FAIR WORK COMMISSION

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

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TEEKAY SHIPPING (AUSTRALIA) PTY LTD

OUTLINE OF SUBMISSIONS ON DELEGATES' RIGHTS TERM

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1. Introduction

1.1 On 10 May 2024 the Fair Work Commission issued a Statement[1] containing the draft delegates' rights term intended to be inserted into all modern awards (**Draft Term**). The Statement invited interested parties to file submissions concerning the Draft Term by 12:00pm Friday 17 May 2024.

1.2 Kingston Reid has assisted Teekay Shipping (Australia) Pty Ltd (**Teekay**) with the preparation of these submissions.

2. Interested Party

2.1 Teekay is a pre-eminent marine services company in Australia. It provides vessel operation, crewing and management services for various vessels including under contracts with the Australian Government. It employs approximately 330 seagoing employees in Australia. Most of these employees work offshore on a particular vessel at sea in accordance with a '4-week on, 4-week off' or '6-week on, 6-week off' swing cycle (**Swing Cycle**).

2.2 Most vessels have enterprise agreements which apply to all Teekay employees who work on that particular vessel. Most of those enterprise agreements are underpinned by modern awards including the Seagoing Industry Award 2020 and the Maritime Offshore Oil and Gas Award 2020.

2.3 On each vessel, there are commonly no less than 3 workplace delegates within the meaning of section 350C of the *Fair Work Act 2009* (Cth) (**FW Act**). These delegates represent members of the Maritime Union of Australia (**MUA**), Australian Maritime Officers (**AMOU**) and the Australasian Institute of Marine and Power Engineers (**AIMPE**).

2.4 Teekay also employs onshore employees and some seagoing employees who are covered by modern awards (**Modern Award**).

2.5 The introduction of a delegates' rights term into the Modern Award will have an immediate impact on Teekay. It will also have a future impact for Teekay in bargaining for new enterprise

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[1] [2024] FWC 1214.

agreements. If Teekay's enterprise agreements do not include a delegates' rights term in the same (or more beneficial) terms than those included in modern awards, the modern award term will prevail.[2]

3. Amendments to the Draft Term

3.1 Clause 95 of Division 4 of new Part 15 in Schedule 1 to the FW Act contains the narrow obligation for the FWC to make a determination varying modern awards to include a delegates' rights term. Delegates' rights term is defined at section 12 of the FW Act which includes a note 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.

3.2 Although Teekay accepts that the Draft Term can provide for a more beneficial entitlement to workplace delegates than that included in section 350C of the FW Act, it has concerns about the Draft Term on the basis that:

(a) contrary to their headings, draft clauses X.6, X.7 and X.8 do not provide for the application of 'reasonableness' within the body of the clause;

(b) the non-exhaustive list contained in draft clause X.5 is too broad, entitling a workplace delegate to represent employees in relation to all individual employment matters and processes rather than those that have an "industrial" or collective aspect;

(c) draft clause X.6 (even when read together with draft clause X.9) entitles workplace delegates to unlimited communications with eligible employees (and their union) during working hours;

(d) draft clause X.7 entitles workplace delegates to vast access to workplace facilities in the possession of the employer (but not necessarily in the workplace); and

(e) the notice requirements in draft clause X.8 will (in many cases) be impossible to comply with having regard to the reality of Teekay's business and the shipping industry in general.

3.3 Separately, Teekay has concerns that it is unable to verify whether an employee is elected or appointed a workplace delegate. The entitlements for workplace delegates expressed in the Draft Term are significant and employers have no ability to require evidence that an employee is in fact a delegate.

3.4 This submission deals with draft clauses X.5 to X.8 in order.

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[2] Section 205A of the FW Act.

