MINERALS COUNCIL OF AUSTRALIA

Submission concerning the Fair Work Commission's draft delegates' rights term (AM2024/6)

22 MAY 2024

This submission

1. This submission of the Minerals Council of Australia (the '**MCA**') is made in response to President Hatcher's statement dated 10 May 2024, calling for interested parties to file submissions concerning the Fair Work Commission's draft delegates' rights term (the '**draft term**').[1] It adds to the MCA's submission in this proceeding dated 24 March 2024, and evidence to the FWC on 10 April 2024.

2. The MCA's suggested changes to the draft term are attached.

Recommendations

3. The MCA recommends the following changes to the draft term.

   3.1. **Paid training leave:** Limit paid training leave for workplace delegates in paragraph X.8.(a) to 1 delegate per 200 employees (with a minimum of one delegate).

   3.2. **Evidence of training:** When providing notice to the employer of their appointment or election, a workplace delegate must also give the employer written evidence that they have received appropriate delegate training or that they intend to access such training within the next 12 months. If such evidence cannot be provided, the notice is invalid.

   3.3. **Untrained delegates:** Require that workplace delegates exercise their rights only if they have completed delegate training during their employment, and/or within the previous 12 months.

   3.4. **Disciplinary processes:** Workplace delegates can only represent an employee in a disciplinary or performance matter if the employee has given written consent, and that the consent identifies whether the delegate is acting as a support person or as an advocate.

   3.5. **Excessive or inappropriate communication:** Prohibit communication with eligible employees where such communication is unreasonably excessive, including unwanted communication. Further, clarify that communication must be subject to reasonable employer policies on appropriate communication and conduct in the workplace.

   3.6. **Representation in bargaining:** Require workplace delegates to be bound by good faith bargaining requirements when they represent employees in enterprise bargaining.

   3.7. **Minimising disruption during productive time:** Confine communication to work breaks or before/after work shifts of the relevant employee(s), except where communication is necessary during working hours.

   3.8. **Access to workplace facilities:** Clarify that employers are not required to incur unreasonable costs, provide a website, provide exclusive access to rooms, or an area that is solely used for delegates' activity, or give delegates access to facilities they cannot access as employees.

   3.9. **Approving training leave:** Clarify that employers are under no obligation to approve paid training leave where it would cause unreasonable cost or disruption to the employer (for example through changing travel arrangements for FIFO workers).

   3.10. **Productivity and service delivery:** Prevent delegates' rights from being exercised in a way that *'unreasonably affects service delivery or productivity'* of the employer.

   3.11. **Conflicts of interest:** Make the right to represent eligible employees subject to the condition that the workplace delegate has no conflict of interest between the delegate's interest as an employee, and duties as a delegate.

   3.12. **Personal information:** Ensure sensitive or personal information obtained in the course of employment cannot be shared with or retained by a union without the consent of the relevant employee, consistent with privacy legislation.

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[1] Justice Hatcher, President, Statement, *Variation of modern awards to include a delegates' rights term (AM2024/6)*, [2024] FWC 1214, para 10.

Paid training leave

4. The mining industry expresses concern about the FWC's proposal to allow for paid training leave for one workplace delegate per 50 employees.

5. MCA members have advised that this ratio greatly exceeds current practices in the mining industry. The success of mining, particularly in the coal and iron ore sectors, has led to large integrated operations which can have more than 1,500 employees. In metalliferous mining industries, operations usually have very low (if any) delegate numbers. For example, one MCA member in this category advised the MCA it has 2-3 delegates per 500 employees in its operations.

6. The notion that delegate numbers might rise to this extent is a significant threat to productive and efficient operations. Workplace disruption could occur through the diversion of employees' productive time towards union organising, increased strain on managerial resources, the direct cost of training leave and the potential for increased disputation.

7. No case has been made in the mining industry for why the number of workplace delegates should increase to such an extent.

8. While workplace delegates can play an important role in enabling employee representation in the workplace, it must also be remembered that they support the role of union officials, who are seperately resourced, and who employees have the freedom to access.

