



# DECISION

*Fair Work Act 2009*

s.269 - Intractable bargaining workplace declaration

**Transport Workers' Union of Australia**

**v**

**Cleanaway Operations Pty Limited**

(B2023/1106)

DEPUTY PRESIDENT SAUNDERS  
DEPUTY PRESIDENT WRIGHT  
COMMISSIONER CRAWFORD

SYDNEY, 15 AUGUST 2024

*Intractable bargaining workplace determination – delegates' rights term.*

## Introduction

[1] This decision concerns the content of the delegates' rights term which must be included in our workplace determination in relation to employees of Cleanaway who work at its Unanderra depot and who are covered by the Unanderra EA.

[2] We use the same defined terms in this decision as we did in our earlier decisions concerning the making of the intractable bargaining declaration and the other content of the workplace determination.<sup>1</sup> The relevant background is also set out in our earlier decisions.

## Requirements for a delegates' rights term

[3] Subsections 273(6) and (7) of the Act provide:

“Delegates' rights term

(6) The determination must include a delegates' rights term for the workplace delegates to whom the determination applies.

Note: *Delegates' rights term* is defined in section 12.

(7) The delegates' rights term must not be less favourable than the delegates' rights term in any modern award that covers a workplace delegate to whom the determination applies.”

[4] Subsections 273(6) and (7) of the Act apply in relation to workplace determinations made on or after 1 July 2024.<sup>2</sup> Accordingly, we must include a delegates' rights term in our workplace determination in this matter.

[5] The expression ‘delegates’ rights term’ is defined in s 12 of the Act to mean a term in a fair work instrument that provides for the exercise of the rights of workplace delegates. A workplace determination is a type of fair work instrument.<sup>3</sup>

[6] Section 350C of the Act governs the meaning of workplace delegates and their rights. It provides:

“Meaning of **workplace delegate**

- (1) A **workplace delegate** is a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise.

Rights of workplace delegates

- (2) The workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer.

Note: This section does not create any obligation on a person to be represented by a workplace delegate.

- (3) The workplace delegate is entitled to:
- (a) reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and
  - (b) for the purpose of representing those interests:
    - (i) reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and
    - (ii) unless the employer of the workplace delegate is a small business employer-- reasonable access to paid time, during normal working hours, for the purposes of related training.
- (4) The employer of the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate.
- (5) Otherwise, in determining what is reasonable for the purposes of subsection (3), regard must be had to the following:
- (a) the size and nature of the enterprise;
  - (b) the resources of the employer of the workplace delegate;
  - (c) the facilities available at the enterprise.”

[7] The term ‘enterprise’ is defined in s 12 of the Act to mean a ‘business, activity, project or undertaking’.

[8] The *Waste Management Award 2020 (Waste Award)* covers employees to whom our workplace determination will apply. Clauses 27A and 31 of the Waste Award concern delegates' rights and provide:

**“27A. Workplace delegates’ rights**

**27A.1** Clause 27A provides for the exercise of the rights of workplace delegates set out in section 350C of the Act.

NOTE: Under section 350C(4) of the Act, the employer is taken to have afforded a workplace delegate the rights mentioned in section 350C(3) if the employer has complied with clause 27A.

**27A.2** In clause 27A:

- (a) **employer** means the employer of the workplace delegate;
- (b) **delegate’s organisation** means the employee organisation in accordance with the rules of which the workplace delegate was appointed or elected; and
- (c) **eligible employees** means members and persons eligible to be members of the delegate’s organisation who are employed by the employer in the enterprise.

**27A.3** Before exercising entitlements under clause 27A, 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.

**27A.4** An employee who ceases to be a workplace delegate must give written notice to the employer within 14 days.

**27A.5 Right of representation**

A workplace delegate may represent the industrial interests of eligible employees who wish to be represented by the workplace delegate in matters including:

- (a) consultation about major workplace change;
- (b) consultation about changes to rosters or hours of work;
- (c) resolution of disputes;
- (d) disciplinary processes;
- (e) enterprise bargaining where the workplace delegate has been appointed as a bargaining representative under section 176 of the Act or is assisting the delegate’s organisation with enterprise bargaining; and
- (f) any process or procedure within an award, enterprise agreement or policy of the employer under which eligible employees are entitled to be represented and which concerns their industrial interests.

**27A.6 Entitlement to reasonable communication**

- (a) A workplace delegate may communicate with eligible employees for the purpose of representing their industrial interests under clause 27A.5. This includes

discussing membership of the delegate's organisation and representation with eligible employees.

- (b) A workplace delegate may communicate with eligible employees during working hours or work breaks, or before or after work.

#### **27A.7 Entitlement to reasonable access to the workplace and workplace facilities**

- (a) The employer must provide a workplace delegate with access to or use of the following workplace facilities:
  - (i) a room or area to hold discussions that is fit for purpose, private and accessible by the workplace delegate and eligible employees;
  - (ii) a physical or electronic noticeboard;
  - (iii) electronic means of communication ordinarily used in the workplace by the employer to communicate with eligible employees and by eligible employees to communicate with each other, including access to Wi-Fi;
  - (iv) a lockable filing cabinet or other secure document storage area; and
  - (v) office facilities and equipment including printers, scanners and photocopiers.
- (b) The employer is not required to provide access to or use of a workplace facility under clause 27A.7(a) if:
  - (i) the workplace does not have the facility;
  - (ii) due to operational requirements, it is impractical to provide access to or use of the facility at the time or in the manner it is sought; or
  - (iii) the employer does not have access to the facility at the enterprise and is unable to obtain access after taking reasonable steps.

#### **27A.8 Entitlement to reasonable access to training**

Unless the employer is a small business employer, the employer must provide a workplace delegate with access to up to 5 days of paid time during normal working hours for initial training and at least one day each subsequent year, to attend training related to representation of the industrial interests of eligible employees, subject to the following conditions:

- (a) In each year commencing 1 July, the employer is not required to provide access to paid time for training to more than one workplace delegate per 50 eligible employees.
- (b) The number of eligible employees will be determined on the day a delegate requests paid time to attend training, as the number of eligible employees who are:
  - (i) full-time or part-time employees; or
  - (ii) regular casual employees.

