



CFMEU Manufacturing
Level 2, 165 Bouverie St
CARLTON VIC 3053
Freecall: 1800 060 556
ABN: 34 183 611 895

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

Clause 95, Schedule 1 – FWC to vary certain modern awards

(AM2024/6)

Variation of modern awards to include a delegates' rights term

**SUBMISSION OF THE
CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION
(MANUFACTURING DIVISION)**

**In response to the
President's Statement [2024] FWC 1214 (10 May 2024) including
Attachment A – Draft Modern Award Delegates' Rights Term**

(22 May 2024)

CFMEU (Manufacturing Division)	Contact Person: Vivienne Wiles Senior National Industrial Officer	Address: Level 2, 165 Bouverie Street Carlton VIC 3053	Tel: Email:	0419 334 102 vwiles@cfmeumd.org industrial@cfmeumd.org
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Fair Work Act 2009
 Clause 95, Schedule 1 – FWC to vary certain modern awards

**VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES' RIGHTS TERM
 (AM2024/6)**

SUBMISSION OF THE CFMEU-MANUFACTURING DIVISION

1. On 10 May 2024 the President issued a Statement [2024] FWC 1214 (**May 2024 Statement**)¹ including at Attachment A, a Draft modern award delegates' rights term (**FWC Draft Model Term**).

2. In these proceedings, CFMEU-Manufacturing Division (**CFMEU-MD**) has an interest in the following modern awards:
 - *Dry Cleaning and Laundry Industry Award 2020* [MA000096] (**DC&LI Award**)
 - *Joinery and Building Trades Award 2020* [MA00029] (**Joinery Award**)
 - *Manufacturing and Associated Industries and Occupations Award 2020* [MA000010]
(Manufacturing Award)
 - *Storage Services and Wholesale Award 2020* [MA000084] (**Storage Award**)
 - *Textile Clothing and Footwear Industry Award 2020* [MA000017] (**TCF Award**)
 - *Timber Industry Award 2020* [MA000071] (**Timber Award**)

3. To date, the CFMEU-MD has filed the following written submissions:
 - Submissions of **5 March 2024**²
 - Reply Submissions on **2 April 2024**³ and a document in support on **15 April 2024**⁴.
 - Submissions of **17 April 2024**⁵
 - Submissions of **19 April 2024**⁶

¹ (AM2024/6) Variation of modern awards to include a delegates' rights term; Statement [2024] FWC 1214 (10 May 2024)

² (AM2024/6) Submissions of the CFMEU-Manufacturing Division (5 March 2024)

<https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-cfmeumd-050324.pdf>

³ (AM2024/6) Reply Submissions of the CFMEU-Manufacturing Division (2 April 2024)

<https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-reply-cfmeumd-020424.pdf>

⁴ (AM2024/6) Document filed in support by the CFMEU-Manufacturing Division (15 April 2024)

⁵ (AM2024/6) Submissions of the CFMEU-Manufacturing Division (17 April 2024) filed in response to the Statement of the Full Bench [2014] FWC FB 212 (16 April 2024) <https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-cfmeu-md-170424.pdf>

⁶ (AM2024/6) Submissions of the CFMEU-Manufacturing Division (19 April 2024)

[https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-cfmeumd-190424%20\(1\).pdf](https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-cfmeumd-190424%20(1).pdf)

4. The CFMEU also provided oral submissions at the full bench consultation held on **12 April 2024**⁷ and filed an additional document in support of its oral submissions on **15 April 2024**.⁸
5. We continue to rely on our written submissions filed to and oral submissions provided as part of the consultation process.
6. At paragraph [9] of the May 2024 Statement, parties are invited to provided submissions concerning the FWC Draft Model Term, subsequently extended to 22 May 2024.

