Australian Industry Group

Delegates' Rights Term

Submission on Draft Modern Award Delegates' Rights Term

(AM2024/6)

22 May 2024

AM2024/6 – DELEGATES' RIGHTS TERM

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is made in response to the statement issued by Justice Hatcher, President of the Fair Work Commission (**Commission**), on 10 May 2024[1] in relation to the variation of modern awards to include a delegates' rights term and the Draft Modern Awards Delegates' Rights Term (**Draft Term**) that is set out in Attachment A to the statement.

2. This submission should be read in conjunction with the following submissions of Ai Group in the current proceedings:

   (a) Ai Group's submission of 4 March 2024 (**Ai Group's Initial Submission**); and

   (b) Ai Group's reply submission of 2 April 2024 (**Ai Group's Reply Submission**).

3. Ai Group comments on various provisions in the Draft Term are set out below, including several important proposed amendments. For ease of reference, we have also collated the amendments proposed throughout this submission in one marked up Draft Term at Attachment 1 to this submission.

[1] *Variation of modern awards to include a delegates' rights term* [2024] FWC 1214.

2. OBSERVATIONS ABOUT THE SIGNIFICANCE OF REFERENCES TO '*REASONABLE*' IN SECTION 350(C)(3)

4. As a threshold issue, we observe that the relevant components of s.350C(3) of the *Fair Work Act 2009* (Cth) (**Act**) use the word '*reasonable*' when describing the rights of workplace delegates. In the sections that follow we have proposed amendments to the Draft Term that are intended to effectively ensure that an employer is only required to provide delegates with relevant rights to the extent that they are '*reasonable*'.

5. We recognise that the Full Bench appears to have adopted an approach in the formulation of the Draft Term that sets parameters around the operation of the relevant rights. We support an approach that provides parameters or other detail related to the operation of new rights beyond the a high level and somewhat vague general obligations set out in the Act. Nonetheless, we respectfully contend that a balance should be struck between providing explicit or prescriptive guidance to parties as to the nature of the rights and how they may be exercised on the one hand, and the need for some flexibility in the operation of the clause in order to take into account the myriad of practical considerations that will undoubtedly arise in the application of the clause on the other. This would be consistent with the statutory scheme.

6. In short, s.350C(3) of the Act entitles a delegate to '*reasonable*' communication with eligible employees, '*reasonable*' access to workplaces and facilities and '*reasonable*' access to paid time.

7. It is crucial to appreciate that the entitlements afforded under s.350C(3) are strictly limited in nature to what is '*reasonable*'.[2] Section 149E of the Act requires that, '*[a] modern award must include a delegates' rights term for workplace delegates covered by the award*.' Section 12 defines a delegates' rights term as a term that '…*provides for the exercise of the rights of workplace delegates*.' The reference to the '*the rights of workplace delegates'* are the rights afforded under s.350C.

[2] We note for completeness that there is not such requirement in s.350C(2).

8. If the Full Bench inserts a term in an award that provides rights for delegates relating to the subject matters identified in s.350C(3) that are not '*reasonable*', the requirement contemplated by s.149E of the Act will not have been met.

9. The Commission may, and indeed must, determine what form a clause delivering the relevant rights should take. It may, for example, place hard parameters around the amount of paid time that must be provided for training where such parameters are reasonable. It does not, however, have complete discretion to determine what is reasonable. The rights provided under a clause crafted by the Commission must be reasonable as contemplated under s.350C(3) and not merely what is determined or viewed by the Commission as reasonable, having regard to broader considerations.

10. Section 350C(4) provides that an employer '…*is taken to have afforded the 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.'* The effect of this is to remove any necessity to assess whether the actions of the employer constituted the provision of reasonable communication or access as contemplated by s.350C(3). Instead, all that is required is that there is compliance with the relevant provision in the applicable fair work instrument.

11. Consistent with the interpretation advanced above, s.350C(5) provides (emphasis added):

> (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.

12. The statute mandates that the factors identified in s.350C(5) are only required to be considered when s.350C(4) does not apply. That is the significance or purpose of the inclusion of the word '*otherwise*' in the provision.