- (c) Payment for a day of paid time during normal working hours is payment of the amount the workplace delegate would have been paid for the hours the workplace delegate would have been rostered or required to work on that day if the delegate had not been absent from work to attend the training.
- (d) The workplace delegate must give the employer not less than 5 weeks' notice (unless the employer and delegate agree to a shorter period of notice) of the dates, subject matter, the daily start and finish times of the training, and the name of the training provider.
- (e) If requested by the employer, the workplace delegate must provide the employer with an outline of the training content.
- (f) The employer must advise the workplace delegate not less than 2 weeks from the day on which the training is scheduled to commence, whether the workplace delegate's access to paid time during normal working hours to attend the training has been approved. Such approval must not be unreasonably withheld.
- (g) The workplace delegate must, within 7 days after the day on which the training ends, provide the employer with evidence that would satisfy a reasonable person of their attendance at the training.

#### **27A.9 Exercise of entitlements under clause 27A**

- (a) A workplace delegate's entitlements under clause 27A are subject to the conditions that the workplace delegate must, when exercising those entitlements:
  - (i) comply with their duties and obligations as an employee;
  - (ii) comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources;
  - (iii) not hinder, obstruct or prevent the normal performance of work; and
  - (iv) not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.
- (b) Clause 27A 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 27A does not require an eligible employee to be represented by a workplace delegate without the employee's agreement.

NOTE: Under section 350A of the Act, the employer must not:

- (a) unreasonably fail or refuse to deal with a workplace delegate; or
- (b) knowingly or recklessly make a false or misleading representation to a workplace delegate; or
- (c) unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate under the Act or clause 27A.

#### **27A.10 Interaction with other clauses of this award**

Other clauses of this award may give additional or more favourable entitlements to workplace delegates (however described). If an entitlement of a workplace delegate under another clause of this award is more favourable to the delegate than an entitlement under clause 27A, the entitlement under the other clause applies instead of the entitlement under clause 27A.

...

**31. Dispute resolution training leave**

**31.1** An employee representative is entitled to leave with pay each calendar year, non-cumulative, to a maximum of 5 days per employee per year, to attend courses which are specifically directed towards effective resolution of disputes regarding industrial matters under this award and/or industrial issues which arise at the workplace. Union delegates and/or employee representatives are only entitled to leave in accordance with clause 31 for bona fide courses.

**31.2** For the purposes of clause 31, a **bona fide course** means a Dispute Resolution Training Leave Course conducted by or on behalf of a registered training organisation whose scope of registration includes industrial relations training. Nothing in clause 31 will prevent the employee representative and the employer from reaching agreement that such training can be provided by a union or other accredited training provider/s.

**31.3** An employee representative must give the employer 6 weeks’ notice of their intention to attend such courses and the leave to be taken, or such shorter period of notice as the employer may agree to accept.

**31.4** The notice to the employer must include details of the type, content and duration of the course to be attended. Upon request, the course curriculum must be provided to the employer.

**31.5** Leave is to be available according to the following scale for each yard, depot or garage of an employer:

No. of full and part-time employees covered by this award	Max. no. of employee representatives eligible to attend per year	Max. no. of days permitted per year
5–15	1	5
16–30	2	10
31–50	3	15
51–100	4	20
101 and over	5	25

**31.6** An employer will not be liable for any additional expenses associated with an employee’s attendance at a course other than the payment of ordinary time earnings for such absence. For the purposes of clause 31 ordinary time earnings are defined as the ordinary hourly rate and shiftwork rates, where relevant, plus over award payment where applicable.

**31.7** Leave of absence on training leave will be counted as service.

**31.8** The employee must provide the employer with proof of attendance.”

[9] Clause 27A was inserted into the Waste Award following the issue of a statement by a Full Bench of the Commission on 28 June 2024, attaching the model delegates' rights term to be included in awards.<sup>4</sup> The Full Bench has not yet published its reasons in relation to the content of the model delegates' rights term.

[10] Clause 31 of the Waste Award also concerns delegates' rights. Clause 31 predated clause 27A. The interaction between clause 31 and clause 27A is governed by subclause 27A.10, which requires that the more favourable delegates' rights provision on the particular delegates' rights entitlement applies "instead of" (and not in addition to) the less favourable entitlement.

[11] The content of the delegates' rights term to be included in our workplace determination is also affected by:

- (a) the terms in which the parties have agreed that access to "Employee Representative Training" would be provided for in the determination. Clause 44 of the draft determinations provided by the TWU and Cleanaway on 6 June 2024 addresses this issue; and
- (b) any delegates' rights terms of the Unanderra EA, with which the delegates' rights term in our workplace determination must be no less favourable.<sup>5</sup>

### **TWU's submissions in chief**

[12] The TWU submits that the defined expression 'delegates' right term' indicates that such a term provides for the exercise of the rights of workplace delegates. This begs the question, so the TWU submits, as to what those rights are.

[13] It is submitted that the verb 'provide' means to 'furnish or supply', whilst the verbal phrase 'provide for' means either 'to make arrangements for supplying means of support, money, etc' or 'to cover or be applicable to'. The TWU submits that a delegates' right term is, therefore, one which supplies or furnishes or covers the exercise of a workplace delegate's rights.

[14] A note to the definition of 'delegates' right term' in s 12 provides 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." The TWU submits that there is some controversy about whether notes such as these are part of the Act. Section 40A of the Act determines that the *Acts Interpretation Act 1901* (Cth) as in force on 25 June 2009 applies to the Act. Section 13(3) to the *Acts Interpretation Act* as in force on that date provided that *marginal notes* were not part of an Act of the Commonwealth Parliament. Historically, marginal notes were notes inserted into an Act by a clerk or printer after the Act was passed by the Parliament. The *Closing the Loopholes Bill* and the *Closing the Loopholes Act* as passed by the Commonwealth Parliament did contain this note, meaning, so the TWU submits, that the note was in the text of the legislation before Parliament. The note to the definition of 'delegates' right term' is, therefore, not a marginal note and not caught by s 13(3) of the *Acts Interpretation Act*. It is submitted that this was the view reached by White J in *WorkPac Pty Ltd v Rossato*<sup>6</sup> in relation to equivalent notes in the Act. The TWU submits that a contrary view was reached by the Full Court in *Adams v DFWBII*<sup>7</sup> and appears to have been adopted (although the matter does not appear to have

been put in issue) by the plurality of the High Court in *Mondelez Australia Pty Ltd v AMWU*. White J's view is, it is respectfully submitted by the TWU, correct and properly reflects the concept of a 'marginal note'. Regardless of whether the note is a part of the Act or not, the TWU submits that it can be considered as an aide to its construction. It is contended that the note makes clear that a delegates' right term is to, as a minimum, provide for the exercise of the rights detailed in s 350C(1). That purpose is made manifest in the Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, at [791], which provides, relevantly, that:

“Part 7 would introduce new workplace rights and protections for workplace delegates, who are employees or workers, appointed or elected under the rules of their employee organisation, to represent members in a particular enterprise. These new rights and protections would support their role in representing employees and regulated workers in workplaces. It would provide for modern awards and future enterprise agreements to provide more detailed rights for specific industries, occupations and workplaces...”

[15] In other words, the TWU submits that a delegates' right term in a modern award or enterprise agreement and, by parity of reasoning, in a workplace determination, was conceived as providing for further and additional rights to those stipulated in s 350C(1) of the Act. It was not contemplated to provide for a lesser bundle of rights, nor for the imposition of fetters that would diminish or undercut those rights.

[16] Section 350C(1) defines the term workplace delegate by describing that a workplace delegate is a person appointed or elected in accordance with the rules of an employee organisation to be a delegate or representative for members of the organisation who work in a particular enterprise. It is submitted that section 350C(1):

- (a) does not limit a workplace delegate to a person who is an employee. Rather, a workplace delegate can be any person;
- (b) does not restrict the representative functions of a workplace delegate to members of the organisation employed or engaged by the employer (or principal contractor) of the workplace delegate. There is no textual basis for the notion that a workplace delegate is limited to representing employees of the workplace delegate's employer; and
- (c) defines a delegate's representative function as extending to 'a particular enterprise'.

[17] It is submitted that point (c) above raises the question as to which enterprise or whose enterprise is contemplated. Assistance is provided by the Revised Explanatory Memorandum, at [820], which states 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. The definition would not include employees of the employee organisations in workplaces generally, as a person can only be a workplace delegate in respect of the enterprise or part of an enterprise where they work, either as an employee or as a regulated worker...”

[18] The TWU submits that this provides a clear indication that the intent of the legislature was to permit a workplace delegate to represent all *workers* in the relevant enterprise, regardless of their status as employees or not, and regardless of whether they were employed by the



workplace delegate's employer. It is contended that the representative functions of a workplace delegate were contemplated to extend to the enterprise, or part of the enterprise, where the delegate worked. That enterprise may be a single geographically confined workplace. The TWU submits that it may extend, however, to multiple workplaces or locations where work is performed.

[19] The TWU submits that section 350C(2) of the Act gives further support to this construction as it provides that a workplace delegate is entitled to represent the industrial interests of members and persons entitled to be members including *in disputes with their employer*. In other words, the representative functions of a delegate are contemplated to include (but not be limited to) representing an employee who works in the enterprise in disputes with that particular employee's employer.

[20] Additionally, it is submitted that the entitlements set out in s 350C(3) are not confined to communication or representation of employees of the workplace delegate's employer. The employer of a workplace delegate is mentioned only in the context of the fact that obligations are imposed on them under s 350C(3)(c)(ii) in relation to reasonable access to paid time for training. Section 350C(b)(i) is submitted to be significant as a delegate is allowed reasonable access to *the workplace* and *workplace facilities* where *the enterprise* is being carried on. The delegate is not limited to the workplace where employees of the delegate's employer work. Rather, it extends to the enterprise that they have, under s 350C(1), been appointed or elected to represent members in.

[21] Further, in assessing reasonableness for the purposes of the entitlements under s 350C(3), s 350C(4) requires regard to be had to both the size and nature of *the enterprise* and the resources of the *employer* of the delegate, as well as the facilities available *at the enterprise*. A distinction is drawn between *the enterprise* where the delegate exercises, or is to exercise their representative functions, and the delegate's employer. The former is the sphere where the delegate's representative functions are to be exercised.

[22] In the result, the TWU submits that the representative function or role of a workplace delegate is not limited to the employees of the delegate's employer.

[23] Section 350C(3)(a) confers an entitlement on a workplace delegate to reasonable communications with members or potential members *in relation to their industrial interests*. The TWU submits that the phrase 'in relation to' is relational and connotes a relationship between two subjects. Here, it is submitted that the relationship is between an activity – *communicating* and a topic – *industrial interests*.

[24] In terms, s 350C(3)(a) confers an entitlement to communicate (i.e. to speak, correspond, talk, write or connect) with a worker about their industrial interests. The TWU submits that there is no warrant for limiting the right to communicate under s 350C(3) to communication for the purposes of representing an employee in relation, for example, to a particular dispute with the member or potential member's employer. The right is framed in more general terms and would extend to communications about the importance of a trade union in representing the industrial interests of an employee or about particular industrial matters which have arisen or may arise at the workplace.

[25] The TWU submits that the adjective 'favourable' in the expression 'no less favourable' under s 273(7) of the Act means 'affording aid, advantage or convenience'. Further, it is

submitted that the requirement that something be ‘no less favourable’ than something else requires a comparative analysis between the two things. In the context of a requirement that the terms of instrument B be ‘no less favourable’ than the terms of instrument A, the TWU contends that the terms of the latter must be at least equivalent to, and not subtract or detract from, the rights or entitlements conferred by the other term. In the case of s 273(7), the TWU submits that this requires:

- (a) identification of any modern award(s) that would cover the workplace delegates to whom the determination is to apply; and
- (b) that the Commission ensure that terms are included in the determination that provide *at least* for the rights and entitlements set out in the relevant award or awards.

[26] The TWU submits that the concept of ‘less favourable’ means ‘less advantageous’ or ‘less beneficial’ and there is no reason that that understanding should not be applied to s 273(7) of the Act.

