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FWC varies all modern awards following Full Court's delegates' rights ruling

The Fair Work Commission (**FWC**) has issued a significant Full Bench decision varying all 155 modern awards to correct jurisdictional errors in the standard delegates' rights term inserted in 2024. The decision follows the Full Court of the Federal Court's ruling in *CFMEU v Australian Industry Group [2025] FCAFC 187*, which found that aspects of the FWC's earlier award variations impermissibly limited the statutory rights of workplace delegates.

This has practical implications for employers across all industries, particularly in how they manage delegate activities, workplace access, communication, consultation, and training. The FWC acknowledged the Full Court's ruling had caused delays to enterprise agreement approvals, and indicated that the expedited variation process was necessary to remove the resulting uncertainty.

Background

In 2023, the *Fair Work Legislation Amendment (Closing Loopholes) Act* introduced provisions in the Fair Work Act 2009 (Cth) (**FW Act**), requiring modern awards to include a delegates' rights term consistent with the statutory rights of workplace delegates.

In June 2024, the FWC inserted a standard delegates' rights term into every modern award. However, in December 2025, the Full Court found that the FWC had misconstrued the statutory task in three key respects when drafting the 2024 standard term, resulting in jurisdictional error.

The court's findings

In this regard, the court identified three principal errors in the 2024 term:

1. ***Representation confined too narrowly*** - The standard term wrongly limited representation to employees of the delegate's own employer. The court confirmed that delegates may represent all members and eligible members in the enterprise, even if employed by different businesses working on the same site/project.
2. ***Communication rights too restricted*** - The term permitted communication only "for the purpose of" representation. The court held the FW Act permits communication "in relation to" industrial interests – an intentionally broader expression.
3. ***Unlawful restrictions on the exercise of rights*** - Clauses requiring delegates not to hinder work, and to comply with all employee duties, applied even where the delegate was reasonably exercising statutory rights. The court found that these limitations could only apply where they do not unreasonably restrict the reasonable exercise of delegates' rights.

As a result, amendments to the awards have been made, with retrospective effect from 1 July 2024.

What this means for employers

The updated delegates' rights term is now the standard term for all modern awards, resolving previous uncertainty and confirming the scope of delegates' rights under the FW Act.

The updated term materially expands the scope of workers a delegate can represent. Employers must ensure workplace policies, consultation and bargaining processes, and operational directives align with the corrected delegates' rights. Employers should review these policies and procedures to ensure compliance with the updated delegates' rights term now in effect across all awards.

Going forward, employers ought to be aware that:

1. Delegates may represent workers outside the employer's own workforce. This is particularly relevant in labour-intensive, multiemployer environments.
2. Delegates may communicate more broadly and more frequently about industrial interests.
3. Limitations on delegate conduct must not override statutory rights. Internal policies and directions must be consistent with the reasonable exercise of delegates' rights.
4. Where "eligible workers" exceed "eligible employees", employers may face a higher number of delegates entitled to paid training time.

Contact Carter Newell today

Sydney | +61 2 8315 2700
Brisbane | +61 7 3000 8300
Melbourne | +61 3 9002 4500
E cn@carternewell.com

Knowledge of right of entry rules is a must for site occupiers

Union officials have the right to lawfully enter a workplace under the FW Act in specific circumstances.

However, it is important that site occupiers are aware of the parameters of those rights – right of entry rights are not unfettered.

Union officials can lawfully enter a workplace to investigate a suspected contravention of the FW Act, to hold discussions with employees and to inquire into a suspected convention of work health and safety legislation.

When at a workplace, union officials must not intentionally hinder or obstruct any person or otherwise act in an improper manner, and they must not exercise a right under work health and safety legislation unless they comply with any reasonable request by the occupier of the workplace to comply with a work health and safety requirement that applies to the premises.

Where union officials act in contravention of the FW Act, penalties can be imposed against union officials, as well as the union. Most recently, in *Fair Work Ombudsman v Construction, Forestry and Maritime Employees Union (Ironside Case) [2025] FCA 1664*, the Federal Court of Australia imposed fines against the CFMEU and four of its officials in relation to right of entry failings.

In that matter, the court found that the four union officials engaged in unlawful conduct at construction sites in Melbourne by:

1. Failing to comply with requests to leave the worksite, in contravention of an occupational health and safety requirement that applied to the site; and
2. Turning off a generator that provided power to the site without authorisation or warning to any of the workers on site; and
3. Causing an excavator to stop working; and
4. Taking photos of a site manager's computer screen without consent.

The Federal Court determined that the four union officials and the CFMEU had breached the FW Act, with the CFMEU being "directly or indirectly, knowingly concerned in or party to the conduct of its officials" making it involved in the contraventions.

The CFMEU was ordered to pay $144,000 in penalties, and the individual officials were fined between $3,000 to $13,000 each.

Key takeaway

To keep a check on union officials, occupiers of worksites must ensure that employees – such as site managers – who are likely to encounter union officials exercising rights of entry are appropriately trained on the respective rights and obligations of both the occupier and the union official, and that clear protocols are in place to support the lawful conduct of all parties.

Did You Know?

Termination for sexual harassment has nothing to do with the intention of the harasser and has everything to do with how the harasser's conduct was received and whether it was unwelcome and of a sexual nature. Social media interaction from one employee to another employee outside of work, that constitutes unwelcome conduct of a sexual nature is a valid reason for dismissal, as confirmed by the FWC in *Pushik v Woolworths Group Limited [2025] FWC 3290*.

Right to work from home considered

> *"Bill seeks to enshrine a minimum right to request to work remotely up to two days per week*

In November 2025, the *Fair Work Amendment (Right to Work from Home) Bill 2025* was introduced into Parliament, proposing significant reforms to the flexible working arrangements framework under the FW Act. The Bill would establish a minimum right for employees to request to work from home for up to two days per week.

The Explanatory Memorandum states that the Bill seeks to "*enshrine a minimum right to request to work remotely up to two days per week available to all workers, while maintaining safeguards for employers where such arrangements are impractical or impossible due to the inherent requirements of the role*".

If passed in its current form, the Bill would materially expand the scope of flexible working arrangements under the FW Act by removing the existing eligibility criteria (such as pregnancy or caring responsibilities) and allowing all employees, regardless of personal circumstances, to request a change in working arrangements.

The Bill would also alter employer obligations when responding to requests. Rather than being required to genuinely try to reach agreement, employers would be required to genuinely engage with employees in relation to their requests.

Importantly, the Bill differentiates between the grounds on which requests may be refused. Requests to work from home for up to two days per week could only be refused where the arrangement would make the performance of the inherent requirements of the role impractical or impossible. Other requests may continue to be refused on reasonable business grounds.

The Bill has been referred to the Senate's Education and Employment Legislation Committee for inquiry, with a report due by the end of March. While there is every chance the Bill does not progress, its progress is likely to be closely watched, particularly in light of proposed work-from-home reforms currently under consideration in Victoria.