

IN THE FAIR WORK COMMISSION

Fair Work Act 2009 (cl.95, Schedule 1)

Matter Number: AM2024/6

Matter: Variation of modern awards to include a delegates' rights term

The Mining and Energy Union's Response to the President's 10 May 2024 Statement

1. On 10 May 2024, the President of the Fair Work Commission (**Commission**) issued a statement in matter AM2024/6.¹ Attachment A to the statement was the Draft Modern Award Delegates' Rights Term (**MDRT**). The Commission intends for the MDRT to be incorporated into each of the modern awards.²
2. Matter AM2024/6 was initiated by the Commission pursuant to clause 95(2) of Schedule 1 to the *Fair Work Act 2009* (Cth) (**FW Act**). Clause 95(2) of Schedule 1 to the FW Act provides that the Commission "*must, by 30 June 2024, make a determination varying the modern award to include a delegates' rights term.*"
3. *Delegates' rights term* is defined by s 12 of the FW Act as "*a term in a fair work instrument that provides for the exercise of the rights of workplace delegates*". The legislative note to the definition clarifies that "*the rights of workplace delegates are set out in section 350C, and a delegates' rights term must provide at least for the exercise of those rights.*"
4. The MEU submits that there are six ways in which the MDRT, as currently framed, does not provide for the exercise of the rights of workplace delegates as set out in s 350C. If these issues are not addressed in an amended MDRT, the MEU submits that the MDRT will not be a '*delegates' rights term*' within the meaning of the FW Act and that the Commission will not, therefore, have fulfilled its function and duties under the FW Act, and will otherwise have misconceived its jurisdiction.³

¹ [2024] FWC 1214.

² *ibid*, [9].

³ *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* (2020) 275 FCR 385 at [90]; *Toms v Harbour City Ferries Pty Ltd* (2015) 229 FCR 537 at [59] (Buchanan J).

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5. To ensure that the MDRT provides for the exercise of the rights of workplace delegates and is a '*delegates' rights term*' within the meaning of the FW Act, the Commission would resolve the following issues:

Issue 1 - In so far as the MDRT confines a workplace delegate's right to represent workers employed by the workplace delegate's employer, it does not provide for the exercise of the right to represent as contemplated by s 350C(2) of the FW Act.

Issue 2 – In so far as the MDRT does not provide for communication with respect to an eligible employee's industrial interests, it does not provide for the exercise of the right to reasonable communication as contemplated by s 350C(3)(a) of the FW Act.

Issue 3 – In so far as the MDRT does not provide the workplace delegate any right which they do not already have, it does not provide for the exercise of the right to reasonable communication as contemplated by s 350C(3)(a) of the FW Act.

Issue 4 – In so far as the MDRT's right to represent is proposed to be subject to the conditions in X.9(a), it does not provide for the exercise of the right to represent as contemplated by s 350C(2) of the FW Act.

Issue 5 – In so far as clause X.9(a)(i) and (iii) prevent the reasonable exercise of the rights to communication and access to the workplace and workplace facilities, the MDRT does not provide for the exercise of the right to reasonable communication and reasonable access to workplace facilities as contemplated by s 350C(3) of the FW Act.

Issue 6 - In so far as the MDRT contains no obligation for the employer of an eligible employee to not hinder, obstruct or prevent a workplace delegate from exercising their rights, it does not provide for the exercise of the rights of workplace delegates as contemplated by s 350C of the FW Act.

6. This submission will address each of these issues and propose amendments to rectify them.
7. The above issues raise questions about the correct construction of the salient provisions of the FW Act.

