delegate must give the employer as much notice as is practicable, and not less than 5 weeks' notice, of the dates, subject matter and the daily start and finish times of the training.
- (d) The workplace delegate must, on request, provide the employer with an outline of the training content.

- (e) The employer must advise the workplace delegate as soon as is practicable, and 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.
- (f) The workplace delegate must provide the employer with evidence that would satisfy a reasonable person of attendance at the training, within 7 days after the day on which the training ends.

X.9 Exercise of entitlements under clause X

- (a) A workplace delegate's entitlements under clauses **X.5** to **X.7** are subject to the conditions that the workplace delegate must:
 - (i) comply with their duties and obligations as an employee;
 - (ii) 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;
 - (iii) not hinder, obstruct or prevent the normal performance of work; and
 - (iv) not hinder, obstruct or prevent employees exercising their rights to freedom of association.
- (b) Clause **X** 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 employees.
- (c) Clause **X** does not require an eligible employee to be represented by a workplace delegate without the employee's agreement.

NOTE 1: 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 **X**.

NOTE 2: 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 **X**.

Definitions to be included in clause 2 of each award

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

enterprise has the meaning given by section 12 of the Act.

small business employer has the meaning given by section 23 of the Act.

workplace delegate has the meaning given by section 350C(1) of the Act.

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¹ President's statement—*Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, 20 December 2023.

² [\[2024\] FWC 150](#).

³ [\[2024\] FWC 241](#).

⁴ [Variation of modern awards to include a delegates' rights term | Fair Work Commission \(fwc.gov.au\)](#).

⁵ [\[2024\] FWCFB 212](#).