

# **SUBMISSIONS**

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

29 February 2024

**Nigel Ward**

CEO + Director

Australian Business Lawyers & Advisors

8 Chifley Square, Sydney NSW 2000

nigel.ward@ablawyers.com.au | Mob: 0405 539 172

**Julian Arndt**

Director

Australian Business Lawyers & Advisors

8 Chifley Square, Sydney NSW 2000

julian.arndt@ablawyers.com.au | Mob: 0408 848 163

<b>1. INTRODUCTION</b> .....	<b>4</b>
<b>2. WHO IS A WORKPLACE DELEGATE?</b> .....	<b>9</b>
<b>3. WHAT IS A WORKPLACE DELEGATE?</b> .....	<b>9</b>
<b>4. FREEDOM OF ASSOCIATION IS UNDISTURBED</b> .....	<b>10</b>
<b>5. WHAT DOES SECTION 350C REQUIRE?</b> .....	<b>11</b>
<b>6. WHAT IS IMPORTANT TO CONSIDER?</b> .....	<b>11</b>
<b>7. REPRESENTATION RIGHT - INDUSTRIAL INTERESTS</b> .....	<b>12</b>
<b>8. COMMUNICATION RIGHT</b> .....	<b>12</b>
<b>9. ACCESS RIGHT</b> .....	<b>13</b>
<b>10. TRAINING RIGHT</b> .....	<b>13</b>
<b>11. MODERN AWARDS OBJECTIVE</b> .....	<b>15</b>
<b>ANNEXURE A</b> .....	<b>17</b>

## IN THE FAIR WORK COMMISSION

### SUBMISSIONS ON BEHALF OF BUSINESS NSW AND AUSTRALIAN BUSINESS INDUSTRIAL

#### 1. INTRODUCTION

- 1.1 The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (**Closing Loopholes Act**) amends provisions of the *Fair Work Act 2009* (Cth) (the **Act**) relating to terms that must be included in modern awards.
- 1.2 These amendments commenced operation from 15 December 2023 and provide that the Commission must make determinations varying modern awards so that they include a delegates' rights term for workplace delegates by 30 June 2024.
- 1.3 Interested parties in AM2024/6 are required to lodge submissions and proposed workplace delegates' rights terms including any award specific terms by 1 March 2024.
- 1.4 Relevantly section 350C is in the following terms:

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

##### *Meaning of workplace delegate*

*(1) A **workplace delegate** is a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise.*

##### *Rights of workplace delegates*

*(2) The workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer.*

*Note: This section does not create any obligation on a person to be represented by a workplace delegate.*

*(3) The workplace delegate is entitled to:*

*(a) reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and*

*(b) for the purpose of representing those interests:*

*(i) reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and*

*(ii) unless the employer of the workplace delegate is a small business employer—reasonable access to paid time, during normal working hours, for the purposes of related training.*

*(4) The employer of the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate.*

*(5) Otherwise, in determining what is reasonable for the purposes of subsection (3), regard must be had to the following:*

*(a) the size and nature of the enterprise;*

*(b) the resources of the employer of the workplace delegate;*

*(c) the facilities available at the enterprise.*

#### 1.5 The Senate Revised Explanatory Memorandum (EM) provides:

823. *There is currently limited legislative protection for workplace delegates performing their roles within a workplace. The FW Act does not contain any positive rights specific to workplace delegates.*

824. *New subsection 350C(2) would provide a key right for workplace delegates to represent the industrial interests of members, and other persons eligible to be a member, of the relevant employee organisation, including in a dispute with their employer. If reasonable opportunities to undertake representation are provided, but not taken up, there will be no breach of the right.*

825. *The proposed note to subsection 350C(2) clarifies that new subsection 350C(2) would not require a worker to accept representation from a workplace delegate or create any obligation on a worker. It would not infringe on a workers' right to choose their own representative in a dispute with their employer or relevant regulated business (if they choose to be represented) and does not affect the relationship between workplace delegates and their members. Rather, new subsection 350C(2) would create an enforceable right between a workplace delegate and their employer or relevant regulated business.*

826. New subsection 350C(3) would facilitate the exercise of the representational rights in new subsection 350C(2) by providing that workplace delegates are entitled to:

*reasonable communication with members, and any other persons eligible to be members, in relation to their industrial interests ;*

*reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and*

*reasonable access to paid time, during normal working hours, for the purposes of related training.*

827. These rights are specified at the level of principle, with the expectation that for most employees, modern awards and enterprise agreements would provide greater detail for particular industries, occupations, or enterprises. In relation to communication and access, in many cases this may require nothing more than the general access to communications or premises that an employee would normally have by virtue of working for an enterprise.