8. A statutory provision is to be construed by considering the words themselves read in their context and having regard to their purpose.⁴ The words used in statutes, like all texts, exist in and take their meaning from the context in which they are used.⁵
9. “Context” includes surrounding statutory provisions, the mischief that the statutory provision was intended to remedy, the provision’s purpose or policy, and extrinsic materials, including legislative history.⁶ Context (including matters of extrinsic context) should be considered at the outset of the constructional task, and consideration of contextual materials is not contingent on the discernment of an ambiguity or uncertainty.⁷ The existing state of the law and the mischief which the provision was intended to remedy may be illuminative of a provision’s purpose.⁸
10. Section 15AA of the *Acts Interpretation Act 1901* (Cth) commands a court and the Commission to prefer a construction of a provision or provisions which best gives effect to the legislative purpose over any other interpretation.⁹ Hence, if it is open to construe a provision in more than one way, the construction which will best promote the purpose of the provision must be adopted.¹⁰ Section 15AA of the *Acts Interpretation Act* also allows a court and the Commission to consider the purpose of a provision or provisions when determining whether there is more than one possible construction.¹¹

Issue 1 - The MDRT confines a workplace delegate’s right to represent workers to individuals employed by the workplace delegate’s employer.

11. Proposed clause X.5 provides a workplace delegate may represent the industrial interests of eligible employees.
12. Clause X.2(c) defines *eligible employee* as members and persons eligible to be members of the delegate’s organisation who are employed *by the employer in the enterprise*. *Eligible employees* which a delegate can represent are, therefore, limited to employees employed by the delegate’s employer.

⁴ *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 352 at [14] (Kiefel CJ, Nettle and Gordon JJ); *CFMMEU v ABCC (The Bay Street Appeal)* (2020) 282 FCR 1 at [4] (Allsop CJ).

⁵ *Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204 at [31] (Bell P).

⁶ See *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495 at [13] (Kiefel CJ, Nettle and Gordon JJ).

⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 225 at [69] (McHugh, Gummow, Kirby and Hayne JJ); *CPB Contractors Pty Limited v CFMMEU* [2019] FCAFC 70 at [57] (O’Callaghan and Wheelahan JJ); *Bay Street Appeal* at [5] (Allsop CJ).

⁸ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Saraswati v The Queen* (1991) 172 CLR 1 at 21 (McHugh J) and *CPB Contractors* at [59]-[60].

⁹ *Mills v Meeking* (1990) 169 CLR 214 at 235 (Dawson J).

¹⁰ *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at [20] (Gageler and Keane JJ) and *Sydney Seaplanes* at [33].

¹¹ *Mills v Meeking* at 235.

13. Clause X.2(a) defines *employer* as the employer of the workplace delegate.
14. Thus, the proposed MDRT limits a workplace delegate to representing members and persons eligible to be members of the delegate's organisation who are employed by the workplace delegate's employer in the enterprise.
15. Section 350C(1) sets out what may be described as a definition¹² of 'workplace delegate' and details that such a person is, relevantly, appointed or elected in accordance with an employee organisation's rules to be a delegate or representative for members of the delegate's organisation *who work in the particular enterprise*.
16. Textually, the provision envisages that the person may be the delegate or representative for members of their union who work in a particular enterprise. The capacity for a person to be a delegate is, therefore, delimited to: (a) them having been appointed or elected to be a delegate for their union's members; and (b) that appointment or election being in relation to the performance of representative functions in the 'particular enterprise'. The term 'enterprise' is defined in s 12 to be a business, activity, project or undertaking.
17. The first precondition detailed in [16] above concerns the status of a worker as a representative: have they been elected or appointed in accordance with their union's rules? This requires an analysis of whether appointment or election is required and a factual analysis of whether the appointment or election has taken place. The second precondition in [16] requires that the election or appointment concern and relate to an identifiable business, activity, project or undertaking.
18. A delegate's entitlement or right is detailed further in s 350C(2) to represent the industrial interests of members and persons eligible to be members *including in disputes with their employer*. The word 'including' is significant as it envisages that a delegate's sphere or operations or responsibility extends beyond disputations as between an employee and their employer. Further, it provides no support for the notion that the delegate need be employed by the same employer as the persons they are representing in the particular enterprise.

¹² See s 12 of the FW Act which says, in relation to 'workplace delegate' "see subsection 350C(1)".

19. Section 350C(2) also allows workplace delegates to represent '*those members, and any other persons eligible to be such members.*' *Those members* is a reference to the members who work in the enterprise with respect to which the workplace delegate has been elected or appointed, as acknowledged by s 350C(1). Thus, pursuant to s 350C(2) a workplace delegate as defined by s 350C(1) may represent any member or potential member who work in the enterprise with respect to which the workplace delegate has been elected or appointed without limitation as to their status as an employee or as an employee of the delegate's employer.

