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HR Highlights Series.

**Implications of the Federal Court's
expansion of workplace delegate
rights**

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Why this matters now

A landmark Full Federal Court decision has expanded delegates' rights across every modern award, with retrospective effect — employers cannot afford to overlook this.

- The Fair Work Commission (FWC) inserted delegates' rights terms into all **155 modern awards** from 1 July 2024, following the **Closing Loopholes Act 2023** amendments.
- Three unions challenged the original award term as too narrow; the Full Federal Court agreed, finding it was inconsistent with the Fair Work Act.
- The FWC Full Bench varied all 155 modern awards in early 2026 to implement the Court's ruling — with **retrospective effect from 1 July 2024**.
- If your organisation is covered by a modern award or has bargained an enterprise agreement since 1 July 2024, **these changes apply to you now**.



At a glance: The Full Federal Court decision

The Full Federal Court found three jurisdictional errors in the FWC's original delegates' rights term, issuing writs of certiorari and mandamus to compel a revised term.

Case *CFMEU v Australian Industry Group [2025] FCAFC 187*

Decided 17 December 2025 — *Wheelahan, Jackson and Dowling JJ*

Error 1 Representational Scope

Original Term

Rights limited to employees of the *same employer* as the delegate

Court's Finding

Must adopt the statutory definition — covering all eligible employees working in the enterprise, including contractors and labour hire workers

Error 2 Communications Scope

Original Term

Communications confined to those made "*for the purpose of representing*" industrial interests

Court's Finding

Must extend to communications made "*in relation to*" industrial interests — a materially wider concept requiring no formal representational purpose

Error 3 Absolute Preconditions

Original Term

Exercise of rights subject to *absolute* compliance with all employee duties; any hindrance to normal work prohibited

Court's Finding

The hindrance restriction must be qualified — applicable only when exercising entitlements under the delegates' rights term, not as a blanket obligation



Outcome: Original award term set aside; FWC directed to re-draft in a manner consistent with section 350C of the Fair Work Act

Change 1 - Who delegates can represent

Delegates can now represent eligible employees across the entire enterprise, including contractors and labour hire workers — not just direct employees of their employer.



Before

Representational rights were confined to "**eligible employees employed by the same employer**" as the delegate — a narrow employer-by-employer restriction.



After

Directly adopts the statutory definition from **section 350C(1) of the Fair Work Act** — representation extends to **all eligible employees working in the enterprise**, regardless of which entity employs them.

Who Is an Eligible Employee?

Union members and persons **eligible to be union members** who work in the enterprise — including **employees of contractors and labour hire companies** on-site.

Practical Impact

A single delegate can now represent a **broader cohort** across an enterprise. Multi-employer worksites face **heightened delegate activity** — policies and access arrangements must reflect this expanded scope.

Change 2 - Scope of permitted communications

The communications entitlement is now broader: delegates may communicate with eligible employees about anything "in relation to" their industrial interests — not just when formally representing them.



Before

Purpose test applied

Communications were limited to those made **"for the purpose of representing"** the industrial interests of eligible employees — requiring a formal representational intent.

Effect on delegates

Delegates could only initiate or engage in conversations where a live dispute or formal representation context already existed. Informal or proactive discussions were outside the protected scope.



After

Wider relational test applies

Delegates may communicate **"in relation to"** industrial interests — a materially wider concept that does not require a representational purpose.

Proactive communications protected

Delegates can raise, discuss or canvass industrial matters with workers even without a live dispute or formal representation context.



Key distinction

"For the purpose of" requires intent to represent; "in relation to" requires only a connection to industrial interests — a substantially lower threshold.



Practical Impact

Increased scope for delegate-initiated conversations during working hours; employers must accommodate without obstruction.

Change 3 - Removal of absolute preconditions

Delegates' rights can no longer be blocked by blanket obligations to comply with all employee duties — the "hindrance" restriction is now qualified, not absolute.



Before

Absolute preconditions applied

Exercise of delegates' rights was subject to absolute preconditions — delegates had to comply with all duties and obligations as an employee, and were prohibited from hindering normal work in any way.



After

Obligation is now qualified

The obligation not to hinder normal work applies **only** when delegates are exercising entitlements under the delegates' rights term — not as a broad, all-encompassing precondition.



Key distinction

Delegates exercising their rights reasonably are not automatically in breach of their employment obligations, even if some disruption to workflow occurs.