13. Having regard to the above, we below seek to constructively propose amendments to the Draft Term that are directed at incorporating requirements that expressly stipulate that the relevant entitlements to communication, access to the workplace and workplace facilities, as well as access to paid time for training, are subject to a caveat of reasonableness. That is, our intention in respect of each category of entitlement

contemplated by s.350C(3) of the Act is to limit the right to what is reasonable. We urge the Full Bench to depart from its provisional view and to adopt this approach.

14. In suggesting this course, we seek to ensure that the term developed by the Full Bench is validly a '*delegates' rights term*' for the purposes of the legislative framework, and that the Commission satisfies the statutory task before it. We appreciate that this approach might be said to be somewhat less certain than the approach proposed by the Full Bench, but we respectfully contend that it is warranted. We also contend that our proposal enables the clause to better address the myriad of variables (many of which are unforeseeable) that are likely to arise in the practical application of the clause.

15. Ultimately, the approach we advocate for mitigates against the risk that employers will have '*unreasonable*' new obligations imposed upon them.

16. It is convenient to here identify that we have identified the amendments that expressly deal with the reasonableness issue and have proposed amendments and new clauses within clauses X.6, X.7, X.7(f), X.8(b) and X.8(e) of the alternate version of the delegates' rights term set out at the end of this submission.

3. RIGHT OF REPRESENTATION

17. Ai Group has concerns about clause X.5(d) in the Draft Term. We reiterate our view that it is not necessary to include a list of matters or contexts in which the right of representation may be exercised. The inclusion of such a list would be contrary to s.138 of the Act.

18. Further, the list will foreseeably result in practical problems. For example, the reference to '*performance management and disciplinary processes*' might reasonably be construed by a lay person as suggesting that a union delegate should be advised when such processes are taking place. In many cases this would breach the privacy of the individual employee concerned. Often an employee (whether a union member or not) would strongly object to a union delegate being advised of the performance management or disciplinary processes that are taking place in relation to them as a matter of course, without their consent. Similarly, the existence of references to such matters in the Draft Term may lead parties to wrongly believe that they must, in all cases, wait for a union delegate to be available to participate in such processes before they can be undertaken.

19. Also, in many instances '*performance management*' will simply be part of proactive management of an organisation's operations or indeed constructive engagement with a worker about their performance. It cannot safely be assumed that this will always entail consideration of an eligible employee's '*industrial interests'*. A link to these industrial interests is an essential precondition to exercising the right of representation. This subtlety may not be apparent to a party reading the award.

20. Clause X.5(d) should be removed.

4. RIGHT OF REASONABLE COMMUNICATION

21. Ai Group has major concerns about clause X.6(b) in the Draft Term. As drafted, this clause is likely to lead to widespread disharmony, disruption and disputation in workplaces, which is in nobody's interests.

22. Clause X.6 of the Draft Term states:

> **X.6 Entitlement to reasonable communication**
>
> **(a)** A workplace delegate may communicate with eligible employees for the purpose of representing the industrial interests of the employees under clause **X.5**. This includes discussing membership of the delegate's organisation 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.

23. Clause X.6(a) would give a workplace delegate the right to communicate with eligible employees for the purpose of representing their industrial interests and to communicate with the delegate's organisation.

24. The absence of the word '*reasonable*' in paragraphs (a) and (b) needs to be addressed. The Act only gives a delegate the right to *reasonable* communication – not *any* communication. Clause X.9 goes some way towards addressing this, but is not sufficient to deal with the raft of potential ways that the new right could be misused, if it remains as framed. The clause must provide some further practical bases for limiting the exercise of the right of employees to what is reasonable, in all circumstances.

25. Members have expressed a myriad of concerns about the potential for employees to undertake unreasonable communication that would potentially be permitted by clause X.6. To provide an example of the real life mischief that members have raised concerns about, the clause would appear to permit a delegate to use a speaker system in a retail establishment to make announcements to staff during trading hours. We doubt the Commission is intending to afford employees such a right, but it appears to be permissible under both proposed clauses X.6 and X.7 in the Draft Term, absent an employer developing a specific policy prohibiting it.

