

# CFMEU

## CONSTRUCTION

### IN THE FAIR WORK COMMISSION

*Fair Work Act 2009*

cl.95, Schedule 1– FWC to vary certain modern awards

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

---

**SUBMISSION OF THE CONSTRUCTION, FORESTRY AND  
MARITIME EMPLOYEES UNION (CONSTRUCTION & GENERAL DIVISION)**

---

1<sup>st</sup> March 2024

<b>Construction, Forestry and Maritime Employees Union (Construction and General Division)</b>  ABN 46 243 168 565	<b>Contact Person:</b>  Stuart Maxwell, Senior National Industrial Officer	<b>Address for Service:</b>  Level 1, 1 Miller Lane Pyrmont NSW 2009	<b>T:</b>  <b>E:</b>	(02) 8524 5800  <a href="mailto:smaxwell@cfmeu.org">smaxwell@cfmeu.org</a>
--	--	--	----------------------------	--

## Introduction

1. The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Cth)* (**Closing Loopholes Act**) received Royal Assent on 14th December 2023. The Closing Loopholes Act amends provisions of the *Fair Work Act 2009 (Cth)* (**FW Act**) relating to terms that must be included in modern awards.
2. In a Statement issued on 20<sup>th</sup> December 2023<sup>1</sup>, Justice Hatcher, the President of the Fair Work Commission (**the Commission**) noted that,

*“[31] The Closing Loopholes Act requires that, by 30 June 2024, the Commission make determinations varying modern awards so that they include a delegates’ rights term. The new terms will come into operation on 1 July 2024.*

*[32] The creation of delegates’ rights terms for modern awards will require significant consultation and engagement with stakeholders. In early January 2024, a major case webpage will be published alongside a Statement about this process. The Statement will include information about how to engage in the consultation process and a draft timetable to meet the legislative deadline.”*
3. On the 18<sup>th</sup> January 2024, the President issued a Statement ([2024] FWC 150) which gave an overview of the legislative changes relevant to workplace delegates’ rights and which set out a draft timetable for the consultation and engagement process. The Statement further advised that this matter would be allocated to a Full Bench consisting of Vice President Asbury, Deputy President Binet and Commissioner Lim.
4. In a further Statement of 30<sup>th</sup> January 2024 ([2024] FWC 241), the FWC President confirmed the following timetable for the award variation process:

Date	Task or event
Week beginning 19 February 2024	Consultations with peak councils
1 March 2024	Parties to lodge submissions and proposed workplace delegates’ rights terms including any award specific terms required
28 March 2024	Parties to lodge submissions in reply
Week commencing 8 April 2024	Consultation sessions with interested parties
Week beginning 6 May 2024	Draft award terms published for comment
17 May 2024	Comments on draft award terms due
By 28 June 2024	Final determinations varying modern awards published
1 July 2024	Determinations come into operation

<sup>1</sup> [www.fwc.gov.au/documents/consultation/presidents-statement-closing-loopholes-2023-12-20.pdf](http://www.fwc.gov.au/documents/consultation/presidents-statement-closing-loopholes-2023-12-20.pdf)

5. The CFMEU (Construction and General Division) (**the CFMEU CG**) is the major union in the building and construction industry and has a substantial interest in the terms and conditions affecting our members contained in the *Building and Construction General On-site Award 2020 (the Building Award)*, the *Joinery and Building Trades Award 2020 (the Joinery Award)* and the *Mobile Crane Hiring Award 2020 (the Mobile Crane Award)* ( which will be referred to collectively as **the Construction Awards**), and any delegates' rights term to be included in these awards.
6. In accordance with the timetable set by the President the CFMEU CG makes this submission in regard to the Construction Awards and the delegates' rights term that should be included in them.

### **The Legislative Changes From the Closing the Loopholes Act**

7. The 18<sup>th</sup> January 2024 Statement, referred to in paragraph 3 above, provided an overview of the relevant provisions contained in the Closing the Loopholes Act concerning the delegates' rights term to be included in modern awards:

“[5] *The key changes relating to modern awards can be summarised as follows:*

- *A new definition of delegates' rights term has been inserted at s 12 of the FW Act. The definition provides that a delegates' rights term means a term in a fair work instrument that provides for the exercise of the rights of workplace delegates. A legislative note to the definition points to the rights of workplace delegates as being set out in s 350C of the FW Act, and also provides that a delegates' rights term must provide at least for the exercise of those rights.*
- *A new s 149E requires that a modern award must include a delegates' rights term for workplace delegates covered by the award. The new s 149E applies in relation to a modern award that is in operation on or after 1 July 2024, whether or not the award was made before that day. The application and transitional provisions clarify that a modern award is not invalid on or after 1 July 2024 only because it does not include a delegates' rights term.*

