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)

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

28th March 2024

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Introduction

1. On the 18th 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.

2. In a further Statement of 30th 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

3. On 1st March 2024 the CFMEU (Construction and General Division) (**the CFMEU CG**) filed a submission which included our proposed delegates' rights term to be included 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**) (to be referred to collectively as **the Construction Awards**).

4. On 19th March 2024 the Full Bench issued a Statement ([2024] FWCFB 166) in which the Full Bench noted the parties that had made submissions,[1] confirmed that submissions in reply are to be lodged by 28th March 2024,[2] proposed dates for consultation sessions to be held in Sydney and/or Melbourne,[3] and invited any feedback in response to the revised audit of existing terms in modern awards that deal with workplace delegates.[4]

5. This reply submission is filed in accordance with the timetable confirmed by the Full Bench. It addresses the submissions filed by the employer organisations that may be seen as being relevant to the Construction Awards, and briefly deals with additions we say should be included

[1] [2024] FWCFB 166 at paragraph [5]
[2] Ibid., at paragraph [6]
[3] Ibid., at paragraphs [7] and [8]
[4] Ibid., at paragraph [8]

in the audit. The CFMEU CG will respond separately by email about the proposed consultation sessions.

Reply to Employer Organisation Submissions

6. There are common themes running through the submissions of the employer organisations that can be summarised as seeking restrictions on delegates' rights and raising either irrelevant considerations or jumping at non- existent shadows. As this reply submission will demonstrate the employer organisations' approach does not address what is expected by the legislature and provides little, if any, assistance to the Full Bench in its deliberations.

HIA Submission

7. The HIA make no detailed submission. Their correspondence of 1st March 2024[5] simply refers to and supports the submission made by the Australian Chamber of Commerce and Industry (ACCI). There is therefore nothing specific in the HIA submission that requires a response.

Business NSW (BNSW) and Australian Business Industrial (ABI) Submission

8. The BNSW/ABI submission[6] can be characterised as the minimalist approach. Their proposed clause set out in Annexure A to their submission does nothing more than repeat what is provided for in s.350C of the Fair Work Act (the **FW Act**). The BNSW/ABI do make a very minor change by adding the words "under the rules of the employee organisation" in X.2 but provide no explanation as to why these words are necessary.

9. The CFMEU CG rejects the clause proposed by the BNSW/ABI as it does not provide any of the "*greater detail for particular industries, occupations or enterprises*" which was expected by the legislature as referred to in paragraph 827 of the Senate Revised Explanatory Memorandum (the **EM**), indeed it provides no additional detail.

10. The BNSW/ABI submission advances 4 propositions. The first is that workplace delegates have always been understood to be first and foremost employees and subject to the ordinary direction of their employer.[7]

11. The CFMEU CG does not quibble with the first part of the proposition, i.e. that workplace delegates are employees, but we do take issue with the second part as any direction from a delegates' employer must not infringe on the rights of the delegate as provided for in the FW Act and the terms of the relevant industrial instrument (an award or an enterprise agreement). Further, any direction from an employer must not be contrary to the protection for union delegates from adverse action by an employer where they participate in industrial activities as provided for in s.346 and s.347 of the FW Act.

12. The second proposition advanced by BNSW/ABI is that the Commission should be wary of any proposition advanced in this matter that seeks to directly or indirectly undermine freedom of association. [8] The BNSW/ABI seems to be more concerned with "freedom from association" as their submission suggests that clauses proposed by unions will be aimed largely at increasing union membership or compelling workers to be represented by a workplace delegate.[9]

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[5] https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-hia-010324.pdf
[6] https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-abi-290224.pdf
[7] Ibid., at paragraph 1.14(a)
[8] Ibid., at paragraph 1.14(b)
[9] Ibid., at paragraph 4.1 to 4.5

13. The BNSW/ABI appears locked into the fearmongering and hysteria of the 1990's and the unjustified attempts by the then Coalition government to curtail union involvement in the workplace thorough the *Workplace Relations Act 1996*. The CFMEU CG would point out that the industrial landscape is now regulated by the *Fair Work Act 2009* and its objects include the "right to freedom of association and the right to be represented"[10] (emphasis added), and taking into account "Australia's international labour obligations"[11]. Those obligations include the ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise,[12] which Australia ratified on 28th February 1973, which includes:

> **Article 2**
>
> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.
>
> **Article 3**
>
> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.
>
> **Article 11**
>
> Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

14. The BNSW/ABI fears are nothing more than them chasing at shadows as there is nothing in the CFMEU CG proposed clause that offends the freedom of association provisions contained in the FW Act or Australia's obligations under the ILO convention.