26. The concept of reasonableness, in terms of communication should include important concepts of:

    (a) How frequently the communication has previously occurred (e.g. communications to convince non-union members to join the union);

    (b) The method of communication, the manner in which the communication is delivered and the content of what is communicated (e.g. whether the communication would result in any harassment or bullying of employees);

    (c) The costs that would be incurred by the employer as a result of the conduct of the communication;

    (d) Whether the communication would result in any disruption to the employer's operations;

    (e) The nature of the employer's business;

    (f) The size of the employer's business;

    (g) The content of the communication including in particular whether it amounts to harassment or bullying, and

    (h) Any other relevant factors.

27. It is also important the clause be amended to reflect that the '*reasonable communication*' provisions in s.350C(3)(a) of the Act only deal with communication between the workplace delegate and members of the relevant union, or persons eligible to be such members (see s.350C(3)(a)). Section 350C does not give a workplace delegate a right to communicate during working hours with their union. Accordingly, the inclusion of such a right in the second sentence of clause X.6(a) is beyond the scope of the current proceedings. Further, although the second sentence is framed as providing clarity as to what is caught by the first sentence of clause X.6(a), the reference to '*consulting the delegate's organisation*' is beyond the scope of communicating with eligible employees as referenced in the first sentence, and consequently the clause does not make sense.

28. We are also concerned that communication that constitutes '*discussing membership of the delegate's organisation*' will not always constitute communication for the

purpose of representing an eligible employee's industrial interests. Given that the communication may be directed at encouraging an employee to join for some other purpose, or to secure some other benefit, it would be beyond the scope of what is covered by clause X.6(a) or contemplated by the Act, the refence to discussing membership should be removed.

29. Ai Group is particularly concerned about clause X.6(b) in the Draft Term. This clause would give a workplace delegate the right to communicate collectively with eligible employees during working hours.

30. In other words, the Draft Term would give a workplace delegate the right to convene a meeting of employees during working hours.

31. We acknowledge that the rights of a workplace delegate under clause X.6(b) would operate subject to the conditions in clause X.9. However, any workplace delegate who convened a meeting of employees during working hours without the agreement of the employer would in all circumstances '*prevent the normal performance of work*'. Such an act would:

    (a) Breach clause X.9(a)(iii) in the Draft Term;

    (b) Breach the workplace delegate's duties as an employee;

    (c) Breach clause X.9(a)(i) in the Draft Term; and

    (d) Expose the workplace delegate to disciplinary action by the employer, including potential termination of employment.

32. The widespread disruption and disharmony that is likely to occur on construction sites, in factories, on mine sites, and in other workplaces across the country, if clause X.6(b) in the Draft Clause is implemented, can be readily foreseen.

33. We also note that the drafting of clause X.6(b) fails to adequately confine the communication to that which is permitted by X.6(a).

34. Clause (b) should be deleted.

35. Alternatively, clause X.6(b) should be amended to only afford a right to communicate, as contemplated by clause X.6(a) outside of working hours (be it during breaks or

before or after work). Moreover, there is no need to deal with whether such communication can be undertaken on an individual or collective basis.

36. Clause X.6 should be amended as follows:

X.6 Entitlement to reasonable communication

(a) A workplace delegate may have reasonable communication ~~communicate~~ with eligible employees for the purpose of representing the industrial interests of the employees under clause **X.5**. ~~This includes discussing membership of the delegate's organisation and consulting the delegate's organisation in relation to matters in which the workplace delegate is representing employees~~.

(b) A workplace delegate may undertake reasonable communication contemplated by clause X.6(a) ~~communicate with eligible employees individually or collectively,~~ during ~~working hours or~~ work breaks, or before the start or after the end of work .

(c) A workplace delegate may have reasonable communication with an eligible employee during working hours with the agreement of the employer.

(d) There is no obligation on an eligible employee to communicate with a workplace delegate if the employee does not wish to do so.