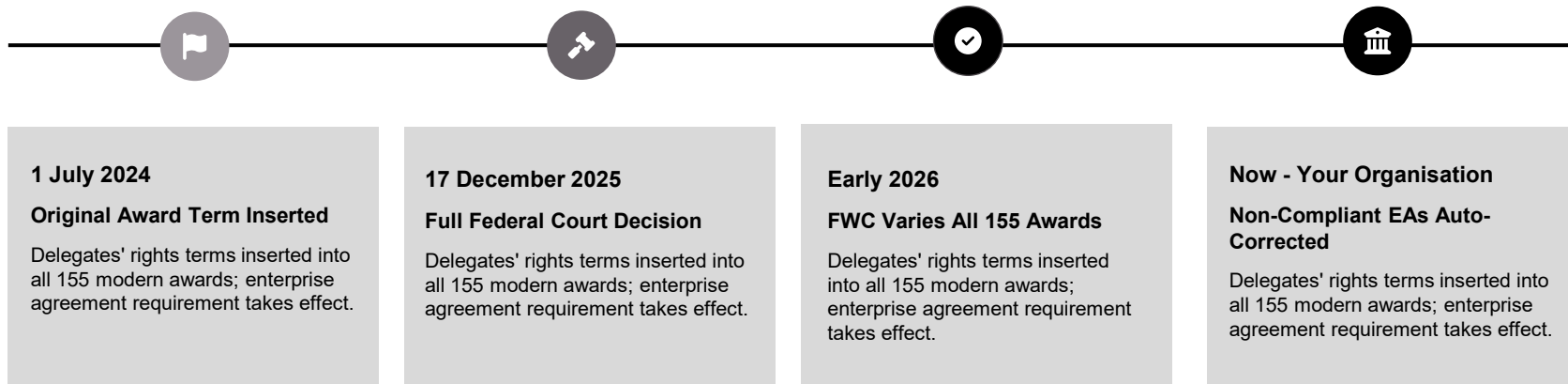


Practical Impact

Employers cannot discipline delegates simply for exercising delegates' rights in a way that disrupts workflow, unless the conduct is unreasonable.

Retrospective effect - Understanding the legal exposure

The revised terms operate from 1 July 2024, meaning any enterprise agreement approved since that date may already be non-compliant by operation of law.



Section 205A of the Fair Work Act

Enterprise agreements must include a delegates' rights term at least as favourable as the relevant modern award term. Where a non-compliant agreement was approved on or after 1 July 2024, the more favourable award term is automatically read into the agreement by operation of law.

Action steps: Employers covered by modern awards



Identify Your Coverage

Confirm which modern award(s) apply to your workforce. All 155 modern awards now carry the revised delegates' rights term.



Audit Workplace Policies

Review delegate-related policies, HR procedures and induction materials to ensure they reflect the broader representational scope, wider communications entitlement, and qualified (not absolute) hindrance restriction.



Train Supervisors & Line Managers

Ensure managers understand that restricting delegate communications to "representational" contexts, or disciplining delegates for minor workflow disruption, may expose the organisation to general protections claims.



Update Delegate Access Arrangements

Review any facility access or time-off arrangements for delegates to confirm they align with the revised award term.

Action steps: Employers bargaining enterprise agreements

Whether you are currently bargaining or have recently obtained approval, the revised award term sets the compliance floor - and the FWC can require undertakings to fix shortfalls.



1 Check Recently Approved Agreements

Review any enterprise agreement approved or lodged since 1 July 2024. If the delegates' rights clause is less favourable than the new award term, the award term is read in automatically.



3 Consider a "Most Favourable Term Applies" Clause

Building this into the agreement future-proofs against further award variations — automatically aligning the enterprise agreement with any subsequent strengthening of the award term.



2 Review Current Bargaining Positions

If currently bargaining, ensure your proposed delegates' rights clause meets or exceeds the new award standard — the three changes (representational scope, communications, preconditions) are the benchmark.



4 Be Prepared to Give Undertakings

Where the FWC identifies a shortfall at the approval stage, employers must be ready to provide undertakings to cure the non-compliance before the agreement can be approved.

Risk mitigation for non-compliant existing agreements

For agreements already in operation that are non-compliant, the law has already corrected itself but employers must still manage the operational and legal risk this creates.



Automatic Read-in

Where an enterprise agreement approved on or after 1 July 2024 contains a delegates' rights term less favourable than the revised award term, the more favourable award term is automatically incorporated by operation of section 205A of the Fair Work Act.



Conduct a Gap Analysis Now

Compare the existing agreement clause against the three-part test:

- Representational scope — does it cover all enterprise employees including contractors?
- Communications — does it say "in relation to" rather than "for the purpose of"?
- Preconditions — are they qualified rather than absolute?