828. All of the rights in new subsection 350C(3) are subject to a requirement of reasonableness, that is, an employer would only be required to provide facilities to the extent that this would be reasonable. To recognise the diversity of Australian workplaces and their available facilities and resources, new subsection 350C(5) would provide that in determining what is reasonable for the purposes of new subsection 350C(3), regard must be had to the size and nature of the relevant enterprise, the resources of the employer at the enterprise and the facilities available at the relevant enterprise.

829. Further, an exemption for small business employers would be provided by new subparagraph 350C(3)(b)(ii). Small business employers would be exempt from the obligation to provide workplace delegates paid time for the purpose of undertaking training for their role as a workplace delegate due to the amendments. This exemption would alleviate the cost burden of the amendments on small businesses. Small businesses could still elect to provide workplace delegates with paid time for training, or may otherwise have obligations to do so, for example under an enterprise agreement. For the purposes of this provision, small business has the meaning given by existing section 23 of the FW Act.

830. Subsection 350C(4) would provide that where an employer complies with a delegates' rights term in a fair work instrument, the employer is taken to have complied with the rights as set out in subsection 350C(3). This would ensure that, where a fair work instrument provides more detailed information about the rights

*of workplace delegates, employers can rely on that term as a complete statement of their obligations under new subsection 350C(3).*

- 1.6 Section 149E requires that each modern award contain a “delegates’ rights term”. This is a defined term in section 12:

***delegates’ rights term** means a term in a fair work instrument that provides for the exercise of the rights of workplace delegates.*

- 1.7 The focal point of those rights now being section 350C.

- 1.8 The delegates’ rights term is also relevant for enterprise agreements as section 205A requires such a term to be included in an enterprise agreement (s205A (1)). However, when the enterprise agreement is approved, if the delegates’ rights term is less favourable than such a term in a modern award covering the employees to whom the enterprise agreement applies it has “no effect” and the (most) favourable modern award delegates’ rights term applies in the form it is in at approval (s205A (2)).

- 1.9 The exercise currently being undertaken by the Fair Work Commission (**the Commission**) is to determine what form of delegates’ rights term to include in modern awards as the legislation itself does not determine a ‘model’ version for this purpose.

- 1.10 Two propositions immediately emerge:

- (a) any such term will need to give effect to rights the Act gives workplace delegates; and
- (b) the modern award inclusive of the new term will need to meet the modern awards objective in section 134.

- 1.11 The substantive amendments dealing with workplace delegates’ rights are set out in Part 3-1 general protections which broadly sets out various workplace rights and prohibitions on conduct against those rights.

- 1.12 In this sense, section 350A establishes protections to the workplace delegates’ rights and section 350C identifies what those rights are.

1.13 Our focus is on section 350C as it sets out the nature of the rights being protected.

1.14 Our submission advances 4 propositions:

- (a) Workplace delegates (often called shop stewards in the past) have always been understood to be first and foremost employees and subject to the ordinary direction of their employer. Nothing in the Act as amended undermines this proposition.
- (b) Section 350A and 350C are contained in Part 3-1 – General protections which enshrines freedom of association as a foundational proposition. Section 3(e) of the Act also provides:

*The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:...*

*(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms*

The Commission should be wary of any proposition advanced in this matter that seeks to directly or indirectly undermine this.

- (c) Statutory protections for workplace delegates' rights are not new<sup>1</sup> but what is new is a codification of such rights being set out in detail in the Act and extending the general protections regime to them. As such the Commission should enter this process with a degree of restraint and should focus on simply giving effect to the new rights rather than amplifying or adding to them.
- (d) When dealing with workplace rights, the Act as amended places significance on the concept of what is "reasonable". In doing so, the Act as amended recognises that the practical application of workplace delegates' rights is likely to be contextual to the enterprise concerned.