(e) In determining what is reasonable for the purposes of clause X.6, the following factors must be taken into account:

(i) How frequently the communication has previously occurred;

(ii) The method of communication;

(iii) The manner in which the communication is delivered and whether the content could amount to misconduct, such communication that amounts to harassment or bullying;

(iv) The costs that would be incurred by the employer;

(v) Whether the communication would result in any disruption to the employer's operations;

(vi) The nature of the employer's business;

(vii) The size of the employer's business; and

(viii) Any other relevant factors.

(f) If an employee ceases work to participate in communication contemplated by this clause they are not entitled to any payment for such time under this award, unless their employer agrees to provide it or to permit them to undertake the activity during work time.

37. Including factors of relevance for determining what is reasonable, as proposed in paragraph X.6(e) above, would be consistent with the outcome of the *Four Yearly Review of Modern Awards – Plain language Re-drafting – Reasonable Overtime*

Case[3] and the Australian Industrial Relations Commission's *Reasonable Hours Case.*[4] The award clauses arising from these cases included a list of factors. Adopting an analogous approach in these proceedings would be appropriate. It would provide practical guidance to parties.

38. In relation to proposed clause X.6(f) we simply observe that activities which do not constitute work, such as the engagement in communication contemplated by the clause, should not (and ordinarily would not) entitle an employee to payment under the award. There is however significant confusion in industry as to whether the effect of clause X.6 in the Draft Term is to require employers to provide '*paid time*' to undertake the relevant communication. The statute contemplates delegates being afforded paid time to undertake relevant training. It does not contemplate them being afforded paid time to undertake other activities.

[3] [2019] FWCFB 6595; [2019] FWCFB 5409; and [2018] FWCFB 6680.

[4] PR072002; [2002] AIRC 857.

5. RIGHT OF REASONABLE ACCESS TO THE WORKPLACE AND WORKPLACE FACILITIES

39. The word '*reasonable*' does not appear in clause X.7 in the Draft Term, other than in the heading. This needs to be addressed for the reasons identified in the opening section of this submission.

40. The Act only provides a delegate the right to reasonable access to the workplace and workplace facilities – not unfettered access.[5] The concept of reasonableness, in terms of access to the workplace and workplace facilities, should include a consideration of matters such as:

    (a) How frequently the workplace delegate/s have used the facilities;

    (b) Whether the facilities are needed by the employer for another purpose;

    (c) Whether the use of the facilities by the workplace delegate/s would result in any disruption to the employer's operations or any other difficulty for the employer;

    (d) The costs that would be incurred by the employer;

    (e) The nature of the employer's business;

    (f) The size of the employer's business; and

    (g) Any other relevant factors.

41. Importantly, the Commission's draft wording in clause X.7 recognises that the legislation does not require that the employer purchase particular facilities or equipment. For example, clause X.7 does not contemplate that an employer must purchase IT equipment for a delegate to use, or to put up a noticeboard where one does not already exist.

42. Clause X.7 also recognises that it is only the employer's facilities that the workplace delate is entitled to access, not facilities belonging to another employer that may be located in the same workplace (e.g. a construction site).

[5] Section 350C(3)(b)(i) of the Act.

43. However, there will often be circumstances where an employer has certain workplace facilities but it is not reasonable for the workplace delegate to use the facilities at the delegate's preferred time. For example, an employer may have a room or area to hold discussions, which is fit for purpose, private and accessible by the workplace delegate and eligible employees. However, this room or area may be needed by the employer at that time for another purpose, for example an important meeting with a customer.

44. Similarly, an employer may have a photocopier / printer, but the device may be needed for another purpose at the time when the workplace delegate would prefer to use the device. It would be unreasonable for an employer to be required to make the relevant facilities / equipment available at the delegate's preferred time in these circumstances. This should be addressed in clause X.7.