15. The third proposition from BNSW/ABI is that the Commission should enter this process of varying awards with a degree of restraint and should focus on simply giving effect to the new rights rather than amplifying or adding to them.[13] The BNSW/ABI argue that any "*rigidly prescriptive clause*" would inappropriately undermine the purpose of s.350C(5),[14] and that "*what may be reasonable in a steel works is unlikely to be reasonable in a kindergarten or a restaurant*".[15]

16. The CFMEU CG submits that the Commission should reject this proposition as it is clearly inconsistent with the intent of the legislators that the rights in the FW Act are at the level of principle and that the "*detail for particular industries, occupations or enterprises*" should be provided in modern awards.[16] Further the clause proposed by the CFMEU CG has been

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[10] Section 3(e)
[11] Section 3(a)
[12] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232#:~:text=Workers'%20and%20employers'%20organisations%20shall,and%20to%20formulate%20their%20programmes.
[13] BNSW/ABI submission at paragraph 1.14(c)
[14] Ibid., at paragraph 6.1
[15] Ibid., at paragraph 6.4.
[16] EM at paragraph 827

specifically drafted for the Construction Awards, taking into account the way the industry operates and the common provisions of enterprise agreements covering its members. We are not seeking the same clause in awards covering kindergartens.

17. The fourth proposition from BNSW/ABI is that the FW Act as amended "*recognises that the practical application of workplace delegates' rights is likely to be contextual to the enterprise concerned*".[17]

18. Whilst what is reasonable regarding a workplace delegates' right to communication, access to the workplace and workplace facilities, and access to paid time during normal working hours for the purposes of related training, may be contextualised based on the size and nature of the enterprise, the resources of the employer and the facilities available at the enterprise, such contextualisation does not extend to the rights to represent workers as expressed by the principle in s.350C(2).

19. In section 7, the BNSW/ABI submits that the Commission does not need to determine the precise definition of "*industrial interests*". The CFMEU CG agrees with this. In *Regional Express Holdings Limited v Australian Federation of Air Pilots [2017] HCA 55* [18] the High Court considered the meaning of the term "*entitled to represent the industrial interests of*" and made the following observations:

> "*20. Looking first to the context of the provision within the Fair Work Act, it may be observed that the expression "entitled to represent the industrial interests of" appears in multiple provisions throughout the Act. For example, under s 176(1) it is provided that an employee organisation may act as the bargaining representative of an employee for a proposed enterprise agreement that is not a "greenfields agreement" if the employee is a member of the organisation[11] or the employee appoints the organisation in writing as his or her bargaining representative[12] and the organisation "is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement"[13]. Under s 481, a permit holder may enter premises for the purpose of investigating a suspected contravention of the Act or a term of a fair work instrument that relates to or affects a member of the permit holder's organisation if the member is one "whose industrial interests the organisation is entitled to represent"[14] and the member performs work on the premises[15]. Under s 483A(1), a permit holder may enter premises for the purpose of investigating a suspected contravention of the Act or a term of a fair work instrument that relates to a TCF award worker "whose industrial interests the permit holder's organisation is entitled to represent"[16] and who performs work on the premises[17]. Under s 484, a permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers who perform work on the premises[18] whose "industrial interests the permit holder's organisation is entitled to represent"[19] if the employee or TCF award worker wishes to participate in the discussions[20]. Significantly, s 480(a) provides that a purpose of the power to enter premises is to enable the industrial organisation to hold discussions with "potential members". Under s 533, the Fair Work Commission may make an order in relation to an employer's failure to notify or consult registered employee associations in relation to the dismissal of 15 or more employees for reasons of an economic, technological,*

[17] BNSW/ABI submission at paragraph 1.14(d)
[18] https://jade.io/article/565882

structural or similar nature in breach of s 531(1), inter alia, upon the application of a "registered employee association that is entitled to represent the industrial interests of one of the employees"[21].