[27] It is submitted that the purpose of s 273(7) is to ensure that workplace delegates are afforded rights and entitlements under a workplace determination that are at least as favourable as (in the sense of not less advantageous or not less beneficial) than those in any award which would cover them.

[28] Clause 27A of the Waste Award is entitled ‘Workplace delegates’ rights’. Clause 27A.2 contains a series of defined terms. Relevantly, it defines ‘employer’ to mean *the employer* of the workplace delegate and ‘eligible employees’ to mean members and persons eligible to be members of the delegate’s organisation who are employed by *the employer* in the enterprise. The TWU submits that the grammatical use of the definite article ‘the’ in relation to *the employer* of the workplace delegate and members or potential members of the delegate’s organisation employed by *the employer* in the workplace suggest there is an earlier reference to ‘the employer’. If this construction be correct, the TWU submits that the entitlements conferred by clauses 27A.5-27A.8 would be limited to employees of the delegate’s employer. It is contended that this would be incongruent with s 350C(1) of the Act. The TWU submits that whether this construction was intended by the Full Bench is unclear as the Full Bench is yet to publish its reasons.

[29] The TWU’s proposed term does not limit a workplace delegate to representing employees of Cleanaway. Rather, the TWU submits, consistently with s 350C(1) of the Act, sub-clause (2) of the TWU’s proposed delegates’ rights term extends to employees and/or contractors who work in the relevant enterprise, being Cleanaway’s enterprise as detailed at clause 3.1(a) of the workplace determination.

[30] The TWU submits that its proposed sub-clause (3) streamlines and makes less formal the process for providing notice to Cleanaway of the appointment or election of a delegate. Given the relatively small nature of the workforce at the Unanderra yard and the established relationship between the TWU and Cleanaway, it is submitted that there is no reason why the TWU as well as the delegate cannot give notice to Cleanaway or provide relevant evidence of the appointment or election.

[31] Sub-clause (4) proposed by the TWU does not impose an obligation on a delegate to give written notice to Cleanaway if they cease to be a delegate. It is submitted that equivalent

clause 27A.4 of the Waste Award would, if contravened, leave a delegate liable to a potential contravention of s 45 of the Act. The TWU submits that its proposed sub-clause (4) simplifies the position and provides that a delegate will remain a delegate until either the delegate or TWU give Cleanaway notice.

[32] Sub-clause (5) proposed by the TWU departs from clause 27A.5 as it makes clear that the matters about which a delegate may represent members or potential members are not limited to those set out in clause 27A.5. It is unclear whether clause 27A.5 is intended to be exhaustive. If it is, the TWU submits that it is unduly narrow and does not give effect to the general right conferred by s 350C(2) to represent *the industrial interests* of members or potential members. A non-exhaustive list of representative activities is set out in proposed sub-clause (5).

[33] Sub-clause (6) proposed by the TWU deviates from clause 27A.6 of the Award. The latter provision is, it is respectfully submitted by the TWU, apt to provide a lesser or diminished entitlement to delegates to that afforded and contemplated by s 350C(3)(a).

[34] Clause 27A.6(a) permits a workplace delegate to communicate with eligible employees *for the purpose of representing their industrial interests under clause 27A.5*. The provision goes on to provide that this includes discussion of membership and representation. It is submitted that the communications clause 27A.6(a) is for a defined purpose, viz., representation of an employees' industrial interests under clause 27A.5. It is contended that this would potentially limit the communications to the representative activities enumerated in clause 27A.5, such as representing an employee during enterprise bargaining or in relation to the resolution of a dispute. It appears to limit communications to representational activities of the kind detailed in clause 27A.5. If this is the correct construction of the provision, the TWU submits that it will result in the clause not affording an entitlement that corresponds with the minimum entitlement detailed in s 350C(3)(a). The TWU submits that the entitlement conferred by s 350C(3)(a) is one to reasonable communication *in relation to* members and potential members' industrial interests. It is not limited to particular representative activities. Proposed sub-clause (6) overcomes this issue by restating the right conferred by s 350C(3)(a) and giving illustrative examples of the kind of communications which may occur. Proposed sub-clause (7) replicates clause 27A.6(b).

[35] Sub-clause (8) proposed by the TWU replicates clause 27A.7(a) of the Waste Award. In light of the size and nature of Cleanaway's business, it is submitted that there is no need for the limitation in clause 27A.7(b) to be included.

[36] Given the size and nature of Cleanaway's business, additional paid time off for training and union related activities are set out in clause 9 proposed by the TWU. The TWU submits that it is appropriate to include such provisions having regard to the factors identified in s 275 including the conclusion in our earlier decision at [123] that Cleanaway breached its good faith bargaining obligations by failing to notify the TWU of the appointment of Mr Green and Mr Packer as bargaining representatives. Proposed sub-clauses (10)-(12) set out mechanical provisions concerning attendance at training and union related activities.

[37] Sub-clause (12) proposed by the TWU sets out mechanical provisions concerning notice for paid leave for any other purpose permitted by sub-clause (9). It is submitted that sub-clause (12) is consistent with the type of leave contemplated within the draft workplace determinations filed by the parties, where Employee Representative Training was an agreed term. It is further

submitted that sub-clause (12) is no less favourable than the delegates rights term in the Waste Award.

[38] Sub-clause (13) proposed by the TWU deals with the exercise of rights by a workplace delegate. It departs from clause 27A.9 in a number of respects.

[39] Clause 27A.9 provides a number of conditions which a delegate must comply with when exercising entitlements under clause 27A. It is framed such that if the delegate does not comply with these conditions, the right(s) conferred by the clause will not be able to be lawfully exercised by the delegate.

[40] The TWU submits that two of the 'conditions' are potentially problematic, in particular a delegate must, relevantly (a) comply with their duties and obligations as an employee (27A.9(a)(i)) and (b) not hinder, obstruct or prevent the normal performance of work (27A.9(a)(iii)).

[41] The TWU submits that the right to representation under s 350C(2) is not qualified or limited, except insofar as (a) it can only be exercised in relation to the representation of the industrial interests of members or potential members of the delegate's organisation; (b) the individual(s) being represented must work in the particular enterprise the delegate has been elected or appointed to represent; and (c) the right to communication under s 350C(3)(a) is a right to reasonable communication, whilst the entitlements to access and training are also filtered by the requirement of reasonableness. No other fetters are imposed on the exercise of rights.