20. Relevantly, further entitlements are detailed in s 350C, including an entitlement to reasonable access to the workplace or workplace facilities where the enterprise is being carried out. In other words, the delegate is entitled to access a location that is a workplace or workplace related facilities at the particular business, activity, project or undertaking to perform their representative function. That access is not envisaged to be limited to access to workplaces or workplace facilities where a particular employer's employees work or may work. It is general in nature and therefore affords support for the notion that a delegate's representative role is not limited to the employees of their employer.

21. Finally, s 350C(1) defines a workplace delegate by reference to their election or appointment to represent *members* of an organisation. Delegates are not limited to representing persons who are *employees and members* of an organisation. Rather, they are elected or appointed to represent *persons* who work in the particular enterprise and are either members or eligible to be members of the delegate's union (see s 350C(2)). The fact that the term 'employee' is not used in s 350C points overwhelmingly against any restriction on delegates representing employees of the delegate's employer.

22. The Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) (EM) said at [724] that:

... The definition of 'workplace delegate' would recognise the role of workplace delegates in representing the interests of all workers, not just employees, who work at the relevant enterprise and who are eligible to be a member of the relevant employee organisation...

23. This aspect of the EM demonstrates that the legislature envisaged that workplace delegates not be limited to representing employees of their employer.

24. EM [21] (which was contained in the part of the EM dealing with the compatibility of the Closing Loopholes Bill with human right) said this about workplace delegates rights, which the Bill introduced:

Part 7 of Schedule 1 would insert statutory workplace rights for workplace delegates to support their role in representing workers and a general protection for workplace delegates to facilitate the exercise of these rights. It would also provide for modern awards and enterprise agreements to detail the specific requirements for various industries, occupations and workplaces.

25. EM [76]-[77] and [79] said:

Part 7 of Schedule 1 would positively engage the right to the enjoyment of just and favourable working conditions by improving access to representation for workers, and the ability of workplace delegates to provide such representation. These provisions engage and promote operative articles of the Workers' Representative Convention, 1971 (No. 135) of the ILO (ILO Convention 135), which Australia has ratified.

Currently, the FW Act provides limited protection to workplace delegates of an employee organisation acting within the workplace. Divisions 3 and 4 of Part 3-1 of the FW Act prohibit adverse action against employees who are officers or members of industrial associations, and allows for freedom of association and involvement in lawful industrial activities. However, these protections do not provide workplace delegates with positive rights that protect and enable them to exercise their roles in the workplace. A key function of a workplace delegate is to be a point of contact for members within the workplace and to represent the concerns of workers to the employer or business. The Bill would positively engage the right to just and favourable conditions of work by ensuring that workplace delegates have substantive rights to represent the industrial interests and concerns of their and their fellow workers.

...

Introducing rights for workplace delegates would also positively impact the right to just and favourable conditions of work for all workers in a workplace. By providing explicit rights for workplace delegates, other workers in the workplace are empowered to raise workplace concerns to the workplace delegate and therefore improve their ability to cooperatively resolve any disputes that may arise in the workplace. Workers can also more effectively engage in bargaining to negotiate fair wages and conditions.

26. These aspects of the EM underscore that workplace delegates were envisaged to be able to represent the interests of members and persons eligible to be members of the delegate's union regardless of their status as employees let alone as employees of the delegate's employer.