21. Subject to contrary indication, it is to be presumed that the expression "entitled to represent the industrial interests of" has the same meaning wherever it appears in the Fair Work Act[22]; and, given that in each case where the expression appears it is directed to the capacity or standing of an industrial association to take some action or to intervene in relation to persons whose industrial interests the organisation represents, it logically presents as intended to have the same meaning wherever it so appears. Contrary to Rex's submissions, that is so notwithstanding that the expression sometimes appears in the Act in contexts that do not involve the exercise of judicial power or the assertion of accrued rights."

20. As there is no contrary indication in s.350C of the FW Act that the expression "entitled to represent the industrial interests of" is to have a different meaning, it would be inappropriate for the Full Bench to insert one in a delegates' rights term in a modern award.

21. In section 8, the BNSW/ABI float a number of issues that they say are relevant to the consideration of reasonable communication.[19] The BNSW/ABI repeat these considerations in section 9.[20] To be blunt these issues are nothing more than "red herrings" raised to divert the Commissions attention from addressing the real issues before it. There are other provisions in the FW Act that deal with the stoppage of work by an employee (i.e. see the definition of industrial action in s.19 and the whole of Part 3-3) and there is considerable case law on the matter. Further the proposition that any communication or access should be in non-paid time should be rejected as it is nothing more than an attempt to put in place a barrier to reduce effective communication and access, and is inconsistent with the history of delegates' right clauses in pre-modern construction awards[21] where job stewards were to be allowed "*all necessary time during the working hours without deduction of pay*" to perform their representative role.

22. In section 10 the BNSW/ABI deal with the issue of the training right of delegates. In responding we would first point out that the case they refer to in 10.3 was not a test case as understood in normal industrial language and was affected by the restrictions in the industrial legislation applying in NSW at the time. As the Full Commission observed,

> "*It must, however, be accepted that each decision, federal or otherwise, where arbitrated on the case by case basis was correct in the circumstances of the particular case. But the leading decisions, emphasise that each application must be decided on a case by case basis, both as to whether any award should be made and, if so, the terms and conditions thereof. They are therefore not definitive of this matter other than to make clear that an individualistic approach to each case is the proper one. We therefore propose to adopt that approach in determining this matter with due regard to the decisions of other tribunals and prior decisions of the former Industrial Commission of New South Wales. We also bear in mind that, in general awards in this jurisdiction do not provide for TUTL and that this is the first occasion on which the matter has been*

[19] BNSW/ABI submission at paragraph 8.1
[20] Ibid., at paragraph 9.5
[21] See paragraphs 9 to 11 of the CFMEU CG Submission

considered by either the Full Commission or by the former Industrial Commission in Court Session.

……..

One area of difference between the statutory frameworks within which the Federal and NSW industrial systems operate is demonstrated by the Objects of the 1991 Act (s.3); they include the following:

(m) to promote the conduct of industrial relations in a non-discriminatory manner and to provide for equality of opportunity in employment matters;

(n) to ensure that employees are free to choose whether or not to join unions by prohibiting preference in employment for union members and by preventing victimisation of persons on the grounds that they are or are not union members.

Division 5 – Voluntary unionism of the 1991 Act commences with s.480:

No Preference for unionists in awards or agreements

480(1) An award or agreement cannot confer a right of preference of employment in favour of a member of an organisation of employees over a person who is not a member of an organisation of employees.

480(2) This section applies to awards or agreements made before or after commencement of this section and so applies despite any provision made before the commencement of this section in an award or agreement.

480(3) Nothing in this Act limits or in any way affects any law relating to preference in employment to persons who have served as members of the Naval, Military or Air Forces of the Commonwealth.

We incline to the view that the grant of the claims would run counter to the spirit and intention of the Act as manifested in the aforesaid Objects, and possibly also to the terms of s.480."