[42] The TWU submits that compliance by a delegate with their duties and obligations as an employee involves, in the ordinary course, performing work as normal and as required by the employer. It is difficult to apprehend, so the TWU submits, how a workplace delegate can engage in representative activities at the same time as complying with their usual duties and obligations. If 27A.9(a)(i) is construed to operate in a way that may neuter or impermissibly qualify the exercise of the rights under ss 350C(2)-(3), the TWU submits that it will detract from the rights contemplated by those provisions. This provision is not replicated in sub-clause (13) proposed by the TWU.

[43] The TWU submits that a requirement to not hinder, obstruct or prevent the normal performance of work has the potential to undermine the exercise of delegates' rights. To 'hinder' is to make more difficult or appreciably interfere with an activity. The bar to hindering the normal performance of work is not a high one. The TWU submits that a delegate who spoke to an employee whilst they were performing work which resulted in the employee stopping work or not working as efficiently would hinder the normal performance of work. The TWU contends that it is difficult to conceive of a scenario where a delegate could exercise representational rights during work time and not at least hinder (or potentially obstruct) the normal performance of work.

[44] The protection conferred on workplace delegates by s 350A(1)(c), which requires that an employer not *unreasonably* hinder, obstruct or prevent the exercise of rights by a workplace delegate under, relevantly, a fair work instrument, is significant. The qualifying adjective 'unreasonable' is not present in clause 27A.9(a)(iii). The TWU submits that an employer is, therefore, able to hinder, obstruct or prevent the exercise of a workplace delegate's rights if it is reasonable to do so. However, a delegate is not able to hinder, obstruct or prevent the normal

performance of work at all including if it is reasonable for the purposes of exercising delegates' rights. The fetter imposed by clause 27A.9(a)(iii) is not replicated in sub-clause (13) proposed by the TWU and, instead, a requirement the mirror of s 350A(1)(c) is included. The requirements to comply with reasonable policies and procedures and not hinder, obstruct or prevent the exercise of freedom of association are retained.

[45] Sub-clause (14) proposed by the TWU replicates clause 27A.9(b), whilst sub-clause (15) reproduces clause 27A.9(c) of the Waste Award.

### **Cleanaway's submissions**

[46] Cleanaway submits the Commission should approach its task of identifying the delegates' rights term for inclusion in the workplace determination with the following matters at the forefront of its consideration.

[47] First, the delegates' rights model term decision by a Full Bench of the Commission is a recent and on-point determination as to what s 350C in the Act requires be addressed, and how. Where the TWU invites the Commission to depart from the model term on the basis that the TWU considers s 350C should prompt a different result, Cleanaway submits that the Commission should decline that invitation, and instead follow the model term decision.

[48] Cleanaway submits that the TWU's invitation, in effect, asks the Commission to treat the model term decision as 'clearly wrong', in circumstances where the reasons for that decision have not yet been issued following extensive consultation and submissions of industry peak bodies and unions. Those submissions dealt with, and in due course the reasons to be published will deal with, some of the very issues the TWU now seeks to reargue for a result different to that determined in the model term decision.

[49] For example, Cleanaway submits that the position urged by the TWU on the Commission in this proceeding is to extend the definition of 'eligible employee' beyond employees of the employer respondent covered by the relevant instrument, to include 'contractors'. That position has been considered and rejected in the model term decision with the issue the subject of specific consideration. Cleanaway submits that is because:

- (a) as an employee of a sub-contracted employing entity, a "contractor" will already have the benefit of the applicable modern award term providing for delegates' rights, by virtue of that employment;
- (b) the extension of an enforceable representation right in respect of representation of persons not covered by an enterprise instrument endangers the requirement that the instrument deal only with permitted matters; and
- (c) to the extent the TWU contends the definition 'contractor' refers to a sole trader (if the TWU intends that result, which is unclear), an individual will not have the same industrial interests of a direct employee to which the s 350C requirement and model term are geared.

[50] Secondly, where including a delegates' rights term in an enterprise instrument, Cleanaway submits that it appears to be common ground that it is appropriate to identify the 'particular enterprise'. Accurate identification is fundamental for the proper operation of the delegates' rights

term. Unless the enterprise instrument covers all employees in the enterprise without exception, the enterprise is distinct from the employees covered by the instrument. Accordingly, Cleanaway contends that it is necessary to more precisely identify the particular enterprise.

**[51]** Thirdly, Cleanaway submits that the delegates' rights term must not exclude the prospect that employees covered by the enterprise instrument may be entitled to have their industrial interests represented by a range of different employee organisations. A restriction of the exercise of delegates' rights to rights of delegates of the TWU is, so Cleanaway submits, inimical to the scheme.

**[52]** Fourthly, Cleanaway submits that the capacity and authority of a workplace delegate to exercise any rights is dependent on their ongoing 'appointment' as a workplace delegate under the rules of the relevant organisation. The appointment, and whether or when it comes to an end, is a matter known only to the delegate and the relevant organisation. Where the appointment entitles the delegate to exercise significant rights, Cleanaway submits that it should be notified in a reliable and provable way (that is, in writing) at the outset, and it is the delegate who must proactively disclose the appointment (and their derived authority) coming to an end. Cleanaway submits that the importance of these formal requirements is magnified when it is recognised that there may be multiple organisations which have appointed a workplace delegate.

**[53]** Cleanaway's proposed delegates' rights term aligns with the Waste Award, subject to properly identifying the 'particular enterprise' to which the delegates' rights term applies to be the business with which the workplace determination is concerned.

**[54]** In its proposed delegates' rights term, the TWU proposes a different form of delegates' rights term, which would depart from the Waste Award in several important respects. As to the TWU's proposed sub-clause (2), Cleanaway submits that the change proposed is:

- (a) to extend the definition of 'eligible employees' to include 'contractors' as well as employees of Cleanaway. That proposal is opposed; and
- (b) to limit the relevant organisation in relation to which a person may be an 'eligible employee' to the TWU. That proposal is opposed.

