

VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES' RIGHTS TERM (AM2024/6)

17 MAY 2024

NSW BUSINESS CHAMBER AND AUSTRALIAN BUSINESS INDUSTRIAL

1. This submission is made in response to the Statement issued by Justice Hatcher, President of the Fair Work Commission (Commission) on 10 May 2024 regarding the draft delegates rights term developed by the Commission and set out at Attachment A to the Statement.

Right of representation

2. Subclause X.5(e) of the draft modern award delegates rights term states:

"A workplace delegate may represent the industrial interests of eligible employees in matters including but not limited to: ... (e) enterprise bargaining.
3. Clause X.5 (e) should be deleted as it will inevitably lead to conflict in the workplace by suggesting that union delegates have some status to participate in bargaining even when they are not bargaining representative under the Fair Work Act (FW Act).
4. Its specificity is unneeded as delegates can discuss bargaining with members etc as an industrial interest. The formulation of X.5(e) suggests far more than this which is the problem in terms of the broader operation of the FW Act.
5. The statutory regime for bargaining clearly sets out that employees are represented in the bargaining process by bargaining representatives whether these are default (noting that such a default bargaining representative can be revoked) or appointed.
6. Clause X.5(e) could be construed to suggest that a new class of person could participate in bargaining that is not subject to the same obligations (such as bargaining in good faith) as apply to bargaining representatives.
7. Union delegates may well be involved in bargaining, but the Commission must ensure that undesirable confusion does not arise from the drafting of this clause to suggest that a union delegate becomes a 'quasi bargaining representative' when they do not occupy that statutory role.
8. These concerns are amplified in circumstances when a default bargaining representative is revoked.
9. Whilst unions are default bargaining representative for union members in the workplace when bargaining for non-greenfield agreement, employees are entitled, in accordance with section 178A(2) of the FW Act, to revoke the status of the union and appoint their own bargaining representative for an agreement should they choose to.
10. In light of the drafting of clause X.5(e) of the draft modern award delegates' right term, a situation could arise whereby employees exercise their rights to displace the default bargaining status of a union and, in turn, a workplace delegate as their bargaining representative, in accordance with section 178A(2), but despite this, the workplace delegate, by virtue of subclause X.5(e), could remain entitled to represent the industrial

interests of the very same eligible employees who have actively sought to revoke their status as their representative in bargaining.

11. Such an outcome would not only be contrary to the intention of section 178A(2) of the FW Act, which seek to retain employee choice when appointing a representative during bargaining but would also be contrary to the principle of freedom of association that underpins the operation of the legislative scheme.

Entitlement to reasonable communication

12. The entitlement of workplace delegates to communicate with members and eligible members as set out in section 350C of the FW Act is not an entitlement to communication 'at large'. Rather a workplace delegates communication must be 'reasonable' and relate to the industrial interests of said employees.
13. Whilst the title of draft clause X.6 indicates that the clause is intended to reflect a workplace delegates entitlement to 'reasonable' communication, as the clause is currently drafted there is no 'reasonableness' constraint placed on a workplace delegates communication with eligible employees.
14. The clause as currently drafted is beyond what is necessary in terms of achieving the modern awards objective in section 138 of the FW Act.
15. Accordingly the following amendment to draft clause X.6 of the draft delegates rights term should be made in order to ensure a workplace delegates entitlement is subject to the necessary limitation of 'reasonableness':

X.6 Entitlement to reasonable communication

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

Entitlement to reasonable access to training

Eligible employees

16. The draft term at subclause X.8(a) provides that an employer is not required to provide five days or one day of paid time during normal working hours to more than one workplace delegate per 50 eligible employees.
17. Whilst it appears that the reference to 50 eligible employees in this subsection is a reference to the number of employees by headcount, by virtue of the reference to "eligible

employees”, due to the varying workforce metrics used in Australia law to describe employee headcount, including but not limited to the meaning of small business employer in section 23 of the Fair Work Act, this subclause would be aided by further clarifying the method of calculation intended to apply to clause X.8.

18. Accordingly, we propose the following amendment to clause X.8(a) of the draft delegate’s right term:

X.8 (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.

For the purpose of calculating the number of eligible employees of an employer, all employees employed by the employer are to be counted.

Paid time

19. The draft term at subclause X.8(b) provides that 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.
20. The use of the phrase ‘normally be rostered’ in this subclause lacks specificity and may in certain workplaces with differing rostering arrangements and practices lead to confusion as to the hours for which an employee may in fact be entitled to pay.
21. In order to provide greater clarity as to the pay an employee is entitled to receive whilst absent from work to attend training, clause X.8(b) should be amended to refer to an employee ‘ordinary hours of work’ as this phrase is both commonly understood and already defined in the FW Act:

X.8(b) A day of paid time during normal working hours is the number of ordinary hours of work 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.

Exercise of entitlements under clause X

22. We support the inclusion of the conditions that a workplace delegate is subject to when exercising their rights as set out in clause X.9 of the draft delegates’ rights clause and submit that in order to ensure the efficient performance of employee rights, an additional subclause should be added to X.9 to ensure that workplace delegates exercise their rights in a reasonably timely manner. Accordingly the following condition should be added to clause X.9 of the draft delegate’s right term:

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:

....

(v) not exceed a reasonable amount of time when exercising their entitlements

23. Without such a condition it is foreseeable that a workplace delegate could seek to exercise their rights to represent the industrial interests of eligible employees in such an unduly and time-consuming manner, so as to significantly diminish the amount of work that the delegate actually perform as an employee.
24. The inclusion of such an additional condition is supported by the modern awards objective the Commission must take into account, being the likely impact of the new delegates' right term on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)). As well as the efficient and productive performance of work (s.134(1)(d)).

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