[6] *The new s 350C inserted by the Closing Loopholes Act is set out in full below:*

#### **350C Workplace delegates and their rights**

##### *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 EM at [827] and [830] sets out an expectation that ‘...for most employees, modern awards and enterprise agreements would provide greater detail for particular industries, occupations and enterprises’, and that s 350C(4) would ensure, where this is the case, that:*

*employers can rely on [the award or agreement term] as a complete statement of their obligations under new subsection 350C(3).”*

8. The CFMEU CG submits that in considering the content of a delegates' rights term to be included in a modern award the following provisions from the Closing Loopholes Act are also relevant:

- The new provision inserted after subsection 201(1):

*Approval decision to note modern award delegates' rights term included in an enterprise agreement*

(1A) If:

(a) the FWC approves an enterprise agreement; and

(b) a delegates' rights term in a modern award is taken to be a term of the enterprise agreement because of subsection 205A(2):

the FWC must note in its decision to approve the agreement that the term is so included in the agreement.

- The new section 205A:

**205A Enterprise agreements to include a delegates' rights term etc.**

(1) An enterprise agreement must include a delegates' rights term for workplace delegates to whom the agreement applies.

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

*When modern award term prevails*

- (2) However, if, when the agreement is approved, the delegates' rights term is less favourable than the delegates' rights term in one or more modern awards that cover the workplace delegates:
    - (a) the term in the enterprise agreement has no effect; and
    - (b) the most favourable term of those in the modern awards, as determined by the FWC, is taken to be a term of the enterprise agreement.
  - (3) To avoid doubt, if the delegates' rights term of a modern award is taken to be a term of an enterprise agreement, the term does not change if the modern award changes.
- The new s 350A Protection for workplace delegates:

**350A Protection for workplace delegates**

- (1) The employer of a workplace delegate must not:
  - (a) unreasonably fail or refuse to deal with the workplace delegate; or
  - (b) knowingly or recklessly make a false or misleading representation to the workplace delegate; or
  - (c) unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under this Act or a fair work instrument.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) To avoid doubt, subsection (1) applies only in relation to the workplace delegate acting in that capacity.
- (3) The burden of proving that the conduct of the employer is not unreasonable as mentioned in subsection (1) lies on the employer.

*Exception—conduct required by law*

- (4) Subsection (1) does not apply in relation to conduct required by or under a law of the Commonwealth or a State or a Territory.

**Union Delegates Rights are Not a New Issue in the Building and Construction Industry**

9. Before going to the award specific delegates' rights clause proposed by the CFMEU CG it is worth noting that union delegates rights terms or clauses in awards are not a new phenomenon for the building and construction industry. Clauses dealing with the rights of Job Stewards have been around since at least the early 1960's, if not before.

10. The *Carpenters and Joiners Award 1962*<sup>2</sup> contained the following clause:

*“41 – Stewards*

*An employee who has been appointed steward on a job shall, upon notification of that fact to the employer, be recognised by the employer as the accredited representative of the Union. Such an employee shall be allowed all necessary time during the working hours without deduction of pay to interview the employer or his representative on any matter affecting the other employees on the job.*

---

<sup>2</sup> 101 CAR 433

11. The first truly national award covering the building trades, the *National Building Trades Construction Award 1975*<sup>3</sup> contained the following provision on Job Stewards:

*“39 - JOB STEWARDS*

1. *An employee appointed as a job steward shall, upon notification by the union to the employer be recognised as the accredited representative of the union to which he belongs and he shall be allowed all necessary time during working hours to submit to the employer matters affecting the employees he represents and further shall be allowed reasonable time during working hours to attend to job matters affecting his union. Provided that the foregoing does not relieve the job steward of the obligation imposed upon him by his employer.*

*A job steward shall notify the principal contractor's representative and his union prior to the calling of any stop work meeting so that the procedures laid down in clause 47 - Settlement of disputes, may be observed before any stoppage of work occurs.*

2. *Prior to dismissal or transfer two day's notice shall be given to any shop steward and the appropriate union. Payment in lieu of notice shall not be given. In the event of the union disputing the decision of management to transfer the job steward or terminate his service he shall remain on the job during which time the Board of Reference as provided in clause 45 - Boards of Reference, shall deal with the matter.*

