



4 March 2024

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

Background

1. On 18 January 2024, the Fair Work Commission (the '**Commission**') President issued a statement¹ commencing a process to vary all modern awards so that they include a delegates' rights term for workplace delegates by 30 June 2024.
2. On 30 January 2024, the President issued a statement² outlining the process including timeline when submissions are required.
3. In accordance with paragraph [4] of [2024] FWC 241, the Pharmacy Guild of Australia ('**Guild**') provides the following responses, including draft delegates' right terms for consideration.
4. The Guild response has been drafted to address the questions raised by the inclusion of 350C Workplace delegates and their rights into the *Fair Work Act 2009* and application in the workplace.
5. The Guild has the opinion that the modern award terms need to deal with the following parameters of 350C:
 - a. an employee appointed or elected, in accordance with an employee organisation, to be a delegate or representative for members of the organisation who work in a particular enterprise (the '**representative**');
 - b. the entitlement to represent the 'industrial interests' of members and eligible persons of the particular enterprise ('**representation**');
 - c. reasonable communication with members and eligible non-members of an employee organisation in relation to their industrial interests (**communication**);
 - d. reasonable access to facilities within the enterprise for the purpose of representing the industrial interests (**access to facilities**); and

¹ [2024] FWC 150;

² [2024] FWC 241;

- e. other than for small businesses (fewer than 15 employees), reasonable access to paid time, during normal working hours, for the purpose of training related to representing industrial interests (to **'training time'**).
 - f. how is the time acting in the delegates role accounted for on the workplace roster (**'rostered ordinary hours'**)
6. Where any proposed clauses go beyond [5a-f] matters, it should be rejected as these additional obligations placed on the workplace go beyond 350C requirements for delegates' rights.
 7. The Guild acknowledges that there may be existing modern award clauses outlining employee representational rights for a specific industry that may address or go beyond 350C requirements. The Guild suggests that this variation process should not be used as a mechanism to replicate these provisions across all awards.
 8. The Guild has concerns regarding how delegates rights will be interpreted and the potential impact on a workplace's cultural, operations and efficiency.
 9. It could be argued that these rights will potentially infringe, in some circumstances, on an employer's right to direct an employee (who has been elected or appointed as a workplace delegate) to undertake work related to their employment, in a certain way and at a specific location. It could be interpreted that this role will distract from the employee's usual employed duties.
 10. The Guild has reservations about the level of detail needed to be contained with a modern award or whether a more effective approach would be 'bench book' example maintained by an industry tribunal that is continuous updated in accordance with precedent decisions.

Representative

11. It is understood the workplace delegate is an employee of the enterprise and 350C does not change this fact. This is in recognition of the fact that a workplace delegate or delegates are first and foremost employees, who must continue to follow the lawful and reasonable direction of their employers and who have a full time (or part-time) job to complete day to day.
12. The provision should simply outline the process in how an employee is either appointed or elected for which a Registered Organisation is being represented by the employee.
13. It should clarify that the delegates' rights cannot be exercised until such time as the employer has been notified in writing of this appointment by the respective Registered Organisation and a delegate can only be a Registered Organisation representative.
14. The provision needs to have 'guardrails' on the actual number of delegates permitted to be appointed or elected in an enterprise. The number should be completely dependent

upon the enterprise size, workplace locations including operations, and number of Registered Organisations being represented in a workplace. For example, the provision could be model from the Health & Safety Representative (HSR) principles under the model WHS Act; nevertheless, actual numbers should be minimal.