45. Clause X.7 should be amended as follows:

> **X.7 Entitlement to reasonable access to the workplace and workplace facilities**
>
> The employer must provide a workplace delegate with reasonable access to, or reasonable use of, the following workplace facilities, unless the employer does not have them:
>
> - - -
>
> **(f)** In determining what is reasonable for the purposes of clause X.7, the following factors must be taken into account:
>
> **(i)** How frequently the workplace delegate/s have used the facilities;
>
> **(ii)** Whether the facilities are needed by the employer for another purpose;
>
> **(iii)** Whether the use of the facilities by the workplace delegate/s would result in any disruption to the employer's operations;
>
> **(iv)** The costs that would be incurred by the employer;
>
> **(v)** The nature of the employer's business;
>
> **(vi)** The size of the employer's business; and
>
> **(vii)** Any other relevant factors.

6. ENTITLEMENT TO REASONABLE ACCESS TO TRAINING

46. Clause X.8 in the Draft Term covers reasonable access to training. The clause needs to be amended to address the following issues:

(a) The paid time to attend the training should only have to be provided if requested by the delegate;

(b) Clause X.8 should only require payment for time spent undertaking the relevant training, and not time spent undertaking ancillary activities such as having lunch, or undertaking travel which is the result of the location of the training selected by a union;

(c) There is a need to define what rate of pay should attach to the '*paid time*' (we have earlier proposed that it should be an employee's minimum rate pay as specified in the applicable Award);[6]

(d) The need to confine the amount of paid time to the '*ordinary hours*' that fall within the '*normal working hours*' in order to ensure the delegates' rights term only provides access to '*reasonable*' paid time as contemplated by s.350C(3)(b)(ii) of the Act. It would not be reasonable for paid time to be calculated by reference to overtime. Indeed, it would be particularly unreasonable for it to be calculated by reference to overtime in contexts where there is not a requirement under the relevant award for the employee to always work the overtime (even if it was normally or routinely worked);

(e) The need to specify the date at which the assessment of the number of eligible employees is calculated, so as to make clause X.8(a) workable from a practical perspective. This could be 1 July each year or, if acceptable to the employer, the date the request to attend the training is first made;

(f) The need to deal with the prospect that clause X.8(a) could deliver an unreasonable obligation on employers who employ significant numbers of casual or part-time employees (particularly if many are employed for short periods) and on employers that employ very large workforces. As it stands, some employers could be required to provide training to thousands of delegates. In

[6] Ai Group's Initial Submission at [64].

our view, if a cap such as what has been proposed is to be adopted, only the number of '*full-time equivalent employees*' should be counted. At the very least, in terms of its application to casual employees, the clause should specify that only regular casual employees, as defined in s.12 of the Act, who have been employed for 6 months need to be considered. In relation to part-time employees, it would potentially be reasonable to only count those that are employed for a substantial number of hours per week (say more than 20). It would be unreasonable to count part-time staff who only work a very small number of hours as this could leave to an excessive number of delegates in sectors that have high levels of part-time employment;

(g) The need to confine '*eligible employees*' referred to in clause X.8(a) to employees covered by the relevant award. This would narrow the cohort of employees who the employer would need to identify as potentially falling within what will often be complex rules regarding eligibility for union membership. It would also ensure that the amount of leave for delegates under the award is in some way proportionate to the number of employees covered by the instrument;

(h) The need to amend clause X.8(e) to clarify that an employee is not able to access the paid time off unless the employer has agreed to it. This appears to be assumed under the wording of the proposed clause, given it indicates that the refusal '*must not be unreasonably withheld*', but is not expressly articulated. This would ensure that the access to paid time would have to be granted by the employer but would permit them to refuse where reasonable;

(i) The need to amend clause X.8(f) to require evidence of not only attendance at the training but also the duration of the training (so that the relevant payment can be calculated);

(j) Other anomalies in the drafting.

47. We elaborate on the need to address some of these matters in the section below and have proposed an amended clause which would rectify the concerns, or at least go some way to mitigating them.

Rate of Pay

48. Clause X.8 in the Draft Term does not specify the rate of pay that applies when a workplace delegate is provided with paid time for the relevant training. It is crucial that this is addressed to avoid uncertainty and disputation.

49. We have previously canvassed, in detail, why the remuneration that the clause should entitle an employee to is the minimum hourly rate and not some higher amount.[7] We make the following supplementary points.