23. In regard to small business, we would point out that whist there is an exclusion to reasonable access to paid time for the purposes of related training in s.350C(3)(b)(ii), there is no such exclusion in existing clauses in modern awards that provide for Dispute resolution procedure training leave (see clause 39.9 of the *Building and Construction General On-site Award 2020*). Accordingly, there should be no exemption for small business in the delegates rights term in these awards.

24. On other points raised by the BNSW/ABI in section 10 we say:

    - The suggestion that unions would schedule training on a weekend for a Monday to Friday day worker is preposterous. Unlike employers, unions value weekends and time away from work.
    - The right to participate in management activities of a trade union is protected by other sections of the FW Act (see s.346-347)
    - The issues identified in paragraph 10.8 are all addressed in the clause proposed by the CFMEU CG
    - There is already a recognised minimum standard of training leave of 5 days per year as reflect in clause 39.9 of the *Building and Construction General On-site Award 2020*.

25. The other consideration raised by BNSW/ABI in section 11 is the modern awards objective. Our response to the matters identified in s.134 of the FW Act are different to those of BNSW/ABI:

(a) relative living standards and the needs of the low paid – a union delegates' rights term would likely assist the low paid through having effective representation in the workplace

(aa) the need to improve access to secure work across the economy - a union delegates' rights term would likely assist workers in accessing secure work through having effective representation in the workplace

(ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation - a union delegates' rights term would likely assist employees in these matters through having effective representation in the workplace

(b) the need to encourage collective bargaining - a union delegates' rights term would likely assist in collective bargaining through having effective representation in the workplace

(c) the need to promote social inclusion through increased workforce participation - a union delegates' rights term would be beneficial to achieving this through having effective representation in the workplace

(d) the need to promote flexible modern work practices and the efficient and productive performance of work - a union delegates' rights term would likely assist the promotion of productive performance of work through having effective representation in the workplace and addressing grievances in a timely manner

(da) the need to provide additional remuneration for:

(i) employees working overtime; or
(ii) employees working unsocial, irregular or unpredictable hours; or
(iii) employees working on weekends or public holidays; or
(iv) employees working shifts;

- a union delegates' rights term would likely assist employees obtaining additional payments through having effective representation in the workplace

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden - a union delegates' rights term would likely assist productivity through having effective representation in the workplace and reducing disputation

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards - a union delegates' rights term would be neutral on this matter

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy - a union delegates' rights term would be neutral on this matter.

26. The CFMEU CG submits that its proposed delegates' rights term is consistent with the modern awards objective and would ensure that award in which it was inserted would provide a fair and relevant minimum safety.

ACCI Submission

27. The ACCI submission[22] raises a number of issues that are common with the submission of the BNSW/ABI.

28. The issues raised under Principle 1 – that a workplace delegate is first and foremost an employee, have been dealt with in paragraphs 10 and 11 above. The only additional point made by the ACCI is that there should be consideration of restrictions on how many delegates can be appointed by trade unions for a particular worksite.[23] The CFMEU CG submits that there should be no such restrictions as it would interfere with the rights of unions to appoint or elect the workplace delegates as provided for in s.350A(1). Further, there are good reasons for having more than one delegate on large construction projects which are spread across several locations or which have separate day and night shifts.

29. As for ACCI's Principle 2 – thatthe modern award provision(s) should be limited to the delegates rights outlined in section 350C, the CFMEU CG disagrees. There are other rights of workplace delegates set out in s.350A that should also be included.

30. The CFMEU CG also takes issue with the ACCI's claim that "*it remains uncontroversial that employers retain the managerial prerogative to generally direct when, where and how work is performed*". The decision in *Construction Forestry Mining and Energy Union v HWE Mining Pty Limited [2011] FWA 8288* articulated the limits on the scope of this prerogative, stating:

> *"[10] However, managerial prerogative in relation to employees (including the employer's right to make and vary policies that employees are required to observe) is subject to legal constraints. It may be constrained by statute or the terms of an award. It may also be constrained by the terms of a contract of employment or a statutory agreement that the employer chooses to make. For example, an enterprise agreement might provide that all work must be carried out in accordance with a roster pattern specified in the agreement. In that example, unless the agreement also confers a right on the employer to vary the roster pattern, the employer has bound itself not to require employees to work a different roster pattern. In particular, an employer can bind itself in a statutory collective agreement not to change a policy or policies without, for example, the agreement of a relevant union or a majority of employees.*
>
> *[11] If an employer's exercise of managerial prerogative is not prevented by statute, an award, a statutory agreement or the contract of employment, the basis for a tribunal such as Fair Work Australia, acting as an arbitrator of a dispute, interfering with what would otherwise be a lawful exercise of managerial prerogative (such as the making or varying of a policy which employees are required to observe) was laid down Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales 7 (XPT case):*
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> > *"It seems to us that the proper test to be applied and which has been applied for many years by the Commission is for the Commission to examine all the facts and not to interfere with the right of an employer to manage his own*

[22] https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-acci-010324.pdf
[23] ACCI submission at paragraph 11

business unless he is seeking from the employees something which is unjust or unreasonable. The test of injustice or unreasonableness would embrace matters of safety and health because a requirement by an employer for an employee to perform work which was unsafe or might damage the health of the employee would be both unjust and unreasonable. The ACTU submitted to us that we should apply the test as to whether the demand of the employer was just and equitable having regard to all the circumstances. It is our view that under any given set of facts the test suggested by the ACTU would not lead to a different decision from the test which the Commission has applied over time. Accordingly in reaching our decision we have approached the matter from the point of view of making a judgement whether the request of the SRA that the XPT be manned by one man is unjust or unreasonable."

[12] I proceed on the basis that an exercise of managerial prerogative will not be unreasonable in this sense if a reasonable person in the position of the employer, could have made the decision in question."

31. The CFMEU CG also disagrees with the assertion that the Commission should focus on the provisions identified in paragraph 17 of the ACCI submission. The Commission should take into consideration all of the relevant provisions of the FW Act and Australia's obligations under ILO Conventions.

32. Principle 3 of the ACCI submission, that the award provisions should include a definition of industrial interests, is rejected for the reasons set out in paragraphs 19 and 20 above.

33. In regard to Principle 4, that any right introduced aligns with what is reasonable as contemplated by section 350C, the CFMEU CG disagrees with the assertion of ACCI at paragraph 33 that s.350C inferentially directs that some consideration be given to the circumstances at <u>each</u> enterprise before the extent of the delegates rights are codified. To show how ludicrous this proposal is we would point out that there are over 400,000 businesses in the building and construction industry alone. Is the ACCI seriously saying that the Commission should consider the circumstances in each one of them? The CFMEU CG clause provides information on what the facilities for union delegates should include, but this to be agreed to by the union (through the delegate) and the employer.

34. In regard to the issue of paid training where the employer is a small business, we have addressed the issue in paragraph 23 above.

35. The CFMEU CG rejects that the ACCI assertion that the factors identified in paragraph 36 should be considered in addition to s.350C on what is reasonable as they are nothing more than an attempt to limit the ability of a workplace delegate to provide effective representation. Similarly, we reject the ACCI's proposed modern award provision set out in part II of the ACCI submission.

AIG Submission

36. The AIG submission[24] firstly deals with the legislative provisions and the history of delegates rights terms in federal awards. The only points of disagreement in these sections are the following, although these matters are not significant in the determination of the matter before the Full Bench:

[24] https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-aig-040324.pdf

- Paragraph 8(b) - Fairness in this context should be assessed from the perspective of employees in their role as a workplace delegate and the employers covered by the modern award in question, this is because not all employees will be delegates
- Paragraph 15 – there is no emphasis in the legislation on the right for employees to elect not to be represented by an industrial association, and by extension a delegate. It is an equal right with the right to be represented.
- Paragraph 19 – the WR Act 1996 sought to curtail the freedom of association of workers and the rights of organisers to enter premises.

37. In section 4 of its submission the AIG set out their key observations about the legislative provisions and the Commission's task. The CFMEU CG disagrees that the Commission should adopt a cautious and conservative approach,[25] as this is not required in industries where the rights of union delegates are well understood by both union members and employers.