---

<sup>1</sup> Protections for trade union delegates are not new and have been featured in various industrial statutes in the past see for example s 95 of the *Industrial Arbitration Act 1940* (NSW).



## 2. WHO IS A WORKPLACE DELEGATE?

2.1 Section 350A (1) defines a workplace delegate as:

*(1) A **workplace delegate** is a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise.*

2.2 Section 12 informs us that an “employee organisation” is an “organisation” of employees and “organisation” means “an organisation registered under the Registered Organisations Act”.

2.3 Accordingly, for our purposes, a workplace delegate is a person who works in a particular enterprise and has been appointed or elected in accordance with the rules of an organisation registered under the Registered Organisations Act.

2.4 The notion of a workplace delegate should remain limited to this specific class of person that the Parliament determined.

2.5 Most trade union rules provide for workplace delegates (although the naming protocols may differ) and how they are authorised and their role and responsibilities etc.

2.6 The identification of workplace delegates is therefore largely left to the trade union concerned under its registered rules.

2.7 While hopefully unlikely, it is possible that this may lead to some gaming where large number of employees are appointed as a workplace delegate as an industrial tactic, but this would likely be amenable to resolution through other provisions of the Act.

2.8 It is also noticeable that the Act as amended does not concern itself with co-delegates or more involved delegate structures such as head delegates etc, and this appears deliberate.

2.9 Whether the employer concerned actually knows that someone is the authorised (through appointment or election) workplace delegate in their enterprise may be a practical issue. Historically award and enterprise agreement clauses solve this issue by requiring the union concerned to confirm in writing, to the employer, who the delegate is for the enterprise. Absent this, an employer would likely need to accept an employee’s notification.

## 3. WHAT IS A WORKPLACE DELEGATE?

3.1 It would be trite to say someone appointed or elected etc. It is important to reflect on the fact that a workplace delegate has always been first and foremost an employee. Nothing in the Act as amended undermines this notion and it is important to weigh this into the consideration.

3.2 Being a workplace delegate has always been seen as a position of responsibility:

*“...while this Commission will be vigilant to protect the position of any delegate unjustly dealt with by an employer for legitimate activity on behalf of his union, it certainly will not regard delegateship as a magic cloak conferring on the wearer immunity from liability for wrongful actions. The provisions of the award conferring rights on a delegate have been quoted earlier. The right to recognition and to be allowed time to interview the company or its representative in working hours is a valuable one, but it carries with it corresponding responsibilities...The responsibilities include the obligation to have industrial disputes settled by resort to constitutional processes and not by direct action or job control...”<sup>2</sup>.*

3.3 Generally speaking, the Commonwealth Commission historically applied the approach that a workplace delegate should not interfere with the effective working of any employer, has no right to leave their place of employment without approval and must confine their attention to problems concerning their own employer.<sup>3</sup>

3.4 In giving effect to a workplace delegates’ term in a modern award the Commission must ensure that this notion is maintained and that the form and expression arrived at does not tilt the workplace delegate away from being an employee first and foremost towards being some form of quasi union official, paid for by the employer.

#### **4. FREEDOM OF ASSOCIATION IS UNDISTURBED**

4.1 Nothing in the Act as amended undermines the foundational notion of freedom of association in the Act. In fact, section 350C affirms this with the note in section 350C (2):

*Note: This section does not create any obligation on a person to be represented by a workplace delegate.*

4.2 It is possible that claims will be advanced in this matter that are aimed largely at increasing trade union membership rather than the orderly discharge of the limited rights in section 350C.

4.3 We anticipate that this will be a point of tension in these proceedings as unions may see the Act as amended as being designed to re-unionise Australian workplaces<sup>4</sup> as opposed to simply setting out limited rights and protections for workplace delegates where they exist.