50. Firstly, the approach would be consistent with many entitlements are calculated under awards and with the statutory requirement that awards are a 'minimum safety net'. Prior to the 4 Yearly Review of Modern Awards, many award clauses were unclear in relation to the rate of pay that applied to particular entitlements. This was addressed by the Commission, through:

    (a) Using the expressions '*minimum rate of pay*' and '*ordinary hourly rate of pay*' in awards;

    (b) Replacing expressions like '*double time*' with expressions like '*200% of the minimum hourly rate of pay*';

    (c) Replacing the expressions like '*ordinary time rate of pay*' or '*applicable rate of pay*' with the expressions *'minimum hourly rate', 'minimum weekly rate*' or '*ordinary hourly rate of pay*'; and

    (d) Clarifying that awards are not intended to regulate over-award payments.

51. The Draft Term, unless amended to clarify the relevant rate of pay, is likely to result in many of the problems that were previously encountered with award clauses that did not specify the relevant rate of pay that applied to particular entitlements.

52. The rate payable for paid workplace delegate training should be the '*minimum rate of pay*' under the relevant award. This rate of pay:

    (a) Would align with the rate that applies to numerous other entitlements in awards;

[7] Ai Group Initial Submission at [64].

(b) Is appropriate for a model award clause that is intended to be suitable for a wide range of industries and occupations;

(c) Is consistent with the modern awards objective, including the need to encourage collective bargaining (s.134(1)(b));

(d) Reflects the fact that a workplace delegate who attends training is not experiencing any of the disutilities associated with undertaking their ordinary duties (and for which allowances and special rates are often paid);

(e) Reflects the fact that workplace delegate training will no doubt be conducted by unions during ordinary business hours, and therefore it is not appropriate for a workplace delegate to receive shift loadings while attending such training;

(f) Takes into account that workplace delegates' training will impose a substantial cost upon employers; and

(g) Takes into account that employees have a choice about whether they wish to become a workplace delegate and whether they wish to attend training.

Scope of '*normal working hours*'

53. Clause X.8(b) states that 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 when they attend training. The scope of '*normal working hours'* is unclear. In particular, it is not clear whether it encapsulates ordinary hours and / or overtime. On one view it could include overtime, particularly if an employee routinely worked overtime. However, the precise circumstances in which overtime hours will be included will be open to interpretation. How often would the overtime need to be worked to constitute normal hours? Would it need to be worked according to a set and stable pattern? A clause such as is proposed would undoubtedly be uncertain in many circumstances.

54. It is critical that employers have some certainty regarding the scope of the time that will be covered. They need to provide payment for it and failure to so could expose them to significant penalties (and shortly potentially criminal penalties). An award clause dealing with monetary entitlements needs to be capable of being interpreted precisely.

55. The Draft Term should only require employers to provide '*paid time*' during an employee's '*ordinary hours*' that occur during their "normal working hours" as contemplated by s.350C(3)(b)(ii). This would not include any overtime – even if it is worked in a somewhat routine manner. It would similarly not capture ordinary hours of work for an employee that fall outside of their '*normal hours*'.

56. This approach is consistent with the language in s.350(3)(b)(ii) of the Act which refers to '*reasonable access to paid time*'. Limiting the paid time in this way would confine the entitlement to '*reasonable access to paid time*'. Accessing paid time during overtime hours could not be construed as reasonable and a clause that adopted such an approach would be inconsistent with the requirements of clause 95 of Part 15 of Schedule 1 to the Act and s.138 of the Act.

57. This position, whereby overtime hours are excluded from the determination of the paid time entitlement, is consistent with the very nature of overtime as contemplated within the award system. There is no requirement under awards that overtime must either always be worked or provided to an employee. Nor is there typically a requirement to notify an employee in advance of a requirement to work overtime. Indeed, many modern awards stipulate employees can refuse to work overtime if it is unreasonable.[8] Whether there will be a need for overtime to be worked in many circumstances is likely to depend on the relevant business needs at the time, something which may not be known at the time a request is made under clause X.8.

