



Compulsory union delegates powers in awards taking effect from 1 July 2024

Background – the government’s legislation and the Fair Work Commission’s award terms

- The Albanese government’s ‘Closing Loopholes’ legislation passed in 2023 included a ‘last minute’ amendment to expand rights for union delegates in workplaces.
- The legislation established rights for union delegates to reasonable communication, representation, access to facilities in the workplace, and an entitlement for delegates to access paid training leave.
- The legislation requires the Fair Work Commission to insert a delegates’ rights term into all modern awards by 30 June, which would flow to new enterprise agreements.
- The legislation requires these terms to take effect from 1 July 2024. On 28 June, the Commission released its model term that will be incorporated into all awards.¹
- The Commission previously released a draft award term on 10 May. The MCA made submissions in response to this term.² A comparison of the draft and final award terms is attached as the **Appendix** to this note.
- This note provides an overview of the key aspects of the Commission’s model term, noting that reasons for decision will be published in due course.

Employer concerns acknowledged

- The MCA and a number of other business organisations made detailed submissions to the Commission and raised concerns in the media³ in response to the claims of the ACTU and unions such as the Mining and Energy Union, whose proposals would have given virtually unlimited powers for union delegates to exercise unprecedented control of workplaces.
- The model term reflects a number of these concerns and places several checks and balances on union delegates’ powers, most notably:
 1. Delegates may only represent the ‘industrial interests’ of relevant employees of the same employer (rejecting the MEU’s attempt to allow delegates to represent the interests of employees of other employers at the same work site)

¹ <https://www.fwc.gov.au/about-us/news-and-media/news/workplace-delegates-rights-awards-and-agreements-changes-1-july>

² <https://minerals.org.au/wp-content/uploads/2024/05/MCA-submission-FWC-Delegates-rights-Response-to-Draft-Award-Term-AM2024-6-22-May-2024.pdf>

³ <https://minerals.org.au/wp-content/uploads/2024/05/Union-power-grab-strikes-at-heart-of-economic-future-Op-ed-22-April-2024.pdf>

2. In exercising their rights, delegates must still 'comply with their duties and obligations as an employee', which includes adhering to lawful and reasonable directions of their employer and complying with all applicable workplace laws
 3. Delegates must continue to 'comply with reasonable policies and procedures of the employer'
 4. Delegates must 'not hinder, obstruct or prevent the normal performance of work', and
 5. Delegates must not 'hinder, obstruct or prevent eligible employees from exercising their rights to freedom of association'.
- Further matters advocated by the MCA were acknowledged in the model term, including:
 1. Clarifying that the right to representation must be based on employee consent, and
 2. Concerns about union delegates having a role in routine performance appraisals were addressed by removing the reference to 'performance management'.

Union proposals rejected

- The Commission's final term rejects a number of 'overreach' proposals by some unions. These included:
 1. CFMEU demands for union delegates to be supplied with company-funded iPads
 2. Mining and Energy Union demands that union delegates be given rights to be 'released from normal duties' to undertake union business, and have preferential access to shifts and rosters
 3. Representing any worker in the 'enterprise', including employees of other employers
 4. Subordinating company policies, privacy legislation and employee duties to delegates' rights
 5. Unlimited numbers of delegates who can access paid leave, and
 6. No limit on union activities during paid time

Areas of concern

- Because of a loophole in the legislation, there remains no limit on the number of union-affiliated workers who can be designated as union delegates, and thus be given access to the special privileges delegates now receive under law. This means the potential for workplace disruption remains significant – and there are early indications that unions will push for as much as 10 per cent of union members on any particular worksite to be made delegates.
- All delegates are entitled to 'up to' five days paid training leave per year initially, then 'at least' one day each subsequent year. This is in contrast to the Mining and Energy Union's evidence, which was that it currently considers three days' training to be sufficient for its delegates.
- The Commission's allowance for 1 in 50 employees to receive delegates' rights is much greater than in most mining operations. For example, large operations with over 1,000 employees can have two or three delegates per 500 employees.
- The Commission's term allows for 1 in 50 *employees* to be eligible for paid leave, not 1 in 50 *union members*. This term creates two loopholes that could be exploited:
 1. Even if a union only had 2 per cent coverage of a workforce (i.e. 1 in 50 workers), each union member could be appointed a 'delegate' and take an extra week's leave and use their new powers to expand their influence in the workplace.
 2. The limit only applies to 1 in 50 workers being able to take paid training leave. It is not a limit on 1 in 50 workers being union delegates *per se*. A union could potentially appoint every member as a 'delegate' and they would have all the other powers, including the right to be paid for union business during work hours.

APPENDIX—Changes between FWC’s draft and final delegates’ rights terms

XA. Workplace delegates’ rights

XA.1 Clause XA 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 XA.

XA.2 In clause XA:

- (a) **employer** means the employer of the workplace delegate;
- (b) **delegate’s organisation** means the employee organisation in accordance with ~~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.

XA.3 Before exercising entitlements under clause XA, 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.

XA.4 An employee who ceases to be a workplace delegate must give written notice to the employer within 14 days as soon as practicable.

XA.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 ~~but not limited to~~ to:

- (a) consultation about major workplace change;
- (b) consultation about changes to rosters or hours of work;
- (c) resolution of ~~individual or collective grievances or~~ disputes;
- (d) ~~performance management and~~ disciplinary processes;
- (e) enterprise bargaining 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 enterprise bargaining; and
- (f) any process or procedure within an award, enterprise agreement or policy of the employer under ~~in~~ which eligible ~~the~~ employees are entitled to be represented and which concerns their industrial interests.

XA.6 Entitlement to reasonable communication

- (a) A workplace delegate may communicate with eligible employees for the purpose of representing ~~their the~~ industrial interests ~~of the employees~~ under clause XA.5. This includes discussing membership of the delegate's organisation ~~and representation with eligible employees. 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.

XA.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, ~~unless the employer does not have them:~~
 - (i) a room or area to hold discussions ~~that which~~ 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 ~~that are~~ 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 in the workplace;
 - (iv) a lockable filing cabinet or other secure document storage area; and
 - (v) office facilities and equipment including printers, scanners and photocopiers ~~and wi-fi.~~
- (b) The employer is not required to provide access to or use of a workplace facility under clause XA.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.

XA.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 the 5 days or 1 day of paid time for training during normal working hours, 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 the number of the amount hours the workplace delegate would have been paid for the hours the workplace delegate would have been normally be rostered or required to work on that a day if on which the delegate had not been is absent from work to attend the training.
- (d) The workplace delegate must give the employer as much notice as is practicable, and not less than 5 weeks' notice (unless the employer and delegate agree to a shorter period of notice) of the dates, subject matter, and the daily start and finish times of the training, and the name of the training provider.
- (e) If requested by the employer, theThe workplace delegate must, on request, provide the employer with an outline of the training content.
- (f) 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.
- (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, within 7 days after the day on which the training ends.

XA.9 Exercise of entitlements under clause XA

- (a) A workplace delegate's entitlements under clause XA 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 XA 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 XA 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 XA.

~~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.~~