*The appropriate union shall, within 3 working days of notifying the management that it disputes the decision to transfer or terminate the job steward, request the Registrar or Deputy Registrar in writing to appoint a Board of Reference to deal with the matter.*

*The union and the employer shall do all things necessary to enable the Board to sit within 10 working days of the management decision to transfer or terminate the job steward. If the Board cannot sit within 10 working days because of the employer's failure to nominate representatives, or their unavailability to sit on the Board, the decision to transfer or terminate the job steward shall be null and void.*

*If the Board cannot sit within 10 working days because of the union's failure to nominate representatives, or their unavailability to sit on the Board, the job steward's transfer or termination shall automatically take effect at the expiry of the period of 10 working days.*

*Provided that nothing in this subclause shall prevent the parties proceeding by agreement to have the matter settled by the Commission or a Local Disputes Board set up in accord with subclause 47.3 in lieu of the Board of Reference procedure.*

*Provided further that nothing shall affect the right of the employer to dismiss a job steward without notice for misconduct or refusing duty.”*

---

<sup>3</sup> Print C6006

12. Similar provisions dealing with Job Stewards/Delegates were found in the *National Joinery and Building Trades Products Award 1993* (clause 39)<sup>4</sup>, the *National Building and Construction Industry (FEDFA) Award 1987* (clause 8(a))<sup>5</sup> the *Mobile Crane Hiring Award 1990* (clause 26)<sup>6</sup> and the *National Building and Construction Industry Award 1990* (clause 39)<sup>7</sup>.
13. Clauses dealing with Job Stewards/Delegates were a common feature of the pre modern awards in the building and construction industry until they were unfairly stripped from awards in the early 2000's through the award simplification proceedings and prohibited content provisions of the draconian WorkChoices legislation introduced by the Howard conservative government.
14. Despite their removal from pre-reform awards the CFMEU CG has maintained the protections and rights contained in Job Stewards/Delegates clauses through their inclusion in enterprise agreements that covered the union.
15. It should be also noted that many of these pre-modern awards contained 5 days per year paid training leave for union delegates/workplace representatives to attend training that would assist them in their settlement of disputes role (see clause 11.1.5 of the *National Building and construction Industry Award 2000*<sup>8</sup>, clause 11.1.5 of the *Joinery and Building Products Award 2002*<sup>9</sup> and clause 8.9 of the *Mobile Crane Hiring Award 2002*<sup>10</sup>). These provisions have been carried over to modern awards and can be found in clause 39.10 of the *Building and Construction General On-site Award 2020*.

#### **What should be Included in the Delegates Rights Term for the Construction Awards?**

16. The full scope of what a delegate's rights term can include is not specified in the FW Act. As noted in the Presidents 18<sup>th</sup> January 2024 Statement:

“[7] The EM at [827] and [830] sets out an expectation that ‘... **for most employees, modern awards and enterprise agreements would provide greater detail for particular industries, occupations and enterprises**’, and that s 350C(4) would ensure, where this is the case, that: employers can rely on [the award or agreement term] as a complete statement of their obligations under new subsection 350C(3).”(Emphasis added)

17. Clearly, in accordance with the FW Act requirements, a delegates' rights term must provide for:
  - the exercise of the rights of workplace delegates (in accordance with the definition in s 12);
  - a right to represent the industrial interests of members and other persons eligible to be such members, including in disputes with their employer (s 350C(2));
  - a right to communication with members and any other person eligible to be such members in relation to their interests (s 350C(3)(a));
  - access to the workplace and workplace facilities where the enterprise is being carried on (s 350C(3)(b)(i));