SUBMISSIONS OF THE ACTU AND CFMEU C&G

7. The CFMEU is an affiliate of the Australian Council of Trade Unions (**ACTU**).
8. The CFMEU-MD has had an opportunity to review the draft submissions and revised model term as proposed by ACTU prepared in response to the May 2024 Statement.
9. Otherwise, as where outlined below, the CFMEU-MD supports by way of general application the submissions of the ACTU, with respect to the awards in which it has an interest other than in relation to the Joinery Award.
10. We have also reviewed the submissions of the CFMEU Construction & General Division (CFMEU-C&G). and support them with respect to the Joinery Award.

ISSUES OF CONCERN REGARDING THE FWC DRAFT MODEL TERM

11. In addition to the matters raised by the ACTU in its submission and those raised by other affiliates, the CFMEU-MD highlights the following key issues of concern regarding the FWC Draft Model Term.
12. These concerns are informed by the particular characteristics of the types of industries and sectors in which the CFMEU-MD has coverage and the current difficulties faced by workplace delegates in such workplaces to effectively undertake their representative role.
13. Whilst a proposed model term for all modern awards may have the appeal of simplicity and uniformity of entitlement across the award system, the implementation of such rights can be frustrated by the

⁷ Transcript at paragraphs [PN1002] to [PN1118]

https://www.fwc.gov.au/documents/awards/variations/2024/20240412_am20246.pdf

⁸ Document filed in matter (AM2021/54) Casual Terms Award Review 2021, Witness Statement of Paris Nicholls (26 August 2024) <https://www.fwc.gov.au/documents/awards/variations/2024/am20246-sub-cfmeumd-150424.pdf>

specific nature of the industry, sector or workplace. In these circumstances, the intended beneficial effect of including a delegates rights term may be defeated by the ineffective practical application of such rights.

14. In broad summary, our concerns with the FWC Draft Model Term (in addition to those outlined by the ACTU and other affiliates) are directed towards:

- (a) Clause X.7 (Entitlement to reasonable access to the workplace and workplace facilities)
- (b) Clause X.8 (Entitlement to reasonable access to training)

Clause X.7 (Entitlement to reasonable access to the workplace and workplace facilities)

15. **Clause X.7(a)** of the FWC model term provides (in part):

The employer must provide a workplace delegate with access to or use of the following workplace facilities, unless the employer does not have them:

- (a) *A room or area to hold discussions which is fit for purpose, private and accessible by the workplace delegate and eligible employees;*

16. We are concerned that the expression “*fit for purpose*” in clause X.7(a) may (perversely) potentially be used by an employer to deny a workplace delegate *any* access to as room or area in the workplace on the basis that it is not “*fit for purpose*” thereby defeating the beneficial intent of clause X.7(a).

17. In many of the sectors in which the CFMEU-MD has members or potential members, the workplace is one reasonably described as a manufacturing, factory, production or warehouse environment. Typically, in such workplaces, the production (award covered) workers do not usually have access to a separate room or areas in which to meet (other than in the lunch and meal areas). Commonly, workers meet in outdoor ‘smoko’ areas, or other undercover outdoor areas; in some cases where crib breaks are provided for shift workers, workers take their rest and meal breaks at, or within close vicinity to the machine in which they are working.

18. The ACTU’s proposed revised model term (Attachment A to the ACT submissions) addresses this concern with an amended clause X.7(a) as follows:

“The employer must provide a workplace delegate with access to or use of the following workplace facilities, unless the employer does not have them:

- (b) *A room or area to hold discussions that where possible, shall be fit for purpose, private and accessible by the workplace delegate and eligible workers;”*

19. We support the revised clause X.7(a) as proposed by the ACTU.

Clause X.8 (Entitlement to reasonable access to training)

20. The CFMEU-MD has multiple concerns regarding the current formulation of **clause X.8** of the FWC Draft Model Term. Clause X.8 provides (in part):

“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 1 day each subsequent year, to attend training related to representation of the industrial interests of eligible employees (subject to the following conditions):

(a) The employer is not required to provide the 5 days or 1 day of paid time during normal working hours, to more than one workplace delegate per 50 eligible employees.