Draft Clause X.5 – Right of representation

3.5 Section 350C(2) entitles a workplace delegate to "represent the **industrial interests** of those members, and any other persons eligible to be such members, **including in disputes with their employer**" (emphasis added). The term "industrial interests" is not defined in the FW Act. Nor is its meaning clear from the authorities. On this basis, we agree that draft clause X.5 should provide for a non-exhaustive list of the circumstances in which a workplace delegate will be representing the "industrial interests" of eligible employees. However, we submit that the list goes far beyond the circumstances in which a workplace delegate may represent an employee's "industrial interests" and should be amended provided for in **Annexure A** below.

3.6 There has long been a distinction between individual employment matters and industrial matters in the employment context. The former arise out of the relationship between the individual employee and employer as governed by the individual employment contract. The latter arise out of the relationship between a collective group of employees and the employer as (often) governed by an industrial instrument.[3] Matters which are ordinarily characterised as individual employment matters may become industrial matters. For example, performance management and disciplinary processes are normally characterised as individual employee matters governed by the employment contract and/or employer policies. However, if these matters become subject to an enterprise agreement, they may become industrial or collective in nature.

3.7 The line between individual employment matters and industrial matters is not always clear. However, draft clause X.5 ignores this distinction and equates "industrial interests" with <u>all</u> matters pertaining to the employment relationship. It does so by including "individual… grievances or disputes" as an example of when a workplace delegate represents an eligible employee's "industrial interests". This will mean that any disagreement between an employee and management on any topic may now be subject to the dispute resolution procedure (**DRP**) contained in the Modern Award. This process may also be engaged at any time Teekay attempts to engage in "performance management [or] disciplinary processes" with an employee. In our submission, this will lead to an unworkable situation whereby:

(a) large amounts of management and/or employee time will be spent discussing individual employment matters with workplace delegates. This will divert resources away from Teekay's operations and impact on productivity;

(b) operations will continually be disrupted. Particularly in circumstances the workplace delegate is not rostered to work on the same Swing Cycle as the eligible employee. For example, if a disagreement between an eligible employee and management arises at sea and the workplace delegate is on their 4 or 6 weeks off, the workplace delegate will

[3] See *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528, 548.

not be able to represent the eligible employee *during work hours* until shift changeover (up to 4 or 6 weeks later). Even if the workplace delegate wishes to represent the eligible employee outside of work hours, it may take several hours for Teekay to arrange the facilities to enable the delegate to represent the eligible employee remotely. If the disagreement relates to a safety critical issue, this may impact on safety. It will also impact on productivity. Issues that could have otherwise been quickly resolved may now be subject to an extended resolution process; and

(c) performance review and disciplinary processes will be delayed. At times, Teekay arranges for performance reviews and disciplinary meetings to be held onshore (i.e., when the employee returns from sea). One reason for this is that Teekay's human resources team are based onshore. If a workplace delegate is not on the same Swing Cycle as the eligible employee, they will likely be at sea when this meeting is scheduled to take place. It is not possible for Teekay to schedule all performance reviews and disciplinary meetings during shift changeover to accommodate representation during work hours. This would lead to delays in these processes and may result in procedural unfairness to the relevant eligible employee.

3.8 Draft clause X.5 would also undermine the scope of the DRP contained in the Modern Award (and some DRP clauses contained within enterprise agreements that will come into operation post 1 July 2024). Currently, it is only disputes which relate to a matter arising under the award or in relation to the NES which fall within the DRP in the Modern Award. The scope of award DRPs are often the starting point for the parties in negotiating the scope of DRPs contained within enterprise agreements. In some cases, an employer may have agreed as part of bargaining to extend the scope of a DRP contained within a particular agreement. For example, in some agreements, the scope of the DRP extends to personal grievances while in other agreements, the scope of the DRP reflects that of the award. Draft clause X.5 would undermine negotiated efforts between the parties and make the scope of DRPs largely redundant in enterprise agreements post 1 July 2024.

3.9 The expanded meaning of "industrial interests" included in draft clause X.5 may also have ramifications for the interpretation of "industrial interests" as it appears in other contexts within Teekay's enterprise agreements.

