

## ARA SUBMISSION

### DRAFT MODERN AWARD DELEGATES' RIGHTS TERMS

#### EXECUTIVE SUMMARY

The Australian Retailers Association ('ARA') welcomes the opportunity to make a submission to the Fair Work Commission ('FWC') in respect of commenting upon the draft modern award delegates' rights terms.

The ARA is the oldest, largest, and most diverse national retail body, representing a \$420 billion sector that employs 1.4 million Australians- making retail the largest private sector employer in the country. As Australia's peak retail body, the ARA informs, advocates, educates, protects, and unifies our independent, national, and international retail community.

Given the immense privilege and responsibility that the ARA maintains in representing the retail sector, we take a vested interest in any and all proposed changes to workplace instruments and laws.

The process of varying modern awards to include a delegates' rights term is on-going, however the draft award terms published by the FWC provides a useful opportunity for industry groups to better understand how the rights can be incorporated into modern awards, and simultaneously, provide industry insights on the practicality of those terms.

This submission explores the ARA's position on these draft terms, noting explicitly that we support a deviation from the legislation in terms of providing greater clarity on how these entitlements would work in practice, and the introduction of limitations on the scope of the entitlements.

We maintain that the model award terms should not deviate from the legislation in terms of importing more obligations on employers, and that award utility should be preserved.

In alignment with this view, we provide the following comments.

#### VARIATIONS SOUGHT TO THE MODEL TERMS

**As to X.4:** We extensively support the inclusion of written notice being provided to the employer upon an employee ceasing duties as a workplace delegate. We do, however, wish to share a concern that a timeframe of 'as soon as practicable' for a workplace delegate to communicate the cessation of their role could create risks and challenges.

Workplace matters should be handled with care, privacy, and efficiency. If an employer was unaware that a person was no longer acting in the capacity as a workplace delegate, this could mean that information would still be shared with this person, impeding the effective carriage of workplace matters. For this reason, it would be valuable to prescribe a specific time frame of 'within 14 days' or even less, by which the employee must communicate the cessation of their role as a workplace delegate.

**As to X.6 (b):** If the workplace delegate is communicating with employees during work hours it would be beneficial for the employer to be notified of this by the workplace delegate. This in anyway does not undermine the legislative entitlement but instead enables an employer to be aware of when an employee may be taking a break from work for the purpose of reasonable communications, in relation to industrial instruments with the workplace delegate. This insertion of a notification obligation would ensure employers can properly make arrangements for any operational impacts.

The clause **X.6 (b)** also enables a workplace delegate to communicate with eligible employees 'before the start or after the end of work'. There is concern that by enabling a workplace delegate to perform their duties before or after work, an employer may attract additional wages if the delegate chose to perform delegate tasks before or after their shift. This causes great ambiguity that could heighten the risk of underpayment or non-compliance with workplace laws. For this reason, there should not be a prescription allowing for workplace delegates to communicate with employees outside of work, unless it is made clear that this will not attract additional wages, overtime or any other related entitlements.

## OTHER COMMENTS ON THE MODEL TERMS: APPROVAL

**As to X.3 & X.4:** The requirement for an employee to provide written notice to the employer as to their appointment as a workplace delegate and upon cessation of that role, is extremely important. This ensures the employer is aware of whom is acting in the role of a workplace delegate and can correspondingly, ensure compliance with their obligations under s350A of the Fair Work Act 2009 (*Cth*) ('the Act').

**As to X.5:** Greater clarity as to the definition of industrial interests is extremely valuable for employers to understand the rights of a workplace delegate. The inclusion of this definition should be preserved.

**As to X.7:** The entitlement to reasonable access to the workplace and workplace facilities is enshrined within s350C (3) (b) (i) of the Act. Notably however, the draft terms specify, in regard to workplace facilities, 'unless the employer does not have them' access would not need to be provided. This is a reasonable insertion given small businesses may not have some of the workplace facilities prescribed. The phrasing of this clause ensures that further obligations are not imported onto employers and simultaneously, employers can meet their responsibilities.

**As to X.8:** The ARA supports a limit being placed on how many days an employer, other than a small business employer, would have to provide workplace delegates access to training during paid time. This provides clarity as to what can be defined as 'reasonable access' pursuant to s350C (3) (b) (ii) of the Act, and seems to consider employer capabilities also.

The stipulation that a workplace delegate must provide notice to undertake training, as well as provide the employer with dates, times and the subject matter is imperatively important to ensure that the workplace delegate is undertaking relevant training. Similarly, providing an employer the opportunity to request an outline of the training content and enabling them to have evidence of attendance ensures the right is not misused, the training is relevant and correspondingly, enables the employer to understand what training took place.

**As to X.9:** The prescription that the workplace delegates rights under clause **X.5** to **X.7** are subject to certain conditions including complying with their obligations and duties as employee, and reasonable policies and procedures, among others, is particularly important. This ensures that the workplace delegate is acting appropriately and reasonably within the workplace and therefore, businesses can avoid the real risk that the role of a workplace delegate could obstruct business operation needs or the enforcement of reasonable internal policies and procedures.

## SUMMARY

The FWC draft delegates rights terms are predominantly, with the exception of the comments made herein, practical and sensible. The terms will provide greater clarity for businesses trying to adhere to their new obligations and correspondingly, balance principles of practicality and fairness between all relevant parties.

The ARA and its members thank the FWC for the opportunity to provide comments on the the draft modern award delegates' rights terms.

Any queries in relation to this submission can be directed to our policy team at [policy@retail.org.au](mailto:policy@retail.org.au)