38. Contrary to the AIG assertion[26] the Commission does have enough time to consider any individual variations from a model term necessary for particular awards, and this is what is expected by the legislators as set out in paragraph 827 of the EM. Further the CFMEU CG has designed a clause for construction workers, not clerical workers so the concern expressed by the AIG in paragraph 38 has been addressed.

39. The CFMEU CG disagrees with the AIG that the Commission should deal with the matters "*on a somewhat general level*"[27]. What is expected of the Commission is that it will prescribe a level of detail appropriate for the industry, occupations and enterprises covered by an award.

40. The CFMEU CG rejects the AIG submission that the Commission should provide guidance as to the entitlement "to represent the industrial interests" for the reason set out in paragraphs 19 and 20 above.

41. The CFMEU CG also rejects the AIG proposition that training should be payable at the minimum rate of pay applicable to the employee under the award. The training should be paid for at the employees ordinary time rate.

42. The AIG set out a range of conditions that they say are needed to ensure that a clause operates fairly and without undue disruption to an employer's operations. The CFMEU CG rejects a number of those conditions as they are unnecessary (i.e. those contained in paragraphs 65, 66, and 69) and points out that our proposed clause already contains sufficient conditions in this regard, that have been developed over time with the agreement of employees and their employers through enterprise bargaining agreements.

43. The CFMEU CG submits that the Commission should not provide guidance on what is reasonable in the award term. If the legislature thought that was necessary they would have included any such guidance in the legislation.

44. The CFMEU CG strongly rejects the AIG assertion in paragraph 75 that someone who is a delegate of 20 years standing and experience will obviously not need to attend training courses for numerous days each year. The AIG seem oblivious to the need of delegates to be aware of

[25] Ibid., at paragraph 31
[26] Ibid., at paragraph 32 and 35
[27] Ibid., at paragraph 47

the relevant changes to industrial and WHS legislation and regulations that occur on a regular basis.

45. The CFMEU CG rejects the AIG's proposed delegates rights term set out in section 5, as it seeks to limit delegates rights, is not appropriate for the Construction Awards and undermines effective union representation in the workplace.

46. The CFMEU CG submits that the Commission should adopt the clause proposed by the CFMEU CG for inclusion in the Construction Awards.

Audit of Terms

47. The CFMEU CG has identified the following provisions in award that should be included in the Commissions audit of terms that include a reference to a workplace representative:

Building and Construction General On-site Award 2020

Clause 16.11(a)

(a) Early starts

The working day may start at 6.00 am or at any time between that hour and 8.00 am and the working time will then begin to run from the time fixed, and the meal break will be adjusted accordingly. The change to the start time requires agreement between the employer and the employees and their representative(s), if requested.

Clause 24.3

24.3 The employer or its representative, when requested by the employees or their representative, must confer within a reasonable time (which does not exceed 60 minutes) for the purpose of determining whether or not the conditions referred to in clause 24.2 apply.

Joinery and Building Trades Award 2020

Clause 26.1(a)

26.1 By written agreement between the employer and the employees, the ordinary hours of work may be altered from those allowed under clauses 16 — Ordinary hours of work , 18 — Breaks or 24 — Overtime to suit the needs of a particular enterprise, factory, workshop or section, provided that:

(a) where employees employed at the enterprise, factory, workshop or section request that the employer consult with their representatives on the proposed alteration, that consultation takes place at least 5 days prior to the introduction of the proposed alteration;

(b) the agreement must be made by the majority of employees in the enterprise, factory, workshop or section affected by the alteration; and

(c) no employee experiences a loss of ordinary time pay or status as a result of the alteration.

Mobile Crane Hiring Award 2020

Clause 13.5

13.5 Where a majority of the employees request that their representative is to be consulted, consultation will take place at least 5 days prior to the alternate rostered day off being implemented.

Clause 19.15

19.15 An employee upon receiving an injury for which the employee claims to be entitled to receive accident pay shall give notice in writing of the said injury to the employer as soon as reasonably practicable after the occurrence; provided that such notice may be given by a representative of the employee.

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