27. In the result, the MDRT fails to provide for the exercise of the rights outlined in s 350C by only allowing workplace delegates to represent persons who are employees employed by the same employer as the workplace delegate.
28. By introducing the further requirement that an individual must both be employed by the workplace delegate's employer and work in the enterprise with respect to which the delegate has been elected, the Commission has also failed to provide for the exercise of the right to represent in s 350C(2) of the FW Act.
29. For example, members of the MEU form lodges and elect representatives at each mine where the MEU has a presence. Under s 350C, these representatives are workplace delegates with respect to the mine at which they work and can represent the interests of members and potential members at the mine regardless of their employer. Under the MDRT these representatives can only represent members or potential members who work at the mine and who are employed by the same employer as the delegate.
30. To ensure that the MDRT is consistent with the FW Act and correctly corresponds with the provisions of s 350C, properly construed and provides for the exercise (and effective exercise) of the rights of workplace delegates, the MEU respectfully submits that the Commission must :
- a. remove X.2(a). The definition of employer would be governed by the definition already incorporated in the modern awards. Namely, an employer would be a national system employer within the meaning of the FW Act.
 - b. amend X.2(c) such that the definition of eligible employee does not refer to the employer of the employee and otherwise reflects the terms of s 350C(1).

Issue 2 –The MDRT does not allow for communication with respect to an eligible employee's industrial interests.

31. Clause X.6(a) of the MDRT provides that a workplace delegate may communicate with eligible employees for '*the purpose of representing the industrial interests of the employees under clause X.5*'. In doing so, it fails to provide for at least the exercise of the rights in s 350C of the FW Act.

32. Section 350C(3)(a) of the FW Act provides that a workplace delegate is entitled to reasonable communication with eligible employees who work in the same enterprise as the delegate *in relation to their* industrial interests.

33. The phrase 'in relation to' is a relational expression,¹³ and refers to a relationship between two subjects: an activity - communication, and a subject matter - industrial interests. It connotes a broad connection between these two matters. Properly construed, the right conferred by s 350C(3)(a) is not a right to communicate for a representative purpose only. Rather, it is broader and more expansive, and is a right to communicate in relation to industrial interests more generally. By limiting the circumstances in which the right to communicate may be exercised to a situation where communication is for the purpose of representing an employee's industrial interests, the MDRT is narrower than the broad right detailed in s 350C(3)(a).

34. In circumstances where the right to communication under the MDRT is narrower than the right to reasonable communication contained in s 350C(3)(a) it can not be said that the MDRT provides for the exercise of the rights in 350C and therefore that the MDRT is a delegates rights term as defined by s 12 of the FW Act. In this regard, it is noteworthy that the note to the definition of 'delegates' rights term' in s 12 to the FW Act is in the following terms:

The rights of workplace delegates are set out in section 350C, and a delegates' rights term must provide at least for the exercise of those rights.

35. The note is not a 'marginal note' and thus excluded from being a part of the FW Act as required by s 13(3) of the *Acts Interpretation Act 1901* (Cth) as in force on June 2009: FW Act s 40A for the reasons detailed by White J in *WorkPac Pty Ltd v Rossato*.¹⁴ A contrary conclusion was reached by the Full Court in *Adams v DFWBII*¹⁵ but it is respectfully submitted that that conclusion was wrong. In any event, the note is a useful aide to interpretation and makes clear that delegates' rights term must, as a minimum, provide for the exercise of rights set out in s 350C. A term which provided for something less would not be a 'delegates' right term' as defined and as required in order for the Commission to perform its statutorily mandated role and function.

¹³ see *R v Khazaal* (2012) 246 CLR 601, [31].

¹⁴ (2020) 278 FCR 179 at [1012].

¹⁵ (2017) 258 FCR 257 at [29]-[31].

36. To ensure that the MDRT allows for communication with respect to an eligible employee's industrial interests as contemplated by s 350C(3)(a) of the FW Act, the MEU respectfully submits that the Commission must amend clause X.6(a) such that it allows a workplace delegate to communicate with eligible employees '*in relation to their industrial interests.*'

Issue 3 –The MDRT does not provide the workplace delegate any right to communication which they do not already have.

37. Clause X.6 of the MDRT provides that the workplace delegate may:

- Discuss membership of the delegate's organisation with the employees; and
- Consult the delegate's organisation in relation to matters in which the workplace delegate is representing employees.

38. Every member of a registered organisation is at liberty to encourage their workmates to join their union and consult that union in relation to workplace matters. Such actions are *industrial activity* within the meaning of s 347(b)(ii) and (iv) of the FW Act and thus are protected by the FW Act's General Protections regime.