(b) A day of paid time during normal working hours is the number of hours the workplace delegate would normally be rostered or required to work on a day on which the delegate is absent from work to attend the training [emphasis added]

21. *Firstly*, in the **opening paragraph of clause X.8** of the FWC Draft Model Term, the small business employer exemption is confirmed. For the reasons we have outlined in our previous written and oral submissions, such qualification will have a significant negative impact on workplace delegates in sectors, such as the textile, clothing and footwear industry (TCF industry) which are typically characterised by small to medium enterprises.⁹

22. *Secondly*, in the **opening paragraph of clause X.8** of the FWC Draft Model Term, a new qualification has been included on the number of days paid training leave available to a workplace delegate (“up to 5 days for initial training and 1 day each subsequent year”). We submit that there is no reasonable warrant to introduce such a significant qualification on the right of a workplace delegate to undertake training in paid time for the subsequent years.

23. This limitation is particularly problematic given the increasing complexity of matters and disputes a workplace delegate may be required to represent members, and eligible members about. The wide range of matters include (non-exhaustively) enterprise bargaining rules and procedures, including protected industrial action; new positive rights and obligations in relation to sexual harassment and sex based discrimination; workplace bullying disputes; disciplinary matters, warnings and dismissal;

⁹ See Reply Submission of the CFMEU-Manufacturing Division (2 April 2024) at paragraphs [45] – [46]; Transcript [PN1037] – [PN1072]; Additional Document Filed by the CFMEU-Manufacturing Division in support of its oral submissions (15 April 2024)

workplace injuries and OH&S; underpayment of wages and entitlements; stand downs; potential insolvency of employer issues.

24. The limitation of 1 day paid training leave for each subsequent year appears to assume a relatively static legislative framework over an extended period of time, an assumption which is not reflective of the serial legislative reforms to industrial and employment laws over the last 20-30 years.
25. We note that currently in relation various awards in which the CFMEU-MD has an interest (Manufacturing Award 2020, TCF Award 2020 and the Timber Award 2020) , there is an existing entitlement to 5 days per annum paid training leave per year for eligible employee representatives (including workplace delegates) with respect to dispute resolution.¹⁰
26. For these reasons, we submit that an entitlement of 5 days per year per delegate is an appropriate award entitlement to ensure that all workplace delegates are properly trained (on an ongoing basis) to undertake their roles efficiently and effectively as possible.
27. In our view, detailed and adequate training is critical to enhancing the role of workplace delegates consistent with the enabling intent of the new workplace delegate provisions. In this respect, we deviate from the ACTU's revised term which provides for 3 days paid training leave in subsequent years.
28. *Thirdly, clause X.8(a)* of the FWC Draft Model Term introduces a further qualification on the right to paid workplace delegate training, by the inclusion of a ratio ("one workplace delegate per 50 eligible employees"). The introduced ratio will disproportionately and detrimentally effect the cohorts of employees who are employed in small to medium sized businesses, who are more likely to be award dependent, female and low paid.
29. In our view, the award right to have effective representation through one or more appropriately trained workplace delegates should not be dependent on the size of the employer's operations, noting larger workplaces commonly have collective agreements in place in any event are more likely to be unionized in general.
30. For the industries in which the CFMEU-MD has coverage, a sizable percentage have workplaces with 50 employees or less, including for example, the TCF industry, furniture and timber manufacture and soft furnishings. In our submission, it is not clear on what basis the ratio has been determined, particularly given employer non-compliance with minimum safety net wages and conditions is, in our experience,

¹⁰ See Manufacturing and Associated Industries and Occupations Award 2020 (clause 44); Textile, Clothing, Footwear and Associated Industries Award 2020 (clause 41) and Timber Industry Award 2020 (clause 37)

more likely to occur in smaller, award dependent workplaces, where the role of a workplace delegate may in fact, be more critical.