9. The FWC has proposed the ratio as an upper limit to the entitlement to receive paid training leave. However, unions and workers are incentivised to maximise delegate numbers. This means that rather than acting as a limit, the 'ratio' will set the norm. The incentive to become a workplace delegate is not limited to access to paid training leave. In practice, workplace delegates will also have more freedom than their co-workers to refuse directions from their employer; will be able to spend substantial time on non-work related tasks which employers cannot monitor; and will have better job security than their co-workers because of the legal protections they receive.

10. In the absence of clear data revealing current industry practices, including delegate numbers and their distribution in workplaces, the ratio should be set lower than it has been set in the draft term. The MCA recognises that, unfortunately, there is limited reliable public data on the current number and distribution of workplace delegates in the economy, nor have relevant unions provided such data as part of this proceeding. This is a matter about which evidence could be sought, and tested, to enable credible findings to be made, against which this issue could be decided.

11. The MCA submits that the 'ratio' be set at 1 delegate per 200 workers, noting there will be further opportunities for award-specific variations.

Untrained delegates

12. The MCA supports workers' rights to form and join trade unions under the principle of freedom of association. These principles are reflected in the objects of *Fair Work Act 2009* (Cth) (the '**Act**'). The objects of the Act also emphasise *'a balanced framework for cooperative and productive workplace relations'.*

13. Whilst the draft term includes a limit on the number of delegates that can access paid training leave, there is no limit on the number of employees who can be appointed as delegates. This is a 'loophole' that will inevitably be exploited and should be closed. Because section 350C places no limit on the number of workplace delegates that can be appointed in a workplace, there is a risk of disruption and disputation being caused by the appointment of large numbers of delegates (who may or may not have received training). Whilst the ambitions of some unions may be unlimited in terms of the number of delegates they desire, the need for balanced, cooperative, and productive workplace relations requires that there be some limit.

14. An unlimited number of untrained delegates exercising their rights at will poses a clear risk of disruption. These risks of disruption will be higher in non-unionised workplaces, such as those in the iron ore, gold, copper, lithium, and rare earths industries in Western Australia, where new delegates are most likely to test the limits of their new rights. These industries are currently providing very successful

employment arrangements that have delivered high paying, secure jobs. They continue to underpin the economic success of the WA and national economies and are critical to the national interest.

15. The MCA recommends that the risks mentioned above be balanced by requiring that when providing notice to the employer of their appointment or election, a workplace delegate must also give the employer written evidence that they have received appropriate delegate training or that they intend to access such training within the next 12 months (if such evidence cannot be provided the notice would be invalid). Further, requiring that workplace delegates can only exercise their rights if they have completed delegate training during their employment, and/or within the previous 12 months.

Fly-in-fly-out (FIFO) workplace delegates

16. Mining relies very heavily on fly-in-fly-out (FIFO) and drive-in-drive-out (DIDO) workers at remote sites. The most common shifts are 14 days on, 14 days off; and 7 days on 7 days off, although some shift patterns include longer on duty and off duty periods.

17. It is unclear how the entitlement to paid training leave would operate in situations where, for example, special travel arrangements must be made to allow a FIFO workplace delegate to attend training during a period that they are rostered on. If not clarified, this may require employers to cover transport, for individual personnel, which could include chartered flights, as well as the expense of 'backfilling' during such absences.

18. The MCA recommends that the draft term explicitly clarify that employers are under no obligation to approve paid training leave where it would cause significant cost or disruption to the employer, including by having regard to the existing shift roster and travel arrangements, as this is not 'reasonable'.

Guidance should be provided on the content and frequency of communication

19. The draft term allows workplace delegates reasonable communication with eligible employees in relation to union membership or other industrial interests 'during working hours'. This is made subject to the conditions in clause X.9, which requires, among other things, that communication not 'hinder, obstruct or prevent the normal performance of work'.