**[55]** Cleanaway submits that the Full Bench process by which the model delegates' rights term decision came about included, on 16 April 2024, the Commission issuing a Statement ([\[2024\] FWCFB 212](#)) in which they noted that during the consultations they raised the interaction between the definition of an 'enterprise' in s 12 of the Act and the meaning of 'workplace delegate' set out in s 350C(1) of the Act. Written submissions were exchanged in accordance with the timetable for this issue. Those submissions expressly canvassed models in which the delegates' rights would explicitly extend to representation to an employer covered by an industrial instrument of persons who were not themselves employees of that employer (for example, employees of other employers undertaking work on a single site). Cleanaway submits that it is apparent the Full Bench has rejected those models and resolved the issue by limitation in the definition of 'eligible employee' to employees of the employer. Cleanaway submits that this is, with respect, unsurprising. It is contended that most operations workers at a single site will be covered at least by a modern award, which as of 1 July 2024 provide for delegates' rights at a minimum in accordance with the model term. Cleanaway contends that there is no gap in regulation which would suggest delegates' rights should be provided for in a way that extends representation to persons who are not employees of Employer A, even if employees of Employer B are at the same workplace. This is because employees of Employer B (and their delegates) have the benefit of the same rights in an applicable industrial instrument, and those can be exercised in a way that most directly enables raising and resolution of industrial matters between the particular employer and its employees. If

workers have chosen not to be directly employed by any employer (for example, owner drivers), their industrial interests and the effect of the Act are materially different to direct employees.

**[56]** As to the TWU's proposed sub-clause (3), Cleanaway submits that the change proposed is:

- (a) to vary the Waste Award provision by removing the requirement that notice of an appointment of a workplace delegate be given in writing. That proposal is opposed; and
- (b) to provide that the TWU (and no other organisation) may 'give' such a notice on behalf of a workplace delegate. That proposal is opposed. Cleanaway submits that ordinary concepts of agency recognise that a notice might be effectively given by an organisation on behalf of an individual, although only with the authorisation of the individual. No change to the Waste Award model provision is required to achieve this. Cleanaway contends that it should always be clear that the giving of a notice by an organisation on behalf of its workplace delegate has been done with the authority of the individual delegate.

**[57]** As to the TWU's proposed sub-clause (4), Cleanaway submits that the change proposed is:

- (a) to vary the Waste Award provision by removing the requirement that written notice of the cessation of appointment of a workplace delegate be given within 14 days of the cessation. That proposal is opposed. The TWU's contention that a failure to notify of cessation in the time provided for would expose a delegate to a civil penalty proceeding for breach of the enterprise instrument is, so Cleanaway submits, a remote prospect, but in any case should be an exposure. To do otherwise would facilitate the prospect of a former delegate misrepresenting their workplace rights; and
- (b) to vary the Waste Award provision by providing that an appointment of a workplace delegate continues until and unless the TWU or delegate provides written notification accordingly. That proposal is opposed. Once an appointment under a relevant organisation's rules has ceased, Cleanaway submits that the authority cannot be revived and continued by a delegates' rights term, and to attempt to do so would be inimical to the democratic control of an organisation achieved by adherence to its rules.

**[58]** As to the TWU's proposed sub-clause (5), Cleanaway submits that the change proposed is:

- (a) to alter the Waste Award's inclusive list of matters in respect of which a workplace delegate may represent eligible employees. Those changes are opposed. Cleanaway submits that they are not demonstrated to be necessary departures from the considered list identified in the model term ; and
- (b) to include a specific additional matter in respect of which a workplace delegate may represent eligible employees as "representing or assisting members or potential members" etc. It is submitted that the Commission has seen that Cleanaway has co-operatively facilitated delegates and other interested employees to attend Commission proceedings. Those changes are opposed. Cleanaway submits that they are not demonstrated to be necessary departures from the considered list identified by in the model term decision.

**[59]** As to the TWU's proposed sub-clause (6), Cleanaway submits that the change proposed is to vary the Waste Award provision to alter the matters about which a workplace delegate is entitled to engage in reasonable communication to eligible employees. First, Cleanaway submits that the Waste Award term refers back to the matters in Waste Award clause 27A.5 which is the appropriate touchstone. Secondly, Cleanaway submits that the TWU's proposed sub-clause (6)(b) is

realistically already encompassed by dot-point 4 in Item S.12 of the Schedule to the Unanderra EA, which would be required to be included in the delegates' rights term in any case. The TWU changes in its proposed sub-clause (6) are opposed.

**[60]** As to the TWU's proposed sub-clauses (9)-(12), Cleanaway submits that the change proposed is to provisions dealing with reasonable delegate access to training. Cleanaway submits that that is an issue which occupied a substantial part of the process which has led to the model term decision. The issue of reasonable delegate access to training is also addressed in clause 31 of the Waste Award, the parties' identical proposed clause 44 in respective draft determinations, and the Unanderra EA.

**[61]** Cleanaway submits that the model term decision contemplated that some modern awards will have pre-existing provisions that are within the definition at s 12 of a delegates' rights term and so are required to be included in the determination for the purposes of ss 273(6)-(7) of the Act. The model term introduced a mechanism to reconcile those pre-existing provisions in what is now clause 27A.10 of the Waste Award.

**[62]** On this basis, Cleanaway submits that determining the appropriate delegates' rights term for reasonable delegate access to training requires:

- (a) First, in accordance with clause 27A.10 of the Waste Award, intra-award reconciliation of which (of the two) is the applicable Waste Award requirement as between clause 27A.8 and clause 31;
- (b) Secondly, recognition of the parties' position as being the provision for reasonable delegate access to training in terms found at clause 44 in the respective draft determinations; and
- (c) Thirdly, confirmation that the appropriate result arising from that assessment is no less favourable than the pre-existing provision for reasonable delegate access to training in the Unanderra EA.

**[63]** It is submitted that that process is not one which can permissibly lead to multiple inconsistent terms providing for the same subject matter, which would be in any case industrially undesirable and likely to increase disputes. Cleanaway submits that this process should lead to a delegates' rights term dealing with reasonable delegate access to training that is in the terms provided for in clause 31 of the Waste Award.

