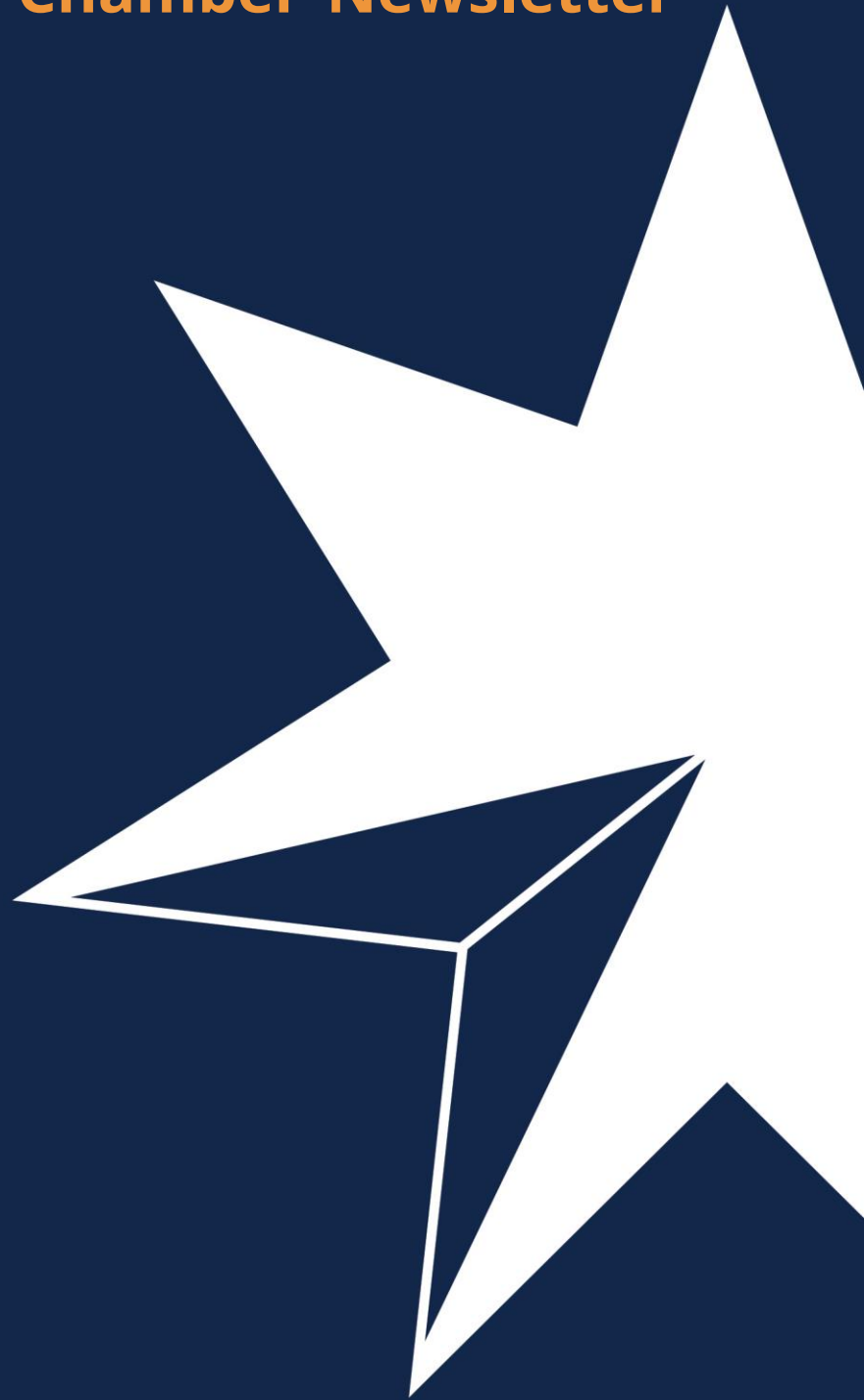


CCIWA Regional Chamber Newsletter

September 2024



Chamber of Commerce
and Industry WA
We stand for business

Workplace Delegate Rights

Natasha Marsala | *Employee Relations Adviser*

The FW Act has recently introduced new rights and protections for workplace delegates when carrying out their role and additionally the Fair Work Commission has inserted delegates' rights provisions into each modern award. A workplace delegate as defined in section 350C of the *Fair Work Act 2009* (Cth) (FW Act) is a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative for members of the organisation who work in a particular enterprise.

What are the rights?

The rights of a workplace delegate include:

- The right to represent the industrial interests of their members and eligible members, including in disputes with their employer
- Reasonable communication with members and eligible members in relation their industrial interests
- Entitlement to reasonable access to the workplace and workplace facilities.
- Reasonable access to paid time during normal working hours for the purposes of related training (except small business employers)

When determining what is reasonable, considerations will include the size and nature of the business, the resources of the employer and the facilities available at the enterprise.

Employers are obligated and legally required to engage with workplace delegates once they have been appointed. Employers are prohibited from:

- Unreasonably refusing or failing to deal with a workplace delegate
- Knowingly and recklessly making false or misleading representations to a workplace delegate
- Unreasonably hindering, obstructing or preventing the exercise of rights of a workplace delegate under the FW Act or other industrial instrument

In any dispute regarding workplace delegate rights, the onus will fall on the employer to prove that their conduct was not unreasonable. In the case of non-compliance, breaches of a civil penalty provision can include \$93,900 for corporations and \$18,780 for individuals. Additionally, if an employer is found to be in breach by taking adverse action against a person because they have exercised this workplace right, the compensation can be uncapped under a general protections claim.