---

<sup>4</sup> Print K6616

<sup>5</sup> Print G8982

<sup>6</sup> Print J5377

<sup>7</sup> Print J4733

<sup>8</sup> Print S0643

<sup>9</sup>AP817265CRV

<sup>10</sup> Print J5377

- access to paid time, during normal working hours for the purposes of related training (s 350C(4));
  - a right to be recognised as a workplace delegate by the employer (s 350A(1)(a));
  - a right to truthful representation from the employer (s 350A(1)(b)); and
  - a right not to be hindered or obstructed by the employer in the exercise of their rights (s 350A(1)(c)).
18. The CFMEU CG submits that in looking for the “*greater detail for particular industries, occupations and enterprises*” expected to be included in awards<sup>11</sup>, to give employers and employees more clarity as to what these rights mean in a practical sense in a workplace, it is appropriate, for the Construction Awards, to consider the union delegates’ rights clause commonly found in enterprise agreements covered by the CFMEU CG.
19. Attached at Appendix A is a draft Union Delegates’ Rights clause which reflects the provisions contained in the majority of enterprise agreements covered by the CFMEU CG. This clause specifically deals with the rights of union delegates in a practical way and has been crafted over time to remove any ambiguity or doubt as to the meaning of any particular provision. It is also a clause that is well known to companies that employ union members and whose workers are represented by union delegates in the workplace.
20. In X.1 – Definitions, the clause uses the term “Union Delegate” rather than workplace delegate as this is the plain language commonly used in the industry and its meaning is well understood by both employees and employers. We would also point out that as a workplace delegate is defined in s 350C(1) as “*a person appointed or elected, in accordance with the rules of an employee organisation*”, an employee organisation is defined in s 12 as “*an organisation of employees*”, and an organisation is defined in s 12 as “*an organisation registered under the Registered Organisations Act*”, then it follows that as the only registered employee organisations covering employees covered by the Construction Awards are unions a workplace delegate must be a union delegate.
21. Subclause X.2 – Rights of a Union Delegate provides the detail on the rights of a union delegate related to the rights set out in s.350A, s.350C(2), and 350C(3)(a) of the FW Act and include details on rights such as:
- The right to be treated fairly and to perform their work without discrimination.
  - The right to represent employees and union members.
  - The right to place information in the workplace.
  - The right to paid time to attend industrial tribunals.
  - The right to address new employees.
  - The right to represent union members in the consultation, disciplinary and dispute resolution arrangements in this award, where they so choose.

The subclause also includes notes to refer the reader to the relevant sections of the FW Act as it is important that employers are aware of the protection for workplace delegates under s 350A of the FW Act and the possible civil remedies for a contravention.

22. Subclause X.3 - Union Delegate Facilities, sets out more detail on how s 350c(3)(a) and (b)(i) can be practically applied in the workplace. It should be noted that the facilities are to be an

---

<sup>11</sup> The EM at [827] and [830]



agreed facility which would obviously require consideration of the limitations of a particular site or workplace.

23. Subclause X.4 - Union Delegate Training Leave, sets out the detail on the right to access paid time, during normal working hours, for the purposes of related training as required by s 350C(b)(ii) of the FW Act. It provides practical provisions dealing with written notice to the employer in advance of the training, a reasonable time for the employer to respond, the arrangement of the training leave to minimise any adverse effect on the Employer's operations, and proof of attendance. This clause has been crafted to reduce as far as possible any disputes over the operation of the clause. The CFMEU CG would point out that in this subclause there is no exemption for a small business employer of a union delegate as no such exemption exists in the current provision contained in clause 39.10 of the *Building and Construction General On-site Award 2020*, and there was no such exemption in the pre-modern *Joinery and Building Products Award 2002* and the *Mobile Crane Hiring Award 2002* (referred to in paragraph 15 above).
24. In further support of the Union Delegates' Rights clause the CFMEU CG submits that the Commission should take into consideration that the clause will only have any operation where there are union members employed by a company and a union delegate is appointed/elected in accordance with the rules of the union (as required by s 350C(1) of the FW Act). It does not have general application to all employees covered by an award.
25. The Commission should also take into account that it is more than likely that where an employers' employees are union members, and a union delegate has been appointed/elected, there will be an enterprise agreement covering the workplace. Having a delegate's right term in the modern award that reflects the delegates rights terms commonly used in enterprise agreements will avoid unnecessary confusion over the application of s 205A in proceedings for the approval of enterprise agreements.

---

## **Appendix A - Draft Union Delegates' Rights Award Clause**

### **X. Union Delegates' Rights**

#### **X.1 Definitions**

Union Delegate has the same meaning as a workplace delegate as defined in s.350C(1) of the FW Act.

