



# 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)

VICE PRESIDENT ASBURY

BRISBANE, 28 JUNE 2024

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

[1] The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (Closing Loopholes Act) amended provisions of the *Fair Work Act 2009* (Cth) (FW Act) with effect from 15 December 2023. The transitional provisions relating to the amendments require the Fair Work Commission (Commission) to make determinations varying modern awards to include a delegates' rights term for workplace delegates, by 30 June 2024. The determinations must come into operation, and take effect from, 1 July 2024.

[2] This matter was allocated to a Full Bench of the Commission constituted by Deputy President Binet, Commissioner Lim and me. The Full Bench consulted with interested parties and stakeholders and received submissions. A draft delegates' rights term was provided to the parties on 10 May 2024 as an Attachment to a Statement issued by the President.<sup>1</sup> The parties were informed that the draft delegates' rights term was intended to be inserted into all modern awards, and that they would have an opportunity to apply for award-specific variations to the term following the conclusion of this matter.

[3] Interested parties were invited to file submissions responding to the draft term. The Commission received submissions from 27 parties concerning the draft term and has considered those submissions in deciding this matter.

[4] A majority of the Full Bench has decided to vary all modern awards to include the delegates' rights term at **Attachment A** to this Statement. This term is not endorsed by Deputy President Binet. The majority has also decided that a review of the term will be conducted after 12 months of operation of the term, to deal with any issues which arise with respect to its operation, generally or in relation to individual modern awards.

[5] The final determinations varying all 155 modern awards to include the term will be issued today and will commence operation and take effect from 1 July 2024.

[6] The following additional subclause will be included in the delegates' rights term for 38 modern awards listed at **Attachment B** to this Statement, to deal with the interaction of the

delegates' rights term with other clauses of those awards, which may be inconsistent with the term because they provide more favourable entitlements:

**XA.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 XA, the entitlement under the other clause applies instead of the entitlement under clause XA.

[7] Reasons for this decision will be issued by the Full Bench in due course.



VICE PRESIDENT

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## **Attachment A—Modern award delegates’ rights clause**

### **XA. Workplace delegates’ rights**

**XA.1** Clause XA 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 XA.

**XA.2** In clause XA:

- (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; 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.

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

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

### **XA.5 Right of representation**

A workplace delegate may represent the industrial interests of eligible employees 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 policy of the employer under which eligible employees are entitled to be represented and which concerns their industrial interests.

**XA.6 Entitlement to reasonable communication**

- (a) A workplace delegate may communicate with eligible employees for the purpose of representing their industrial interests under clause XA.5. This includes discussing membership of the delegate's organisation and representation with eligible employees.
- (b) A workplace delegate may communicate with eligible employees during working hours or work breaks, or before or after work.

**XA.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 employees;
  - (ii) a physical or electronic noticeboard;
  - (iii) electronic means of communication ordinarily used in the workplace by the employer to communicate with eligible employees and by eligible employees 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 XA.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.

**XA.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 employees, 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 employees.
- (b) The number of eligible employees will be determined on the day a delegate requests paid time to attend training, as the number of eligible employees 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.

#### **XA.9 Exercise of entitlements under clause XA**

- (a) A workplace delegate's entitlements under clause XA are subject to the conditions that the workplace delegate must, when exercising those entitlements:
  - (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 eligible employees exercising their rights to freedom of association.
- (b) Clause XA 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 XA does not require an eligible employee to be represented by a workplace delegate without the employee'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 XA.

**Definitions to be inserted into the definitions clause for 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.

## **Attachment B —Modern awards that include an additional subclause XA.10**

1. Airport Employees Award 2020
2. AirServices Australia Enterprise Award 2016
3. Australia Post Enterprise Award 2015
4. Australian Broadcasting Corporation Enterprise Award 2016
5. Australian Bureau of Statistics (Interviewers) Enterprise Award 2016
6. Australian Capital Territory Public Sector Enterprise Award 2016
7. Australian Federal Police Enterprise Award 2016
8. Australian Government Industry Award 2016
9. Australian Nuclear Science and Technology (ANSTO) Enterprise Award 2016
10. Australian Public Service Enterprise Award 2015
11. Building and Construction General On-Site Award 2020
12. Christmas Island Administration Enterprise Award 2016
13. Cleaning Services Award 2020
14. Concrete Products Award 2020
15. Contract Call Centres Award 2020
16. CSIRO Enterprise Award 2016
17. Electrical Power Industry Award 2020
18. Fire Fighting Industry Award 2020
19. Graphic Arts, Printing and Publishing Award 2020
20. Health Professionals, Medical Scientists and Support Services (Victoria) State Reference Public Sector Award 2018
21. Local Government Industry Award 2020
22. Manufacturing and Associated Industries and Occupations Award 2020
23. Market and Social Research Award 2020
24. Metropolitan Newspapers (South Australia and Tasmania) Printing Award 2015
25. Northern Territory News Award 2015
26. Northern Territory Public Sector Enterprise Award 2016
27. Optus Award 2015
28. Parliamentary Departments Staff Enterprise Award 2016
29. Printing Industry – Herald & Weekly Times – Production Award 2015
30. Road Transport and Distribution Award 2020
31. Sugar Industry Award 2020
32. Telecommunications Services Award 2020
33. Textile, Clothing, Footwear and Associated Industries Award 2020
34. Timber Industry Award 2020
35. Transport (Cash in Transit) Award 2020
36. Victorian Local Government Award 2015
37. Viterra Bulk Handling and Storage of Grains, Pulses and Minerals Award 2015
38. Waste Management Award 2020.

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<sup>1</sup> [\[2024\] FWC 1214](#)