39. The EM acknowledges that prior to the introduction of s 350C, the FW Act did not contain any positive rights specific to workplace delegates.¹⁶ By introducing s 350C the Parliament intended to extend specific rights to workplace delegates. The Parliament tasked the Commission with introducing into the modern awards delegates' rights terms that provided for the exercise of the rights of workplace delegates. Thus, this award process must necessarily provide a workplace delegate with rights that allow them to undertake actions that they were previously unable to undertake.

40. In very simple terms, clause X.6 fails to confer a right on a delegate that they don't presently enjoy as an employee. The purpose of the task imposed on the Commission by clause 95(2) of Schedule 1 was to create award terms that gave rights to delegates that they didn't already have.

41. To ensure that the MDRT provides for the exercise of the rights of workplace delegates, the MEU respectfully submits that the Commission must amend clause X.6(a) to confer on delegates rights to reasonable communication that they don't currently have. For the

¹⁶ EM, [727].

reasons already explained by the MEU in previous submissions, the critical rights that should be conferred on delegates include the right to:

- c. discuss industrial matters with eligible employees;
- d. address eligible employees at the commencement of their employment in the enterprise; and
- e. identify themselves to eligible employees.

Issue 4 –The MDRT’s right to represent is subject to the conditions in X.9(a).

42. Clause X.9(a) of the MDRT provides that the right to represent, as outlined in X.5, is subject to the following qualifications:

- a) comply with their duties and obligations as an employee;*
- b) 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;*
- c) not hinder, obstruct or prevent the normal performance of work; and*
- d) not hinder, obstruct or prevent employees exercising their rights to freedom of association.*

43. The right to represent, as provided by s 350C(2) of the FW Act, is not so fettered or confined. The right to represent, as provided by s 350C(2), is subject only to the following limitations:

- a. The representation must be of an individual’s industrial interests.
- b. The individual who is being represented must be a member or eligible to be a member of the registered organisation of which the workplace delegate has been elected or appointed as a representative (however described).
- c. The individual who is being represented must work in the enterprise in respect to which the workplace delegate has been elected or appointed.

44. The right to represent in s 350C(2) is otherwise unqualified. This is emphasised by a comparison between the right to represent with the right to communicate and to access the workplace, workplace facilities and paid time to train outlined in s 350C(3). Each of

those rights are subject to a 'reasonableness' filter. Contra-distinctly, the right to represent under s 350C(2) is not.

45. Imposing qualifications on the right to represent other than those listed in [43] above is, therefore, not '*providing for [the] exercise*' of rights as conferred by s 350C(2).

46. To ensure that the MDRT provides for the exercise of the right to represent as contemplated by s 350C(2) of the FW Act, the MEU respectfully submits that the Commission must amend the chapeau of clause X.9(a) to remove reference to X.5.

Issue 5 - Clause X.9(a)(i) and (iii) prevent the reasonable exercise of the rights to communication and access to the workplace and workplace facilities.

47. Clause X.9(a) of the MDRT subjects the rights bestowed to a workplace delegate under X.6 and X.7 to the same qualifications extracted at [42].

48. The MEU has submitted above that the right to represent as contemplated by s 350C(2) must not be subject to any qualification. It is evident from the text of s 350C(3) and s 350C(5), that the rights of communication and access to the workplace and workplace facilities are not unconstrained. Rather, they are subject to the qualification that their exercise must be '*reasonable*'.

49. Consistent with s.350C(3) and (5), the rights of delegates are subject to a reasonableness criterion adjudged solely by the matters set out in s 350C(5). No further or additional fetters or impingements on rights may be imposed. Preconditions or limitations on the exercise of rights, such as obligations to *not hinder or obstruct* or *prevent* the normal performance of work and to *comply with their duties and obligations as an employee* are apt to impinge on reasonable and proper exercises of rights in a manner not envisaged by s 350C(3) when read with s 350C(5).

50. In this connection, it is hard to imagine a circumstance where a delegate could exercise any of the rights of workplace delegates which would not prevent the normal performance of work. For example, a workplace delegate working in an office environment who has a five minute discussion with a colleague concerning the bargaining for an enterprise agreement is likely to have prevented the normal performance of work.