#### **X.2 Rights of a Union Delegate**

- (1) Union Delegates are entitled to the protections of Division 4 of part 3-1 of the FW Act in relation to their involvement in lawful industrial activities.
- (2) An Employer must not initiate, be involved in, or interfere with the appointment/election of a Union Delegate.
- (3) Where an Employee has been appointed/elected as a Union Delegate, the Employer will recognise the following:
  - (a) the right of a Union Delegate to be treated fairly and to perform their role without any discrimination in their employment;
  - (b) for the Union Delegate to represent an Employee where requested in relation to a grievance, dispute or a discussion with a member of the Union;
  - (c) the right to place information related to permitted matters in prominent locations in the workplace except that the material must not breach freedom of association, privacy and other applicable laws;
  - (d) the right to paid time to attend industrial tribunals and/or courts where they have been requested to do so by an Employee (which may include themselves) whom they represent in a particular dispute in their workplace;
  - (e) the right to paid time to assist and represent Employees who have requested them to represent them in respect of a dispute arising in their workplace;
  - (f) the right to represent the interests of members in their workplace to the Union, the Employer and industrial tribunals/courts;
  - (g) the right to represent the interests of Employees who request their assistance in their workplace to the Employer and industrial tribunals/courts;
  - (h) the right for reasonable time off to attend accredited union education;
  - (i) the right to take reasonable leave to work with the Union;
  - (j) the right to have reasonable time off to participate in the operation of the Union;
  - (k) the right to address new Employees about the benefits of union membership at the time that they enter employment or on their first day on site;
  - (l) the right to paid time during working hours to consult and confer with Employees, Union members and officials;
  - (m) the right to represent Union members employed by the Employer in the consultation, disciplinary and dispute resolution arrangements in this award, where they so choose; and

(n) prior to the Employer making a decision to terminate or transfer a Union Delegate the Employer must notify the Union Delegate 10 days in advance of such termination or transfer, or by agreement make a payment in lieu of such notice.

Note: the Fair Work Act 2009 (Cth) s 350A(1) provides that an employer may not unreasonably fail to refuse or deal with a delegate, knowingly or recklessly make a false or misleading statement to a delegate or unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate.

Note 2: the Fair Work Act 2009 (Cth) s 350C(2) provides that a workplace delegate is entitled to represent the industrial interests of union members and eligible members, including in disputes with the employer.

### **X.3 Union Delegate Facilities**

(1) The Employer shall provide an agreed facility for the use of the Union Delegate to perform their duties and functions as the on-site representative of the Employees. The provision of the following facilities is to ensure that the Union Delegate is able to effectively perform their functions in a professional and timely manner. The facilities shall include:

(a) a telephone

(b) an iPad equipped with mobile Internet access

(c) a table and chairs

(d) a filing cabinet

(e) air-conditioning/heating

(f) access to stationery and other administrative facilities, including use of a photocopier, facsimile, use of email (if available on site), following consultation between the Union Delegate and Site Management

(g) a private lockable area.

(h) a suitable workplace location to conduct confidential discussions with those Employees who chose to be represented by the Union Delegate. The Employer will respect the privacy of the Union Delegates use of these facilities and will not monitor communications using those facilities.

### **X.4 Union Delegate Training Leave**

(1) An Employee appointed/elected as a Union Delegate shall, upon application in writing to the Employer, be granted up to five days paid leave each calendar year to attend relevant Union Delegate courses.

Such courses shall be designed and structured with the objective of promoting good industrial relations within the building and construction industry.

(2) Consultation may take place between the parties in the furtherance of this objective.

(3) The application for leave shall be given to the Employer in advance of the date of commencement of the course. The application for leave shall contain the following details:

(a) The name of the Union Delegate seeking the leave

(b) The period of time for which the leave is sought (including course dates and the daily commencing and finishing times); and

- (c) A general description of the content and structure of the course and the location where the course is to be conducted.
- (4) The Employer shall advise the Union Delegate within seven clear working days (Monday to Friday) of receiving the application as to whether or not the application for leave has been approved.
- (5) The time of taking leave shall be arranged to minimise any adverse effect on the Employer's operations. The onus shall rest with the Employer to demonstrate an inability to grant leave when an eligible Union Delegate is otherwise entitled.
- (6) The Employer shall 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.
- (7) Leave rights granted in accordance with this clause will not result in additional payment for alternative time off to the extent that the course attended coincides with a Union Delegate's RDO or with any concessional leave.
- (8) A Union Delegate on request by the Employer shall provide proof of their attendance at any course within 7 days. If an Employee fails to provide such proof, the Employer may deduct any amount already paid for attendance from the next week's pay or from any other moneys due to the Union Delegate.
- (9) Where a Union Delegate is sick during a period when leave pursuant to this clause has been granted proof of attendance at the course is not required for that period and the Employee shall receive payment if entitled under the provisions of the relevant award clause.
- (10) Leave of absence granted pursuant to this clause shall count as service for all purposes of this award.