**[64]** As to the TWU's proposed sub-clause (13), Cleanaway submits that the change proposed is to alter the conditions determined in the model term decision directed at the exercise of entitlements under the delegates' rights term. It is submitted that the justification for the TWU's proposed changes cavils with the clear result in that decision as to what are the appropriate conditions on the exercise of delegates' rights to meet the requirements of s 350C, and the changes are opposed.

### **TWU's reply submissions**

**[65]** The TWU submits that Cleanaway's contention that clauses 27A and 31 in the Waste Award should be transplanted into the workplace determination should not be accepted for the following reasons:

- (a) Cleanaway's submissions do not grapple with terms of ss 273(6)-(7) of the Act. The TWU submits that the Commission's task under s 273(6) is to include a delegates' right



term. That expression takes its meaning from s 12 which provides that such a term is one that provides for the exercise of rights by workplace delegates. The minimum rights which such a term must usually contain are those detailed in s 350C. However, s 273(7) obliges the Commission to ensure not simply that the minimum rights under s 350C are included so that the term meets the statutory description of a delegates' rights term but that it is also '*no less favourable*' than a term or terms provided by an applicable modern award. The TWU submits that the terms for which it contends are ones which meet both these criteria;

- (b) contrary to Cleanaway's submissions and for the reasons detailed in the TWU's submissions in chief, the TWU contends that the Full Bench appears to have taken an erroneous view of s 350C(1) in crafting delegates' rights terms such that they limit delegates to representing employees of the delegate's employer. In any event, the TWU submits that there is no reason of principle or practicality identified in Cleanaway's submissions as to why a term which reflects s 350C(1) should not be included in the determination;
- (c) Cleanaway has not identified any other unions with constitutional coverage of employees who perform work in its business at the Unanderra depot. The TWU submits that there is no reason, therefore, not to refer to the TWU in the delegates' rights clause;
- (d) there is no warrant for the prescriptive and officious approach contended for by Cleanaway. If a workplace delegate ceases to be a delegate, they cannot exercise rights and doing so may result in a contravention of s 345 of the Act. The TWU submits that it is unnecessary for a workplace delegate to be potentially exposed to a civil penalty if they do not comply with a requirement to notify Cleanaway in a particular timeframe or manner. In any event, the TWU contends that there is no reason to think that the requirements included in the TWU's proposed term will not achieve the result of ensuring Cleanaway is notified of the election or appointment of a workplace delegate. The TWU submits that Cleanaway's reasons for the TWU not being permitted to give notice are opaque. It is contended that there is no basis for the TWU to not give notice that a delegate has been elected or appointed in lieu of the delegate. In either case, the TWU submits that the function and object of the notification (i.e. Cleanaway being made aware of an employee being elected or appointed a delegate) will be achieved;
- (e) section 350C(1) of the Act permits workplace delegates to represent workers in the enterprise. The TWU submits that there should be no limitation to employees of the delegate's employer. Any requirement to the contrary would, so the TWU submits, be contrary to s 350C(1) and would therefore not result in the determination containing a 'delegates' rights term' for the purposes of s 12. The TWU further submits that there is no practical reason identified for Cleanaway's opposition to such a term;
- (f) the TWU is content to amend its proposed clause 4 to provide as follows:
 

“An employee will remain a workplace delegate unless and until they cease, in accordance with the TWU Rules to be a workplace delegate. Where this occurs, the TWU or the delegate should give notice to Cleanaway as soon as practicable.”
- (g) Cleanaway misapprehends the requirements of ss 273(6)-(7) insofar as it asserts that the TWU must show why there is a basis for deviating from the terms of the Waste Award.

In any event, the TWU submits that its proposed clauses 5-6 are congruent with s 350C(2)-(3) and ensure that delegates are able to exercise the rights accorded to them under that provision;

- (h) the TWU's proposed clauses 9-12 meet the criteria under s 273(7) as they are no less favourable than clause 31 of the Waste Award. If the Commission does not accede to the TWU's application that the training provisions sought by the TWU be included, clause 31 of the Waste Award should in the alternative be included in the workplace determination; and
- (i) there is no need to show justification for a departure from the terms in the Waste Award. In any event, the TWU submits that departure is justified for the reasons detailed in its submissions in chief. Tellingly, the TWU contends that Cleanaway does not cavil with the propositions detailed at paragraphs [56]-[62] of its submissions in chief.

### **Consideration**

[66] We have considered the different delegates' rights terms proposed by the TWU and Cleanaway, together with the submissions advanced by each party in support of those terms.

[67] Having regard to all the circumstances, including the relatively small enterprise in which the employees who will be covered by our workplace determination work and the relevant provisions of the Act set out above and addressed in our earlier decision, we consider it appropriate to include in our workplace determination a delegates' rights term which aligns with the model term in clause 27A of the Waste Award and the pre-existing term in clause 31 of the Waste Award, and includes terms which are not less favourable than the delegates' rights terms of the Unanderra EA.<sup>8</sup> In addition, we will properly identify in the delegates' rights term the 'particular enterprise' to which the term applies.

[68] Notwithstanding the fact that the Full Bench responsible for determining the content of the model delegates' rights term has not yet published its reasons for making the model provision in the terms that it has, we are not persuaded that that Full Bench has taken a plainly erroneous view of s 350C of the Act. Nor are we persuaded that the other amendments proposed by the TWU to the model delegates' rights term should be adopted in the circumstances of this case. Having regard to the particular enterprise in which employees based at the Unanderra depot work, we consider that a delegates' rights term which is based on the model term appropriately balances the statutory rights and obligations relating to workplace delegates and should provide the basis for the delegates' rights term to be included in our workplace determination. Contrary to the submissions made by the TWU, we do not consider that the model delegates' rights term, including the provision replicated in clause 27A.9 of the Waste Award, on its proper construction, neuters or impermissibly qualifies the exercise by a workplace delegate of their rights under s 350C of the Act.

[69] The content of the delegates' rights term to be included in our workplace determination is set out in Annexure A to this decision. We are satisfied that this term constitutes a 'delegates' rights term', provides at least for the rights of workplace delegates set out in s 350C of the Act, is not less favourable than the delegates' rights terms in the Waste Award,<sup>9</sup> is not less favourable than the delegates' rights terms of the Unanderra EA,<sup>10</sup> and is appropriate having regard to the factors set out in s 275 of the Act.