58. If the Commission does not accept our proposed amendment confining the paid time to ordinary hours that fall within an employee's normal hours, there is additional force to our argument that the rate of pay that should attach to paid time for training is the applicable minimum hourly rate prescribed by the award, and not a rate that includes premiums that attach to overtime payments.

Determining the number of eligible employees for the purpose of clause X.8(a)

59. It is foreseeable that for some employers, the number of eligible employees in their workforce will fluctuate over time. In many cases, there may be significant and unpredictable changes in staff numbers throughout the year. Such fluctuation would

[8] See, for example, clause 20.1(b) of the *Fast Food Industry Award 2020;* clause 32.9(b) of the *Manufacturing and Associated Industries and Occupations Award 2020* and clause 21.1(b) of the *General Retail Industry Award 2020*.

have ramifications for assessing the number of workplace delegates entitled to access paid time for training under clause X.8 and could result in unfairness for employers.

60. To help provide certainty around the number of employees in its workforce, we submit the Draft Term should be amended to clarify that the assessment of the number of eligible employees should be undertaken on 1 July each year or, at the employer's election, at the time the first request to access leave under clause X.8 is made by a delegate. This would provide certainty.

61. To address the foregoing matters, the relevant parts of clause X.8 in the Draft Term should be amended as follows:

X.8 Entitlement to reasonable access to training

Unless the employer is a small business employer, the employer must, if requested by a workplace delegate, provide them 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. The number of eligible employees must be determined based on:

(i) the number employed on either 1 July of that year or, at the employer's election, the number of employees employed on the date the request under clause X.8 is made in any given year;

(ii) only counting regular casual employees who have been engaged by the employer over a period of at least 6 months;

(ii) only counting part-time employees who undertake more than 24 ordinary hours per week; and

(iv) only counting eligible employees covered by this award.

(b) It is reasonable for the employer to grant the paid time having regard to matters including the total amount of paid time requested by employees covered by this award in the year.

(c) The workplace delegate must give the employer as much notice as is practicable, and not less than 5 weeks' notice, of the dates, subject matter and the daily start and finish times of the training.

(d) The workplace delegate must, on request, provide the employer with an outline of the training content.

(e) 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.~~ that it has approved the paid time to attend the training. Such approval must not be unreasonably withheld.

~~(b)~~(f) A day of paid time is the ordinary 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. ~~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.~~

~~(f)~~(g) The workplace delegate must provide the employer with evidence that would satisfy a reasonable person of their attendance at the training and of the duration of the training, within 7 days after the day on which the training ends.

(h) **'Paid time'** is payable at the applicable minimum hourly rate of pay specified by this award for the classification in which the employee would have worked had they not been on leave or in which they ordinarily work.

(i) Payment must only be made for time spent attending the relevant training. It does not include time spent undertaking ancillary activities, including breaks from the training or travel to attend the training.

7. OTHER MATTERS

62. Clause X.9 in the Draft Term refers to '*ICT resources'* but does not define what these are. To ensure the clause is precise and easy to understand, the scope of this term should be clearly explained. This could be achieved by amended clause X.9(a)(ii) to refer to '*information and communication technology resources*' instead of the abbreviation.

ATTACHMENT 1

X. Workplace delegates' rights

X.1 Clause **X** provides for the exercise of the rights of workplace delegates set out in section 350C of the Act.

X.2 In **clause X**:

(a) **employer** means the employer of the workplace delegate;

(b) **delegate's organisation** means the employee organisation 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.

X.3 **Before** exercising entitlements under clause **X**, 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.

X.4 An **employee** who ceases to be a workplace delegate must give written notice to the employer as soon as practicable.

X.5 Right of representation

A workplace delegate may represent the industrial interests of eligible employees in matters including but not limited 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)**~~(d) enterprise bargaining; and

~~**(f)**~~(e) any process or procedure in which the employees are entitled to be represented.

X.6 Entitlement to reasonable communication

(a) A workplace delegate may have reasonable communication with ~~communicate~~ with eligible employees for the purpose of representing the industrial interests of the employees under clause **X.5**. ~~This includes discussing membership of the delegate's organisation 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 undertake reasonable communication contemplated by clause X.6(a) ~~communicate with eligible employees individually or collectively,~~ during ~~working hours or~~ work breaks, or before the start or after the end of work.