4.4 Importantly, section 350C (and/or section 134) does not require the Commission to create modern award terms which foster or empower trade unions or the trade union movement

---

<sup>2</sup> *BHP Co Ltd (No 2)* 1961 AR 48 at 66-7

<sup>3</sup> (Re F.E.D.F.A. and Garden Island Dockyard (1964) 2107 C.A.R. 806, and see also *Re Cairns Meat Export Co Pty Ltd v A.M.I.E.U.* – 17 IIB 876; *A.E. Goodwin Ltd v A.E.U* 20 IIB 503; *Thomas Borthwick & Sons v A.M.I.E.U* (1965) 111 C.A.R. 501; *Morts Dock & Engineering Co Ltd v Federated Ship Painters and Dockers Union* (1957) 88 C.A.R 212; *Queensland Country Agents v Aust. Meat Industry Employees’ Union* (1959) 91 C.A.R. 208.)

<sup>4</sup> *The Australian Bureau of Statistics has trade union membership at 12.5% of the workforce as at 14/12/22 down from 41% in 1992; [Trade union membership, August 2022 | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/Trade-union-membership-August-2022)*

such as preference of employment to union members etc. Nor does it compel anyone to be represented by a workplace delegate even if they are a trade union member.

- 4.5 The Commission will need to approach any amplified workplace delegates' rights claims cautiously to ensure that the notion of freedom of association is not directly or indirectly undermined.

## 5. WHAT DOES SECTION 350C REQUIRE?

- 5.1 In simple terms it establishes the following limited rights for workplace delegates:

- (a) Section 350C (2): The right to represent the industrial interests of members and persons eligible to be members, including in disputes with their employer while no person is obliged to be so represented (**representation right**).
- (b) Section 350C (3): The right to reasonable communication with those persons in relation to their industrial interests (**communication right**).
- (c) Section 350C (3): For the purpose of representing those interests have reasonable access to the workplace and workplace facilities where the enterprise is being carried on (**access right**).
- (d) Section 350C (3): Unless the employer of the workplace delegate is a small business employer, provide the workplace delegate reasonable access to paid time, during normal working hours, for the purposes of related training (**training right**).

- 5.2 Relevantly, section 350C illuminates the notion of reasonableness which is relevant to the communication, access and training right.

- 5.3 In making such a determination regard must be had to:

- (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.

## 6. WHAT IS IMPORTANT TO CONSIDER?

- 6.1 Any modern award clause must allow for a contextual determination of what is reasonable. A rigidly prescriptive clause will inappropriately undermine the purpose of s 350C(5).

- 6.2 Reasonableness with respect to the communication, access and training rights is *contextual to the specific enterprise*; so much is clear from section 350C (5).

- 6.3 This naturally militates against creating a modern award clause that is prescriptive in nature.

- 6.4 What may be reasonable in a steel works is unlikely to be reasonable in a kindergarten or a restaurant.

6.5 This supports a clause that largely reflects the language in the Act rather than a prescriptive elaboration of this.

## 7. REPRESENTATION RIGHT - INDUSTRIAL INTERESTS

7.1 Clearly the word “industrial” qualifies the notion of “interest”. An interest is:

*“the relation of being affected by something in respect of advantage or detriment”<sup>5</sup>*

7.2 The notion of what is ‘industrial’ can be inferred from the Act itself and related legislation; modern awards, enterprise agreements, NES, workplace rights etc.

7.3 Precisely where this line is drawn (and the precise definition of ‘*industrial interests*’) is not something that the Commission would need to determine in this matter unless a party seeks to build on the notions in section 350C beyond simply giving effect to it.

7.4 This might invoke a consideration of collective versus individual rights and the possible distinction between industrial and employment rights.

## 8. COMMUNICATION RIGHT

8.1 The notion of allowing reasonable communication invokes a consideration of a series of issues:

- (a) Does the workplace delegate have the right to simply cease work without notification or authorisation to undertake the communication?
- (b) Can the person the delegate is communicating with simply cease work without notification or authorisation?
- (c) The communication right does not make reference to “*access to paid time*” which is a deliberate distinction with section 350C(3)(b)(ii). To be reasonable, any communication will likely need to be in non-paid time unless agreed otherwise.

8.2 Reflecting on (a), in a steel works this might invoke material issues of safety while in a childcare centre this may mean that the centre is failing to meet its mandatory staff ratios etc.

8.3 One thing that is immediately clear is that the section extends no right or protection to the “member” or “potential member” in terms of the communication and as such they have no right to cease work or leave their workstation without authorisation from their employer.