3.10 The amendments we have made to draft clause X.5 make clear that workplace delegates are not entitled to represent eligible employees in relation to <u>all</u> individual employment matters and processes. Whether the meaning of "industrial interests" characterised by collectively or not, the Commission should not determine this in making the Draft Term. Instead, it should be left to be interpreted on a case-by-case basis. If individual employment matters become "industrial" in nature due to their inclusion in enterprise agreements, draft subclause X.5(e) will allow for workplace delegates to represent eligible employees' interest in these matters. At the very least,

draft clause X.5(c) should exclude the words "individual or" to avoid disruption to work and ensure employers can continue to manage employees effectively.

Draft Clause X.6 – Entitlement to reasonable communication

3.11 Teekay has the following concerns about this clause:

(a) the term "reasonable" is only included in the heading and has not been used within the clause itself;

(b) "reasonable communication" includes "consulting the delegate's organisation in relation to matters in which the workplace delegate is representing employees"; and

(c) "reasonable communication" includes communicating with eligible employees "individually or collectively, **during working hours**" (emphasis added).

Absence of the term "reasonable"

3.12 The heading of draft clause X.6 includes a requirement that communication be "reasonable". This inclusion in the heading demonstrates the intention that the draft clause be subject to the same requirement in section 350C of the FW Act that communication be reasonable. Notably, the body of draft clause X.6 does not include a requirement that access be reasonable.

3.13 The *Acts Interpretation Act 1901* (Cth) (**AI Act**) applies to the interpretation of modern awards.[4] Relevantly the AI Act provides that headings are considered part of an Act. The explanatory memorandum to the AI Act notes that headings will be treated as part of a particular Act and given appropriate weight, which will "ordinarily be less than the words of the section itself".[5]

3.14 In the absence of the requirement that communication be reasonable in the body of draft clause X.6, it is foreseeable that parties will dispute whether the heading in the clause can be relied on in interpreting the meaning of the clause and whether communication must be reasonable.

3.15 In order to give unequivocal effect to the intent demonstrated in the heading of draft clause X.6, that communication be reasonable, the body of the clause should be amended as set out in **Annexure A** below.

3.16 Without this amendment, draft clause X.6 could be interpreted as entitling workplace delegates to unlimited communications with eligible employees (and their union) during work hours. For

[4] *City of Wanneroo v Australian, Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at [52].

[5] Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) at [93]; *Singh v Minister for Immigration and Citizenship* (2012) 266 FLR 85; *Hewitt v Topero Nominees Pty Ltd (t/a Michaels Camera Video Digital)* (2013) 238 IR 42.

the reasons given in paragraph 3.20 below, draft clause X.9 does not go far enough in avoiding such an interpretation.

Consultations with the delegate's organisation

3.17 Draft clause X.6(a) states:

"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" (emphasis added).

3.18 The first sentence of draft clause X.6(a) aligns with section 350C(3)(a) of the FW Act, which entitles workplace delegates to "reasonable communication **with those members, and any other persons eligible to be such members**, in relation to their industrial interests" (emphasis added). However, the second sentence of draft clause X.6(a) extends beyond this section in entitling workplace delegates to "consult" with their union (including during work hours).

Communication during working hours

3.19 Entitling workplace delegates to communicate with eligible employees during working hours will impact on Teekay's output, operations and productivity. It will also impact on our operational reliability, which our customers including the Australian Federal Government, depend on.

3.20 Although draft clause X.9(a)(iii) states that a delegate must "not hinder, obstruct or prevent the normal performance of work", it is unclear whether this obligation applies to the work of delegates themselves. It is also unclear how draft clauses X.6(b) and X.9(a)(iii) will interact. Will managers be able direct workplace delegates (and eligible employees) engaging in communications during work hours to resume work? To do so, will the manager need to demonstrate the operational necessity to resume work? Will Teekay be able to manage delegates whose duties as a delegate impact on their productivity as an employee or the safety of others?