20. The MCA considers it appropriate for the FWC to provide some guidance on the frequency of proactive communications, being communications which are not expressly sought by employees. These 'proactive' communications might be about matters such as union membership. For example, while it may be reasonable for a workplace delegate to provide a new starter with information about the role of the union and union membership, it would be unreasonable for such information to be repeatedly pushed on employees who have made it clear they have no intention of joining the union. This could be addressed by adding a condition in clause X.9 that prohibits unreasonably excessive communication, including unwanted communication with eligible employees.

21. In the interests of promoting harmonious and productive workplaces, it is also appropriate to provide clear guidance that the right to communicate cannot be used for derogatory, inappropriate, or defamatory communications inconsistent with reasonable company policies. This could be clarified by adding policies related to 'appropriate communication and conduct in the workplace' to the types of policies referred to in clause X.9(a)(ii).

22. The above measures would serve as important protections against abuse of these rights.

Access to workplace facilities

23. Under the current drafting it is unclear whether delegates are required to be provided with exclusive use of a specific room or area, or whether the requirement can be met by, for example, allowing appropriate meeting rooms to be booked as needed.

24. The provision that workplace delegates can access facilities *'unless the employer does not have them'* does not make it clear enough that facilities such as company servers or equipment assigned to other employees cannot be used by delegates when they would have no right to use them otherwise.

25. The reference to an *'electronic notice board'* is similarly ambiguous. It should be clear that there is no requirement to supply an independent website under the control of the union.

Minimising disruption during productive time

26. Unlike the legislative provision for paid training leave, section 350C is silent on whether the right to reasonable communication can occur 'during normal working hours'. It is therefore open to the FWC to set reasonable boundaries on whether and how much paid time can be used by delegates to exercise their rights.

27. The MCA submits that the exercise of the right to reasonable communication be confined to 'work breaks' and 'before the start or after the end of work' of the relevant eligible employee(s), except where 'reasonably necessary'. This would support the principle that employees must not be unnecessarily distracted from their productive tasks during work time, consistent with the objects of the Act.

28. Specifying that the terms 'work break' and 'before the start or after the end of work' apply to 'eligible employees', also resolves the ambiguity that will occur where employees and delegates have different start, finish and break times.

Unreasonably disrupting services and productivity outcomes

29. While the draft term prevents the 'normal performance of work' from being hindered, obstructed or prevented, it does not protect business and productivity outcomes in the same way. These should be protected, with an added condition in clause X.9. that prevents delegates' rights from being exercised in a way that 'unreasonably affects service delivery or productivity'.

30. The draft term should deal within this concern with greater clarity. It is not sufficient for disputes over such matters to be dealt with through the applicable dispute resolution processes. The draft term should provide more detailed guidance to prevent such disputes arising in the first place.

31. This could be addressed by inserting a condition in clause X.9 that prevents delegates' rights from being exercised in a way that 'unreasonably affects service delivery or productivity' of the employer.

Representation in disciplinary processes

32. Clause X.5(d) of the draft term allows a workplace delegate to 'represent' an employee in 'performance management and disciplinary process'. Clause X.9(c) clarifies that the basis of representation is employee consent.

33. However, there is potential for confusion to occur in relation to whether a workplace delegate has been asked by an employee to act as a support person or in the capacity of the employee's advocate. The draft term should provide greater clarity, by requiring that a workplace delegate can only represent an employee in a disciplinary or performance matter if the employee's consent to be represented has been given in writing, and that the employee has been provided with information about the distinction between support and advocacy. The draft term could include an appropriate note to explain the distinction. This approach would better align the rights of workplace delegates with those of union officials.

34. The draft term should also clarify that a workplace delegate's right to represent eligible employees is subject to the condition that the workplace delegate is free of any conflict of interest between the delegate's interest as an employee, and duties as a workplace delegate. The clause should preclude individuals from exercising rights under the clause where such a conflict, or the potential for such a conflict, is apparent. For example, a conflict may arise where a delegate is a representative of an employee in a disciplinary process, but is also subject to that same process, or was a witness to an incident that caused the process to be initiated.