51. The qualifications provided in clause X.9(a)(i) and (iii) go well beyond and are apt to be incompatible with the limiting criterion of ‘reasonableness’ under s 350C(3), which is the singular criterion that fetters the exercise of rights afforded by s 350C(3). The proposed qualifications are impermissibly absolute and incongruent with s 350C(3) and (5). X.9(a)(i) and (iii) can be contrasted with X.9(a)(ii) in this regard. X.9(a)(ii) is consistent with s 350C because it incorporates the concept of ‘reasonableness’. Under X.9(a)(ii), the conditions imposed on the workplace delegate are not to comply with **all** policies and procedures of the employer, including **all** codes of conduct and requirements – rather, the condition is confined to only those policies and procedures (and codes of conduct and requirements) that are **reasonable**. The MEU commends X.9(a)(ii) as striking the right balance and urges that a similar approach be adopted with respect to X.9(a)(i) and (iii)

52. Similarly, clause X.9(a)(iii) of the MDRT is also apt to frustrate the exercise of the rights to reasonable communication and reasonable access to workplace facilities. The phrase ‘*not hinder and obstruct*’ as it is employed in s 500 of the FW Act has been taken to mean ‘*to not make it more difficult for*’.¹⁷ A modern award is an instrument made under the FW Act and an expression used in a modern award is inclined to adopt the expression’s FW Act meaning.¹⁸

53. As such, the reference to *not hinder, obstruct*, as it appears in X.9(a)(iii) of the MDRT, will prevent a workplace delegate from exercising any of their rights in circumstances where their exercise makes it more *difficult for the normal work to be performed*. As currently drafted the MDRT also impermissibly prevents the exercise of rights if their exercise *prevents* the normal performance of work.

54. To ensure that the MDRT provides for the exercise of the rights of workplace delegates consistent with the ‘reasonableness’ qualification imposed in s 350C(3), the MEU respectfully submits that the Commission must:

- a. amend clause X.9(a)(i) to ensure that a workplace delegate must comply with their duties and obligations while exercising their rights only

¹⁷ See *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCA 1698, [66]-[67] citing *Director of the Fair Work Building Industry Inspectorate v Bragdon* (2015) 147 ALD 373, [47] and *Footscray Station Case (Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 872, [92]. See also *BGC POS Pty Ltd v CFMMEU* (2019) 285 IR 43 at [46]-[47] citing Flick J in *Darlaston v Parker*, (2010) 189 FCR 1 at [52].

¹⁸ See *Acts Interpretation Act 1901(Cth)*, s.46; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813, [52].

- when it is reasonable for the workplace delegate to do so; and
- b. amend clause X.9(a)(iii) to ensure that a workplace delegate may exercise the rights in X.6 and X.7 unless their exercise unreasonably hinders, obstructs or prevents the normal performance of work.

Issue 6 - The MDRT contains no obligation for the employer of an eligible employee to not hinder, obstruct or prevent a workplace delegate from exercising their rights.

55. As argued above, s 350C of the FW Act allows workplace delegates to represent the interests of all workers, not just employees, who work at an enterprise and who are eligible to be a member of the relevant employee organisation.
56. The Commission's statutory task is to provide for at least the exercise of the rights of workplace delegates as outlined in s 350C. When providing for the rights of workplace delegates, the Commission must ensure that a workplace delegate may exercise those rights without the interference of their employer or the employer of the individual who they are representing.
57. Section 350A provides that a workplace delegate's employer must not unreasonably hinder, obstruct or prevent the exercise of the rights of workplace delegates. However, it has no application to the employer of the individual the delegate is representing unless they are employed by the same employer as the workplace delegate.
58. A modern award applies to an employer with respect to their employees.¹⁹ However, a modern award can regulate the conduct of an employer in relation to matters relevant to their employees. A modern award could proscribe conduct directed towards a workplace delegate of an employer of employees to whom the award applied, regardless of whether the delegate was an employee of the employer. The Commission should extend the obligation in s 350A to the employer of employees represented by a workplace delegate, regardless of whether the workplace delegate is the employee of the employer.
59. To ensure that the MDRT provides for the exercise of the rights of workplace delegates, the MEU respectfully submits that the Commission should:

¹⁹ FW Act, [47].