[70] For clarity, the delegates' rights term set out in Annexure A amends the model term in clause 27A of the Waste Award in the following respects:

- (a) the term 'enterprise' is defined to reflect the business being conducted by Cleanaway from the Unanderra depot;
- (b) the expression 'workplace determination' has been included in clause X.5(f);
- (c) clause 27A.7(b) of the Waste Award has been omitted because the exception in that provision does not apply to the Unanderra depot;
- (d) clause 27A.8 of the Waste Award has been omitted and in lieu thereof clause 31 'Dispute Resolution Training Leave' of the Waste Award has been expressly incorporated by clause X.8. This has been done because clause 31 of the Waste Award is more favourable than clause 27A.8 of the Waste Award, clause 44 of the workplace determination proposed by the parties on 6 June 2024, and the relevant terms of the Unanderra EA, save for the final dot point of item S.12 of the Schedule to the Unanderra EA (which is dealt with in subparagraph (e) below); and
- (e) clause X.11, which does not form part of the Waste Award, has been included. Clause X.11 is in the same terms as the final dot point of item S.12 of the Schedule to the Unanderra EA, and has been included to ensure that the delegates' rights term in our workplace determination is not less favourable than the relevant terms of the Unanderra EA.

[71] The TWU and Cleanaway are directed to confer and prepare a workplace determination which accords with our earlier decision<sup>11</sup> and includes the delegates' rights term in Annexure A to this decision. The proposed workplace determination should be filed by 4pm on 22 August 2024.



DEPUTY PRESIDENT

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## **Annexure A – delegates’ rights term to be included in workplace determination<sup>12</sup>**

### **To be inserted in Definitions clause (clause 7):**

**employee organisation**, for clause X Workplace delegates’ rights, has the meaning given by section 12 of the Act.

**enterprise** means, for clause X Workplace delegates’ rights, the business covered by this Determination of waste management services, including the collection, transportation, handling, recycling and disposal of any waste material and the operation of transfer stations, landfill sites, recycling depots, and related services in Cleanaway’s New South Wales Solids Waste Business Unit C&I and CDS operations in Wollongong.

**workplace delegate**, for clause X Workplace delegates’ rights, has the meaning given by section 350C(1) of the Act.

### **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.

NOTE: Under section 350C(4) of the Act, the employer is taken to have afforded a workplace delegate the rights mentioned in section 350C(3) if the employer has complied with clause X.

X.2 In clause X:

- (a) employer means the employer of the workplace delegate;
- (b) delegate’s organisation means the employee organisation in accordance with the rules of which the workplace delegate was appointed or elected; and
- (c) eligible employees means members and persons eligible to be members of the delegate’s organisation who are employed by the Company 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 within 14 days.

### **X.5 Right of representation**

A workplace delegate may represent the industrial interests of eligible employees who wish to be represented by the workplace delegate in matters including:

- (a) consultation about major workplace change;
- (b) consultation about changes to rosters or hours of work;

- (c) resolution of disputes;
- (d) disciplinary processes;
- (e) enterprise bargaining where the workplace delegate has been appointed as a bargaining representative under section 176 of the Act or is assisting the delegate's organisation with enterprise bargaining; and
- (f) any process or procedure within an award, enterprise agreement, workplace determination or policy of the employer under which eligible employees are entitled to be represented and which concerns their industrial interests.

#### **X.6 Entitlement to reasonable communication**

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

#### **X.7 Entitlement to reasonable access to the workplace and workplace facilities**

- (a) The employer must provide a workplace delegate with access to or use of the following workplace facilities:
  - (i) a room or area to hold discussions that is fit for purpose, private and accessible by the workplace delegate and eligible employees;
  - (ii) a physical or electronic noticeboard;
  - (iii) electronic means of communication ordinarily used in the workplace by the employer to communicate with eligible employees and by eligible employees to communicate with each other, including access to Wi-Fi;
  - (iv) a lockable filing cabinet or other secure document storage area; and
  - (v) office facilities and equipment including printers, scanners and photocopiers.

#### **X.8 Entitlement to reasonable access to training**

Clause 31 "Dispute Resolution Training Leave" of the *Waste Management Award 2020* is incorporated.

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

- (a) A workplace delegate's entitlements under clause X are subject to the conditions that the workplace delegate must, when exercising those entitlements:

- (i) comply with their duties and obligations as an employee;
  - (ii) comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources;
  - (iii) not hinder, obstruct or prevent the normal performance of work; and
  - (iv) not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.
- (b) Clause 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: 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.

X.10 Other clauses of this Determination may give additional or more favourable entitlements to workplace delegates (however described). If an entitlement of a workplace delegate under another clause of this Determination is more favourable to the delegate than an entitlement under clause X, the entitlement under the other clause applies instead of the entitlement under clause X.

X.11 The employer agrees to introduce new employees to relevant workplace delegate(s) at the site for workplace delegates to discuss union representation matters with eligible employees. Introductions will be conducted at a mutually convenient time and can take place when an employee is inducted, at toolbox talks or any other agreed forum.

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<sup>1</sup> [\[2024\] FWCFB 127](#) & [\[2024\] FWCFB 305](#)

<sup>2</sup> Clause 97 of Schedule 1 to the Act

<sup>3</sup> See definition of 'fair work instrument' in s 12 of the Act

<sup>4</sup> [\[2024\] FWC 1699](#)

<sup>5</sup> Section 270A(2) of the Act

<sup>6</sup> (2021) 271 CLR 456

<sup>7</sup> (2017) 351 ALR 379

<sup>8</sup> Clause 38 and Schedule item S.12 of the Unanderra EA

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<sup>9</sup> Clauses 27A and 31 of the Waste Award, noting that on the topic of training for workplace delegates clause 31 of the Waste Award is more favourable to workplace delegates than both clause 27A.8 of the Waste Award and item S.12 of the Schedule to the Unanderra EA

<sup>10</sup> Clause 38 and Schedule item S.12 of the Unanderra EA

<sup>11</sup> [\[2024\] FWCFB 305](#)

<sup>12</sup> In light of the terms of this delegates' rights term, clause 44 of the proposed workplace determination filed by each party on 6 June 2024 will not be included in the final workplace determinaton.