3.21 Teekay recognises the importance of communication between workplace delegates and eligible employees. However, it considers that these communications should take place during meal breaks or other breaks. It does not expect delegates to perform their delegate duties before or after work hours and holds concerns about how this would interact with the newly introduced right to disconnect. At the very least, draft clause X.9 should be amended to make clear that it applies to workplace delegates in the work they perform themselves.

Draft Clause X.7 – Entitlement to reasonable access to the workplace and workplace facilities

3.22 Draft clause X.7 provides for the delegates' rights articulated in subsection 350C(3)(b)(i) of the FW Act. Broadly, the entitlement relates to a workplace delegates' reasonable access to workplace facilities.

3.23 Draft Clause X.7 should be amended to:

(a) include a requirement that access to workplace facilities be reasonable; and

(b) replace the word "employer" (the second time it appears) with "workplace".

3.24 An amended Clause X.7 including these amendments appears at **Annexure A** to this submission.

Reasonable access

3.25 Section 350C(3)(b)(i) of the FW Act provides that a 'workplace delegate is entitled to… **reasonable access** to the workplace and workplace facilities…' (**our emphasis**). Importantly, the provision qualifies the workplace delegates' right to access workplace facilities with the requirement that the access is reasonable.

3.26 The heading of draft clause X.7 also includes a requirement that access to workplace facilities be 'reasonable'. This inclusion in the heading demonstrates the intention that the draft clause be subject to the same requirement in the FW Act that access to workplace facilities be reasonable. Notably, the body of draft clause X.7 does not include a requirement that access be reasonable.

3.27 For the reasons given in paragraph 3.13 above, disputes may arise as to whether the heading in the clause can be relied on in interpreting the meaning of the clause and whether access to workplace facilities must be reasonable. To give unequivocal effect to the intent demonstrated in the heading of draft clause X.7, the body of the clause should be amended in line with **Annexure A.**

3.28 It is noted that the body of draft clause X.7 includes a requirement that access to workplace facilities is only required to the extent the employer has those facilities. While that inclusion addresses one aspect of reasonableness, it is of more limited utility than the broader operation of reasonable access, as provided for in the FW Act. It does not, for example, extend to using the equipment in a reasonable way.

3.29 For example, the operation of the draft clause means that a workplace delegate may only have access to a printer if the employer has a printer. However, the draft clause may entitle the workplace delegate to print excessively and to occupy a printer excessively, without any qualification that use is reasonable.

3.30 Similarly, to the extent there is a printer or other workplace facility on the vessel, but it is occupied at the time the workplace delegate seeks access, the draft clause may entitle the workplace delegate to have access immediately. This poses particular difficulties for the shipping industry where facilities on a vessel are necessarily limited as compared to a more typical workplace like an office.

3.31 A simple addition to draft clause X.7 that access is reasonable would remedy this type of impracticality which is unlikely to be exclusive to the shipping industry.

'Employer' facilities

3.32 The use of the word 'employer' rather than 'workplace' in the second line of draft clause X.7 may have the presumably unintended consequence that an employer must provide access to a workplace facility which the employer has, but which does not exist at the particular workplace of the delegate.

3.33 In the context of the vast majority of Teekay employees and the shipping industry more broadly, the 'workplace' is a vessel which may be at sea for the entire Swing Cycle of the workplace delegate. It is not possible for the employer in these circumstances to give access to the workplace facilities that the 'employer' has at its head office, but does not have on the vessel.

3.34 Draft clause X.7 should be amended to replace the word 'employer' with 'workplace' to avoid any confusion as set out in Annexure A.

List of workplace facilities

3.35 The list of workplace facilities in draft clause X.7 is unnecessary to achieve the purpose of s 350C(3)(b)(i) of the FW Act. The inclusion of the list is likely to cause unnecessary disputation about what Teekay has access to which must be provided to the workplace delegate.

3.36 If draft clause X.7 was amended to include reasonable access as set out in **Annexure A**, it would assist to avoid unnecessary disputation.