31. The limitation of the ration 1:50 imposed in **clause X.8 and X.8(a)** also does not appear to consider that many manufacturing and production workplaces operate on established shiftwork arrangements including morning shift, day shift, afternoon shift and night shift. Typically, unions aim to have a workplace delegate elected or appointed to each category of shift to ensure that members, and employees eligible to be members, have access to a shop steward/delegate to assist and represent them.
32. Whilst the proposed ratio does not limit a union seeking to have a workplace delegate elected or appointed to each shift on a shiftwork arrangement, it does severely impact the potential to train those delegates within a reasonable period of time. For example, if a manufacturing employer with 50 employees or less operates a day shift, afternoon shift and night shift, if there is a workplace delegate for each shift, under clause X.8 of the FWC Draft Model Term, it could potentially take up to 3 years for all 3 delegates to receive the initial 5 days training in paid time. In our submission, such an outcome is counterintuitive to the enhancement of delegates rights generally and would practically undermine the intention and implementation of the new statutory provisions.
33. Further, we note that the proposed 1:50 ratio in clause X.8(a) is also less beneficial than the current dispute resolution training leave provisions in a number of awards in which the CFMEU-MD has an interest.¹¹
34. For the reasons outlined above, we do not support the introduction of the ratio in clause X.8(a) of the FWC Draft Model Term.
35. *Fourthly*, further to the issue of shiftwork, **clause X8.(b)** of the FWC Draft Model Term does not sufficiently engage with the realities of how workplace delegates on non-day shift arrangements can safely and effectively undertake paid training leave. In practice, for the sectors in which the CFMEU-MD has coverage, workplace delegates normally undertake delegate training during standard day time hours (9am to 5pm, or similar). For workplace delegates on an Afternoon Shift or Night Shift the span of hours for the training is outside of, or partially crosses over their normal shift work hours of work.

¹¹ See Manufacturing and Associated Industries and Occupations Award 2020 (clause 44); Textile, Clothing, Footwear and Associated Industries Award 2020 (clause 41) and Timber Industry Award 2020 (clause 37), noting the TIA 2020 contains no ratio at all.

36. In these circumstances, we submit that to ensure the FWC Draft Model Term is implemented effectively and safely (as it applies to delegates on shift work) particular consideration needs to be given to the inclusion of terms which address these concerns.
37. In this regard, we have had the opportunity to review the revised model clause proposed by the AMWU attached to its submissions.
38. For the awards in which the CFMEU-MD has an interest (other than the Joinery Award) we support the inclusion of the AMWU's proposed amendments to clause X.8, specifically new sub-clauses X.8(b) and (c), reproduced below for convenience:

(AMWU Proposed amendment to clause X.8 (b) and (c))

(b) If a workplace delegate who is a shift worker is attending a training course or attending a Court of Tribunal that occurs outside their usual rostered hours falling on a rostered day off, the employer will allow for the delegate to swap shifts to attend during rostered hours. If this is not possible, the workplace delegate will not be required to attend a shift that commences less than 12 hours after the conclusion of such training, without any loss of pay.

(c) The workplace delegate will be granted paid travel time of up to two hours per day of training. The workplace delegate will not be required to commence their next shift within 12 hours of the conclusion of the training and travel time.

39. *Fifthly*, **clause X.8(e)** of the FWC Draft Model Term provides:

"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." [emphasis added]

40. We submit that the period of not less than 2 weeks advice from the employer is insufficient particularly in context where the notice required of the workplace delegate under clause X.8(c) is not less than 5 weeks' notice (or less by agreement of the parties as proposed by the ACTU). Workplace delegates attend union training from workplaces in major cities but also from regional areas, requiring overnight accommodation. Arrangements for transport and bookings for accommodation need to be made in advance by the workplace delegates organisation, particularly for regional delegates.
41. For these reasons we submit that a more appropriate period of notice by the employer is a minimum of 3 weeks as proposed by the ACTU in its proposed amendments to the model term.

Filed on behalf of the:

**Construction, Forestry and Maritime Employees Union
(Manufacturing Division)**

(22 May 2024)