8.4 Trying to answer these issues in a modern award clause that addresses the enterprise (this being the focus of section 350C) would be a fraught exercise and one that the Commission

---

<sup>5</sup> See Macquarie Dictionary Eighth Edition A-K

is not required to entertain in giving effect to section 350C in modern awards. Adopting the proposal in the Annexure A of this submission allows these issues to be reasonably resolved at an enterprise level.

8.5 These are issues best left to the enterprise to be resolved contextually and failing this through dispute procedures in the modern award.

## **9. ACCESS RIGHT**

9.1 The access right is conditioned in that the access is for the “...*purpose of representing those interests...*” being the industrial interests in section 350C (2).

9.2 Accordingly, the access right is not ‘at large’ to be used at will or as a general industrial tactic but rather limited to a circumstance where the access right is being exercised as part of representing the industrial interests of the person.

9.3 Having reasonable access to the workplace invokes the questions that are relevant to the communication right and a ‘one size fits all’ approach to answering these questions involves the same challenges.

9.4 Access to facilities in the modern workplace also raises questions of technology given the wide variety of potentially relevant facilities and the potential array of enterprise-based policies governing the use of those facilities.

9.5 The notion of allowing reasonable access invokes a consideration of a series of issues:

- (a) Does the workplace delegate have the right to simply cease work without notification or authorisation to access the workplace or the facilities etc?
- (b) In accessing the workplace can the delegate disrupt the normal work of employees without authorisation?
- (c) The access right does not make reference to “access to paid time” which is a deliberate distinction with section 350C(3)(b)(ii) so for any access to be reasonable it will likely need to be in non-paid time unless agreed otherwise.

9.6 Again, trying to answer these issues in a modern award clause that addresses the enterprise would be a fraught exercise and one that the Commission is not required to entertain in giving effect to section 350C in modern awards.

## **10. TRAINING RIGHT**

10.1 The notion of trade union training leave is not new. It has been a feature of our industrial landscape for decades originally based on the Trade Union Training Authority.

10.2 It had previously had common application in many awards in the federal jurisdiction although never seemingly the subject of a test case; rather evolving based on consent awards.

- 10.3 The jurisdiction that considered trade union training leave at a 'test case' level was New South Wales and against the consensual trend refused to introduce it into awards in NSW<sup>6</sup>.
- 10.4 The first thing relevant to consider in relation to the training right is that a small business employer is excluded from the statutory scheme.
- 10.5 Secondly, paid time during normal working hours should be understood to be synonymous with leave from work in ordinary work hours without loss of pay. It does not, for instance, lead to union training being scheduled for a Monday to Friday day worker on a weekend and expecting that they be paid at overtime rates.
- 10.6 Thirdly, the right is for "training"<sup>7</sup>. This should be given its ordinary grammatical meaning: *"the action of teaching a person ... a particular skill or type of behaviour"*.
- 10.7 Training is distinct from being involved in management activities of a trade union<sup>8</sup> it is also distinct from participating in unlawful industrial action or public rallies or protests.
- 10.8 The training right invites the following questions:
- (a) Should the employer receive notice and if so, how much?
  - (b) Should the employer have a right to reject any request and if so on what basis?
  - (c) Should the employer be informed of the content of the training?
  - (d) What is the amount of training that an employer should allow, and can this be aggregated in bigger businesses (or related entities) and is it accrued?
- 10.9 Again, each of these issues could weigh on the question of reasonableness and most are contextual to the enterprise<sup>9</sup>.
- 10.10 As training courses are likely to be structured with a cohort of participants, reasonable notice would seem an uncontroversial and entirely workable feature.
- 10.11 The precise period of the notice could be contextual to the enterprise especially when it involves employees in advanced classifications holding limited skills who are hard to replace or where replacement is mandated by regulation or safety requirements or where static 'manning' rules have been imposed industrially or through bargaining.
- 10.12 Informing the employer of the content of the training is not an uncommon feature in enterprise agreements and may go to the question of reasonableness more generally to ensure that the request is in fact for "training".

---

<sup>6</sup> *Retail Trade Union Training Leave (State) Award* [1994] NSWIRComm 154 (15 December 1994)

<sup>7</sup> The legislative scheme does not comment on who delivers this training.