- a. amend clause X.9 to ensure that an employer can not unreasonably hinder, obstruct or prevent a workplace delegate from exercising their entitlements under the clause.

Conclusion

60. By way of summary, to ensure that the MDRT provides for the exercise of the rights of workplace delegates and thus is a '*delegates rights term*' within the meaning of s 12 of the FW Act, the MEU respectfully submits that the Commission must:

- a. remove X.2(a);
- b. amend X.2(c) such that the definition of eligible employee does not refer to the employer of the employee;
- c. amend clause X.6(a) such that it allows a workplace delegate to communicate with eligible employees '*in relation to their industrial interests*';
- d. amend Clause X.6(a) such that it expressly includes the right to:
 - i. discuss industrial matters with eligible employees, including at mass meetings;
 - ii. address eligible employees at the commencement of their employment in the enterprise; and
 - iii. identify themselves to eligible employees;
- e. amend the chapeau to clause X.9(a) to remove reference to X.5;
- f. amend clause X.9(a)(i) to ensure that a workplace delegate must comply with their duties and obligations while exercising their rights only when it is reasonable for the workplace delegate to do so;
- g. amend clause X.9(a)(iii) to ensure that a workplace delegate may exercise the rights in X.6 and X.7 unless their exercise unreasonably hinders, obstructs or prevents the normal performance of work.
- h. amend clause X.9 to ensure that an employer can not unreasonably hinder, obstruct or prevent a workplace delegate from exercising their entitlements in relation to employees of the employer.

61. Annexed to these submissions is a marked-up version of the MDRT incorporating the above changes.

62. The MEU has had the benefit of reviewing the ACTU's proposed submission. To the extent that the positions advanced therein are not inconsistent with the positions advanced above, the MEU's support the changes called for in the ACTU's submission.

Mining and Energy Union

22 May 2024

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 **work** ~~are employed by the employer~~ in the enterprise.

Commented [JP1]: Deletion of this sub-clause relates to Issue 1 discussed in the MEU Submission dated 17 May 2024.

Commented [JP2]: Deletion of these words relates to Issue 1 discussed in the MEU Submission dated 17 May 2024.

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~~ **in relation to their** industrial interests of the employees under ~~clause X.5.~~ This includes:

- (i) discussing membership of the delegate’s organisation with eligible employees;
- (ii) ~~and~~ consulting the delegate’s organisation in relation to matters in which the workplace delegate is representing eligible employees;:-
- (iii) **discussing relevant industrial and workplace matters with eligible**

Commented [JP3]: The amendments in this sub-paragraph relate to Issue 2 discussed in the MEU Submission dated 17 May 2024.

- employees, including at mass meetings;
- (iv) addressing eligible employees at the commencement of their employment in the enterprise; and
- (v) identifying to eligible employees that they are a workplace delegate, including by wearing a badge, apparel, sticker or other mark, or to use a sign, or other forms of communication.

Commented [JP4]: The inclusion of (i) to (v) relate to Issue 3 discussed in the MEU Submission dated 17 May 2024.

- (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 X.6** to **X.7** are subject to the conditions that the workplace delegate must:
 - (i) comply with their duties and obligations as an employee **that are reasonable in all of the circumstances;**
 - (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 **unreasonably** 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.
- (d) **An employer must not hinder, obstruct or prevent a workplace delegate from exercising their entitlements in X.5 for the benefit of an eligible employee whom they employ.**
- (e) **An employer must not unreasonably hinder, obstruct or prevent a workplace delegate from exercising their entitlements in X.6 to X.8 for the benefit of an eligible employee whom they employ.**

Commented [JP5]: The deletion of the reference to X.5 relates to Issue 4 discussed in the MEU Submission dated 17 May 2024.

Commented [JP6]: The insertion of the words in X.9(a)(i) and (iii) relates to Issue 5 discussed in the MEU Submission dated 17 May 2024.

Commented [JP7]: The inclusion of X.9(d)(e) relates to Issue 6 discussed in the MEU Submission dated 17 May 2024.

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.