Document Position

Record your gap analysis and the basis for any read-in provision. This will be critical evidence if a dispute or general protections claim arises.

Understand the difference between absolute obligations (requirement not to hinder) and the new obligation (only have to comply with obligation not to hinder work if they are being unreasonable in the exercise of the delegate rights)



Seek Legal Advice Before the Next Agreement

Do not replicate a non-compliant clause in a new or replacement agreement — this could prompt the FWC to refuse approval or require undertakings.



Consider Proactive Variation

Where an enterprise agreement approved on or after 1 July 2024 contains a delegates' rights term less favourable than the revised award term, the more favourable award term is automatically incorporated by operation of section 205A of the Fair Work Act.

Key takeaways and immediate priorities

The window for reactive compliance has passed - organisations that act now will reduce legal exposure and build more constructive delegate relationships.

1 Audit Now

Review all enterprise agreements approved since 1 July 2024 and all award-reliant policies for alignment with the revised delegates' rights term.

2 Brief Your People Managers

The most common compliance failure will be supervisors who restrict delegate activity based on the old, narrower understanding of the rules - targeted training is essential.

3 Align Your Bargaining Strategy

If bargaining is underway or imminent, the revised award term is your compliance floor - build from there rather than trying to negotiate around it.



The broader scope of delegate rights is now settled law - employers who engage constructively with delegates under the new framework will be better positioned than those who resist.

Speaking of expansion ...

Aldi Foods Pty Limited As General Partner Of Aldi Stores (A Limited Partnership) Trading AS Aldi Stores [2026] FWC 2

In the course of conducting a BOOT analysis of the proposed agreement, the Commission proposed to removed ALDI's clauses that allowed the company to set rosters without specific starting and finishing times.

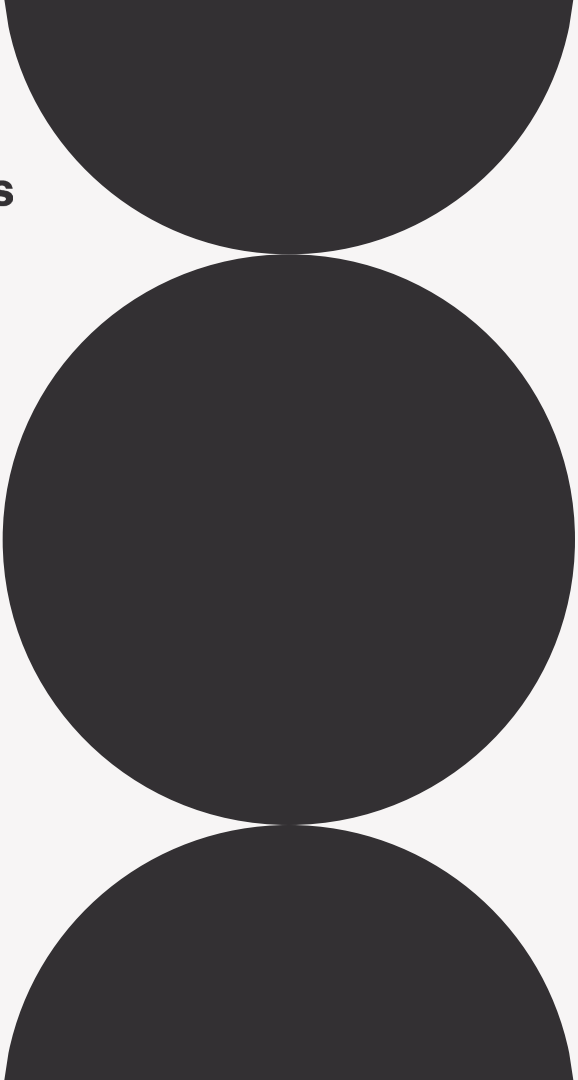
The Commission's alternative was to replace them with mandatory contract hours specifying the hours/days worked and set starting and finishing times, which can only be varied by written agreement.

The Act provides that if the Commission has a concern that an agreement does not meet the BOOT it may approve the agreement if satisfied that an amendment is necessary to address the concern. Section 191B provides that where the Commission specifies an amendment in approving the agreement the agreement is taken to be amended by the amendment

ALDI argued that FWC could not use its power under section 191A to determine the content of an agreement that had not been agreed to by the employer.

The Commission disagreed and inserted its preferred amendment.





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Questions

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**Colin
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Thank you.

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