<sup>8</sup> See for instance see *Australian Workers Union v Alcoa Portland Aluminium Pty Limited T/A Portland Aluminium* [2022] FWC 2303.

<sup>9</sup> A useful example of the contextual nature is gleaned from a consideration of *Australian Workers Union v Manildra Stockfeeds Manufacturing Pty Ltd & NSW Sugar Milling Co Op Ltd t/a Sunshine Sugar* [2018] FWC 4833.

- 10.13 The amount of the training would however appear to be contextual to an enterprise.
- 10.14 This may depend on its geography, the size and nature of the enterprise etc and possibly the experience of the workplace delegate themselves.
- 10.15 Creating a minimum standard would require a consideration of each and every industry and occupation as well as the character of the enterprises within them which again is unnecessary given the approach we propose.

## **11. MODERN AWARDS OBJECTIVE**

- 11.1 Being part of a modern award, any workplace delegates' rights term involves a consideration of section 134 and the modern awards objective.
- 11.2 Section 134 provides a series of considerations that need to be weighed in the balance in arriving at the fair and relevant minimum safety net for both employers and employees<sup>10</sup>.
- 11.3 The modern awards objective creates a minimum safety net, and this is conditioned by section 138.
- 11.4 Following the recently completed Four Yearly review, modern awards were held to satisfy the modern awards objective in the absence any codified delegates' rights clause. Nonetheless, the effect of the Closing Loopholes Act is to create a legislative assumption that the inclusion of a delegates' rights clause is required to satisfy the modern awards objective and to create a fair and relevant minimum safety net.
- 11.5 The following preliminary comments can be made in regard to section 134:
- (a) s134(1)(a) is of neutral consideration as the codification of workplace delegates' rights has no causative effect on the relative living standards and the needs of the low paid.
  - (b) s134(1) (aa) is of neutral consideration as the codification of workplace delegates' rights has no causative effect on the need to improve access to secure work across the economy.
  - (c) s134(1) (ab) is of neutral consideration as the codification of workplace delegates' rights has no causative effect on the need to achieve gender equality in the workplace.
  - (d) s134(1)(b) is a consideration as the statutory focus of the workplace delegates' rights is the "enterprise" and as such the Commission can and should allow amplification,

---

<sup>10</sup> See *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001.

development or extension to occur in bargaining thus providing motivation for the encouragement of bargaining.

- (e) s134(1)(c) is of neutral consideration as the codification of workplace delegates' rights has no causative effect on the need to promote social inclusion through increased workforce participation.
- (f) s134(1)(d) is a consideration as the statutory focus on the productive performance of work would not be achieved if delegates were given a free hand to cease work or interrupt work as they chose.
- (g) s134(1) (da) is of neutral consideration as the codification of workplace delegates' rights has no causative effect on additional remuneration.
- (h) s134(1)(f) is a consideration as the training right will incur a cost although given the very low levels of union membership in Australia this will be localised to more unionised sectors and industries. The same can be said for providing workplace delegates with the representation and communication right which may involve time absent from productive work and in certain contexts a need or requirement to back fill them.
- (i) s134(1)(g) favours alignment between the statutory rights and the modern award rights providing questions of reasonableness to be resolved at an enterprise level. It is perhaps a given that the last 18 months of industrial reform have extensively increased regulatory burden on employers, and this will be yet a further increment in this.
- (j) s134(1)(h) is of neutral consideration as the codification of workplace delegates' rights has limited causative effect on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

11.6 Set out in Annexure A is the proposed workplace delegates term reflecting the above submissions.



## ANNEXURE A

### X. WORKPLACE DELEGATES RIGHTS

X.1 A **workplace delegate** is a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise.

X.2 A workplace delegate is entitled to represent the industrial interests of members, and any other persons eligible to be such members under the rules of the employee organisation, including in disputes with their employer.

*Notation: This does not create any obligation on an employee to be represented by a workplace delegate.*

X.3 A workplace delegate is entitled to:

- (a) reasonable communication with those referred to in clause 1.2, in relation to their industrial interests; and
- (b) for the purpose of representing those interests:
  - (i) reasonable access to the workplace and workplace facilities in the enterprise; and
  - (ii) unless the employer of the workplace delegate is a small business employer—reasonable access to paid time, during normal working hours, for the purposes of delegate training.