Modern Awards and Enterprise Agreements

As of 1 July 2024 all modern awards have been updated to include workplace delegates' rights terms. Employers are required to review the modern awards that apply to their business, as the provisions outlined may contain more beneficial terms than what is

provided in the FW Act. Enterprise agreements that have been voted on prior to 1 July 2024 are not required to include terms relating to workplace delegates' rights, however the model clauses in the FW Act will still apply. If the enterprise Agreement is voted up on or after 1 July 2024, the enterprise agreement must include workplace delegates' rights terms.

Tips and considerations for employers

- Assess and review which provisions in the relevant industrial instruments apply to the business
- Implement a workplace policy to establish clear expectations for employees and management, including specifying the communication methods for delegates to interact with employees
- Educate all levels of management and staff to understand the role and rights of workplace delegates
- Review the current business processes and policies to ensure they acknowledge workplace delegates' rights and their role in representing employees
- Foster open communication with delegates and include them where nominated by an employee to represent in relevant process and dispute resolution

For further information on workplace delegates rights, call the Employee Relations Helpline at CCIWA on 08 9365 7660 or email advice@cciwa.com

Redundancy

Natasha Marsala | *Employee Relations Adviser*

In recent months, Australia has seen a notable increase in redundancies across various sectors. A genuine redundancy occurs when an employee's role in the organisation is no longer required to be done by anyone. It can occur because of organisational restructuring, downsizing, closure/ relocation of the business or increased technological advancements. Redundancy is a significant concern for both employers and employees, understanding the rights, processes and entitlements is crucial for both compliance and favourable outcomes for both employers and employees.

National System Employers

As outlined in section 389 of the *Fair Work Act 2009* (Cth) (FW Act), for a redundancy to be genuine, the following must be satisfied:

- The employer must no longer require the person's job to be performed by anyone, because of changes in the operational requirements of the enterprise; and
- The employer has complied with any obligations in the relevant industrial instrument that applies. This usually includes consultation with the employee about the potential redundancy.

In the event of claim, a dismissal will not be a case of genuine redundancy if:

- The employer still needs the employee's role to be done by someone else
- The employee is dismissed for misconduct and/or underperformance reasons
- The employer has not complied with relevant requirements under the relevant industrial instrument

When an employer is making a role redundant that is worked by multiple employees in the same area of the business, objective selection criteria must be used. When coming to a decision, this assessment should be based on the employee's ability and capacity to undertake the remaining role. Additionally, this should be documented and kept on record for future reference.

The Process

All awards and enterprise agreements specify a consultation process that must be followed in the event of a redundancy. Before commencing, employers should review the applicable industrial instrument to ensure the correct steps are taken. The general process includes:

1. Notify the employees who may be affected by the proposed changes.
2. Provide employees with the relevant information about the changes and the anticipated impacts and invite them to a formal consultation meeting where they can share their views.

3. Hold the formal consultation meeting with individual employees. An employee is entitled to bring and have a relevant representative or support present during these. Discuss with the employee concerned any ways to minimise the negative impacts on the employee and consider if there are any reasonable redeployment opportunities in the business. Employers should actively seek feedback in the consultation meeting about any alternative proposed suggestions to avoid potential redundancy (for example job sharing).
4. Employer to consider the employee responses and feedback, then make their final decision.
5. Conduct a final meeting with the employee to confirm the decision and undertake appropriate steps moving forward.
6. If more than 15 employees are being made redundant, then the employer must inform Services Australia and relevant trade unions as soon as practicable and prior to any terminations occurring.

If an employee does not accept a suitable alternative role in the business, then an employer may apply to the Fair Work Commission for a variation of the redundancy payment (if applicable). By not following the above steps, the employer may risk a successful unfair dismissal claim because they may not have met their obligations to go through procedural fairness before termination.

Redundancy payment

Under the National Employment Standards (NES), an employee is entitled to receive redundancy pay depending on their length of service and the size of the business. Additionally, all employees are entitled to receive their minimum notice period or payment in lieu of notice before termination. Where an employer has implemented a redundancy policy and process that is more beneficial than what is outlined in the NES or the relevant industrial instrument that applies to the employee, the policy will take precedence.

Exclusions

Employers are advised to follow best practices for terminations, even if the employee is not eligible to be paid a redundancy payment.

The following groups are excluded from receiving redundancy pay under the NES:

- Small business employers (where there are less than 15 employees employed)
- Employees with less than 12 months of continuous service with the business
- Employees hired for a specific period of time, task or season and the contract has come to its natural end
- Casual employees
- Employees to whom an industry specific redundancy scheme in a modern award or enterprise agreement applies
- Employees terminated for serious misconduct

- Apprentices and trainees when the training contract comes to its natural end
- Employees who have been indicated by a modern award that they are exempt

For further information on workplace delegates rights and redundancy, call the Employee Relations Advice Centre at CCIWA on 08 9365 7660 or email advice@cciwa.com

Helpful Resources

CCIWA's Redundancy – What are employers obligations information sheet provides more detailed information please see [Employee Relations Helpline - Information Sheets](#).

CCIWA has a helpful publication available for purchase that can support your business when undergoing significant workplace change. Find more information here [Significant Workplace Change Kit — CCIWA Guide](#)

To find out more information, call the Employee Relations Helpline at CCIWA on 08 9365 7660 or email advice@cciwa.com.