Representation

15. The provision should simply state that a workplace delegate is entitled to represent the 'industrial interests' of those members, and any other persons eligible to be such members of the respective Registered Organisation, including in disputes with their employer.
16. The term "industrial interests" is undefined within the provision, but it will be in the interests of the employer, delegate/s and employees, to clearly outline the matters upon which a delegate can take time away from their usual duties (during their ordinary work hours or rostered hours) to perform delegate tasks.
17. The Guild notes the inclusion of '*including in disputes with their employer*' within 350C(2) may suggest that there could be circumstance where a delegate might reasonably attend to or undertake delegate (union) work, which is not at the request of the employer, during their rostered ordinary hours.
18. The Guild acknowledges that there will be different concepts of 'industrial interests' and suggest the provision is limited to, unless requested by the employer to assist in a situation, the following:
 - a. Disputes involving an employee of the enterprise who is or can be a member of the registered organisation under 'industrial law' as defined by the *Fair Work Act 2009* including an industrial instrument.
 - b. Consultation about major workplace changes or changes to rosters or hours works as defined with the existing model Award terms for employee representative rights.
 - c. Matters relating to discipline and performance of an employee that can represented by the Registered Organisation (as either a member or non-member however is entitled to join); and
 - d. Bargaining.
19. Any other matter not directly relevant or directly related to an employee's employment, including their workplace rights or terms and conditions of employment, should not be dealt with by workplace delegates during their rostered ordinary working paid hours unless requested or approved by the employer.

20. The Guild suggest that any provision clearly outlines the delegates' rights are strictly separate and different to the 'right of entry' provisions under section 484 of the *Fair Work Act 2009*.

Communication

21. It should be clearly clarified with the provisions that communication between delegate and employees that can represented by the Registered Organisation (as either a member or non-member however is entitled to join) must be in relation to the 'industrial interests' of the employees and no other matter.
22. The Guild believes that delegates should be permitted to communicate with represented employees during normal rest or meal breaks in the workplace. If communicate in necessary outside of these times, the delegate needs the permission of the employer (which should not be reasonably refused) to undertake the activity.
23. An employer should carefully consider each request on its merits and necessity for the activity depending upon productivity impact, cost, facilities, enterprise size and number of employees being represented.
24. The Guild has the opinion that no communication should occur via the employer communication channels (eg social, internet, intranet, email, electronic media groups) without the direct authorisation of the employer.

Access to facilities

25. The use of workplace facilities should be considered carefully to determine what is reasonable and does not impact on the enterprise operations. The Guild notes the use of facilities should be only permitted to the necessary extent for the delegate to represent the 'industrial interests' of employees, and for no other arrangement.
26. The facilities usage is at the employer agreement – where agreement is not reached, employer should consider what available space could be allocated to permit the delegate to safely perform the relevant activity.
27. The Guild believes an employer should be able to determine how the access to facilities are to occur during normal business operating hours including rostered shift arrangements for a workplace delegate, which would be reasonable. Outside of normal business operating hours is only at the discretion of employer.

Training time

28. The Guild has the opinion this provision should clarify that the training must be directed to the effective representation of employees "industrial interests", and nothing else. The training should be provided by the Registered Organisation that the workplace delegate is representing and organised at least 8 weeks in advance of the training dates.

29. The training course curriculum should be made available to the employer on request and the training is delivered by a Registered Training Organisation (RTO).
30. It is suggested the training duration would be a maximum of 2 days per delegate per year; however, this provision would need to be considered carefully for industries with high labour turnover and whether the turnover is a result of the employer or employee's action.
31. Noting the small business exemption for paid leave, there needs to be a maximum number of approved absences to access the leave entitlement depending upon the workplace scale and operations.
32. The Guild has the firm belief that an employer is not liable for any additional expenses associated with an employee's attendance at a course other than the payment of ordinary time earnings for such an absence.
33. The provision will need to determine the appropriate definition for ordinary time earnings, for example it should be employee's base hourly rate exclusive of any allowances or penalty rates for travelling time, fares, shift work or overtime.
34. Leave of absence on training leave will be counted as service.

Rostered ordinary hours

35. The Guild has considered the question on whether time during a delegate's ordinary rostered hours is paid or unpaid time to undertake the workplace delegates tasks. In addition, whether the time is at the employer request, or the delegate exercise a right to be involved.
36. The Guild has concerns on how the time will be accounted for, managed in the workplace, impact on rostering and possibly overtime arrangements.
37. No firm view has been established on the question.

Scott Harris

Director, Workplace Relations & Business

Pharmacy Guild of Australia