Draft Clause X.8 – Entitlement to reasonable access to training

3.37 Draft clause X.8 provides for the delegates' rights articulated in subsection 350C(3)(b)(ii) of the FW Act. Broadly, the entitlement relates to a workplace delegates' reasonable access to paid time for the purpose of training.

3.38 Draft clause X.8 should be amended to include a requirement that access to paid time for training be reasonable.

3.39 An amended draft clause X.8 including this amendment appears at **Annexure A** to this submission.

Reasonable access

3.40 Section 350C(3)(b)(ii) of the FW Act provides that a 'workplace delegate is entitled to… **reasonable** access to paid time, during normal working hours, for the purpose of related training' (**our emphasis**). Importantly, the provision qualifies the workplace delegates' right to access paid time for training with the requirement that the access is reasonable.

3.41 The heading of draft clause X.8 includes a requirement that access to training be 'reasonable'. Again, the inclusion in the heading demonstrates the intention that the draft clause be subject to the same requirement in the FW Act that access to training be reasonable. However, the body of draft clause X.8 does not include a requirement that access be reasonable.

3.42 For the same reasons articulated at paragraph 3.13 of this submission, in the absence of the requirement that the access to training be reasonable in the body of draft clause X.8, it is foreseeable that parties will dispute whether the headings in the draft clause can be relied on in interpreting the meaning of the clause and if not, whether access must be reasonable.

3.43 In order to give unequivocal effect to the intent demonstrated in the heading of draft clause X.8 that access to training be reasonable, the body of the clause should be amended in line with **Annexure A**.

3.44 The body of draft clause X.8 includes several subparagraphs which provide for the steps to be taken by a workplace delegate and an employer before the training may be accessed. Those steps may ensure that access to training is reasonable for some workplaces. However, the prescriptive steps absent a more general requirement that access is reasonable does not contemplate the peculiarities of the shipping industry, including the Swing Cycles.

3.45 For example, draft clause X.8(c) provides the workplace delegate must give the employer at least 5 weeks' notice of the training and pursuant to draft clause X.8(e) and the employer must give the workplace delegate at least 2 weeks' notice of whether the training has been approved.

3.46 This prescribed criterion will cause practical rostering difficulties for Teekay. For workplace delegates working in accordance with a Swing Cycle, 5 weeks' notice of training may occur as late as one week prior to that employee commencing their Swing Cycle. This will cause issues for Teekay to ensure a full crew complement is available to operate the vessel in accordance with its' obligations.

3.47 Similarly, the requirement to provide 2 weeks' notice of the approval to attend training may not be possible on a regular basis. The shipping industry is currently facing a significant skills shortage and Teekay is often working to ensure a full crew complement is available, often within days before the Swing Cycle commences.

3.48 While the clause is drafted as a minimum requirement, it is fair to expect the insistence of the minimum by union parties. A more general application of reasonableness as provided for in the FW Act allows for a case-by-case assessment of what is reasonable, having regard to the peculiarities of the shipping industry or any other particular industry or workplace.

3.49 A simple addition to draft clause X.8 that access is reasonable (as set out in **Annexure A**) would remedy this type of impracticality which is unlikely to be exclusive to the shipping industry.

4. Conclusion

4.1 Teekay submits that the Draft Term should be amended as set out in **Annexure A**. At the very minimum, the Commission should amend the Draft Term to:

(a) remove the words “individual or” from draft clause X.5 (as marked up in **Annexure A**);

(b) remove the word “communicate” and insert the phrase “engage in reasonable communication” in draft clause X.6 (as marked up in **Annexure A**);

(c) insert the word “reasonable”, remove the word “employer” (the second time it appears) and insert the word “workplace” in draft clause X.7 (as marked up in **Annexure A**); and

(d) insert the word “reasonable” in draft clause X.8 (as marked up in **Annexure A**).

Annexure A

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)**~~**(d)** enterprise bargaining; and

~~**(f)**~~**(e)** 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~~ engage in reasonable communication 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 reasonable access to or use of the following workplace facilities, unless the ~~employer~~ workplace 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 reasonable 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 (including their own 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.