(c) A workplace delegate may have reasonable communication with an eligible employee during working hours with the agreement of the employer.

(d) There is no obligation on an eligible employee to communicate with a workplace delegate if the employee does not wish to do so.

(e) In determining what is reasonable for the purposes of clause X.6, the following factors must be taken into account:

(i) How frequently the communication has previously occurred;

(ii) The method of communication;

(iii) The manner in which the communication is delivered;

(iv) The costs that would be incurred by the employer;

(v) Whether the communication would result in any disruption to the employer's operations;

(vi) The nature of the employer's business;

(vii) The size of the employer's business; and

(viii) Any other relevant factors.

(f) If an employee ceases work to participate in communication contemplated by this clause they are not entitled to any payment for such time under this award, unless their employer agrees to provide it or to permit them to undertake the activity during work time.

X.7 Entitlement to reasonable access to the workplace and workplace facilities

The employer must provide a workplace delegate with reasonable access to or reasonable 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;

(b) a physical or electronic noticeboard;

(c) electronic means of communication that are ordinarily used by the employer to communicate with eligible employees in the workplace;

(d) a lockable filing cabinet or other secure document storage area; and

(e) office facilities and equipment including printers, scanners, photocopiers and wi-fi.

(f) In determining what is reasonable for the purposes of clause X.7, the following factors must be taken into account:

(i) How frequently the workplace delegate/s have used the facilities;

(ii) Whether the facilities are needed by the employer for another purpose;

(iii) Whether the use of the facilities by the workplace delegate/s would result in any disruption to the employer's operations;

(iv) The costs that would be incurred by the employer;

(v) The nature of the employer's business;

(vi) The size of the employer's business; and

(vii) Any other relevant factors.

X.8 Entitlement to reasonable access to training

Unless the employer is a small business employer, the employer must, if requested by a workplace delegate, provide them ~~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.

The number of eligible employees must be determined based on:

(i) the number employed on either 1 July of that year or, at the employer's election, the number of employees employed on the date the request under clause X.8 is made in any given year;

(ii) only counting regular casual employees who have been engaged by the employer over a period of at least 6 months;

(ii) only counting part-time employees who undertake more than 24 ordinary hours per week; and

(iv) only counting eligible employees covered by this award.

(b) It is reasonable for the employer to grant the paid time to attend training as contemplated by this clause having regard to matters including the total amount of such paid time that has been requested by employees covered by this award in the year.

(c) The workplace delegate must give the employer as much notice as is practicable, and not less than 5 weeks' notice, of the dates, subject matter and the daily start and finish times of the training.

(d) The workplace delegate must, on request, provide the employer with an outline of the training content.

(e) 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.~~ whether it has approved the paid time to attend the training. Such approval must not be unreasonably withheld.

~~**(b)**~~**(f)** A day of paid time is the ordinary 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. ~~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~~.

~~**(f)**~~**(g)** The workplace delegate must provide the employer with evidence that would satisfy a reasonable person of attendance at the training, and of the duration of the training, within 7 days after the day on which the training ends.

(h) **'Paid time'** is payable at the applicable minimum hourly rate of pay specified by this award for the classification in which the employee would have worked had they not been on leave or in which they ordinarily work.

(i) Payment is only required to be made for time spent attending the relevant training. It does not include time spent undertaking ancillary activities, including breaks from the training or travel to attend the training.

X.9 Exercise of entitlements under clause X

(a) A workplace delegate's entitlements under clauses **X.5** to **X.7** are subject to the conditions that the workplace delegate must:

(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 information and communication technology ~~ICT~~ resources;

(iii) not hinder, obstruct or prevent the normal performance of work; and

(iv) not hinder, obstruct or prevent employees exercising their rights to freedom of association.

(b) Clause **X** 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 **X** does not require an eligible employee to be represented by a workplace delegate without the employee's agreement.

NOTE 1: 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 **X**.

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**.