35. For the avoidance of doubt, the draft term should also include a note which clarifies that 'performance management and disciplinary process' does not extend to routine performance appraisals.

Loophole in representing employees in bargaining

36. The draft term makes it clear in clause that workplace delegates have the right to represent eligible employees in enterprise bargaining.[2] Unions also represent employees in bargaining processes, but are subject to good faith bargaining requirements. This obligation extends to union officials and employees of the union – but workplace delegates are neither. There is no reason why workplace delegates should not be subject to the same good faith bargaining requirements, including the broad prohibition against 'capricious or unfair conduct' when exercising their representational rights. The MCA recommends that this loophole be explicitly closed in the draft term.

Access to personal employee information

37. Employee personal information should be adequately protected under the draft term. There is a real risk that the performance of delegates' duties, and the obligation to provide information, will conflict with an employer's duties under privacy legislation.

38. The issue should be dealt with explicitly, from two clear directions; first, no employer should be required to provide a delegate with any information which would amount to the employer breaching the privacy legislation applicable to them; and secondly, where a delegate is in possession of personal information about employees as a result of the exercise of the rights in the clause, a prohibition on using or distributing this information without employee consent or in a way that is contrary to privacy legislation.

39. The term should expressly state that workplace delegates who acquire personal information or sensitive information in such a capacity are subject to the relevant obligations that apply to the collection, retention, and use of such information under the *Privacy Act 1988* (Cth).

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[2] Draft term, clause X.5(e).

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.3A In providing notice to the employer under clause X.3, a workplace delegate must also give the employer written evidence that they have received appropriate training in accordance with clause X.8, or that they intend to access such training within the next 12 months. Where a workplace delegate does not or cannot provide such evidence, the notice under clause X.3 will be invalid.

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, which do not include routine performance appraisals;

(e) enterprise bargaining; and

(f) any process or procedure in which the employees are entitled to be represented.

A workplace delegate may represent an eligible employee in accordance with clause (d) as either a support person or advocate, provided that the eligible employee's consent to be represented is provided in writing and that this consent identifies the form of representation for which the employee has agreed.

A workplace delegate is bound by good faith bargaining requirements when they represent employees in enterprise bargaining.

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.

(c) A workplace delegate may not communicate with eligible employees where such communication is unreasonably excessive. This may include circumstances in which the workplace delegate has previously communicated with an employee and that employee has indicated that further communication is unwanted, or the workplace delegate should have a reasonable belief that further communication is unwanted.

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.

Nothing in this clause requires an employer to incur unreasonable costs, provide a website, provide exclusive access to a room or area that is solely used for workplace delegates' activity, or access facilities workplace delegates would not ordinarily be entitled to access during their employment.

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~~ 200 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.

(g) The employer is under no obligation to approve a request for paid training leave where it would cause unreasonable cost or disruption to the employer.

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, acceptable use of ICT resources, and appropriate communication and conduct in the workplace.

(iii) not hinder, obstruct or prevent the normal performance of work;

(iv) not unreasonably affect service delivery or productivity of the employer;

(v) not hinder, obstruct or prevent employees exercising their rights to freedom of association, and

(vi) not exercise the entitlements under clauses X.5 to X.7 unless they have completed delegate training under clause X.8 during their employment, and/or within the previous 12 months.

(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.

(d) Clause **X** does not entitle a workplace delegate to represent an eligible employee in relation to specific matters in which the workplace delegate has an actual or potential conflict of interest in relation to their duties as an employee.

(e) In exercising any entitlements under this clause, a workplace delegate must comply with applicable privacy obligations in relation to any personal information or sensitive information that is obtained from eligible employees in their capacity as a workplace delegate. This includes, but is not limited to, obligations under reasonable policies and procedures of the employer, and the obligations of the *Privacy Act 1988* (Cth) that would apply to the workplace delegate if they were the employer of an eligible employee from whom such information is obtained.

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.