

# WORKPLACE DELEGATES

## Contents

Authority and Application .....	1
Overview .....	1
Relevant provisions of the Agreement .....	2
Other Relevant Provisions .....	2
Supplementary Guidance Information .....	2
1. Who is a Workplace Delegate? .....	2
2. Interaction with the <i>Fair Work Act 2009</i> and Award .....	2
3. Rights of Workplace Delegates – Interaction between Award and Agreement terms .....	2
4. Responsibilities of Workplace Delegates .....	4
5. Evidence requirements .....	5
6. Protections for Workplace Delegates .....	5
Making decisions under this policy .....	5
Dispute resolution .....	5
Further Information.....	6
Related policies or documents .....	6
Attachment A - Clause 27.A of Award – Workplace Delegates Rights.....	7

## Authority and Application

Clause 82 and 84 of the Victorian Public Service Enterprise Agreement 2024 (Agreement) apply to Victorian Public Service Departments and Agencies (Employers) and their Employees covered by the Agreement. These negotiated clauses outline a range of entitlements and rights which apply to Workplace Delegates.

However, changes to the *Fair Work Act 2009* (FW Act), which took effect after the conclusion of bargaining but prior to the Agreement being approved by the Fair Work Commission mean that clause 27A of *Victorian Public Service Award 2016* (Award) is taken to be a term of the Agreement and applies in addition to clause 82 & 84 of the Agreement to Employers and their Employees covered by the Agreement.

## Overview

Clause 27A of the Award provides for the exercise of the rights of Workplace Delegates. Delegates have the right to represent the industrial interests of union members and potential members as outlined in clause 27A of the Award. These rights include:

- the right to represent the industrial interests of eligible Employees,
- an entitlement to reasonable communication,
- an entitlement to reasonable access to the workplace and workplace facilities,
- entitlement to reasonable access to training.

While many of these rights complement existing rights enshrined in the Agreement, the rights enshrined in clause 27A of the Award apply in addition to any express rights provided for in other clauses of the Agreement. The policy explains how the Award and Agreement provisions are intended to interact.

## Relevant provisions of the Agreement

**Clause 82 – Industrial Relations Training**

**Clause 84 - Agreement Compliance and Union Related Matters**

## Other Relevant Provisions

**Clause 27.A. of the Award – Workplace Delegates Rights**

## Supplementary Guidance Information

### 1. Who is a Workplace Delegate?

1.1. Clause 2 of the Agreement defines a Workplace Delegate to be a person appointed or elected, in accordance with the rules of the Union, to be a delegate or representative (however described) for members of the organisation who work in a particular workplace.

### 2. Interaction with the *Fair Work Act 2009* and Award

2.1. Section 205A of the FW Act requires that an enterprise agreement must include a delegates' rights term for Workplace Delegates to whom the agreement applies.

2.2. Where the delegates rights clause is less favourable in an agreement as compared to the delegates rights term in the Modern Award, the term of the enterprise agreement has no effect.

2.3. In paragraph 3 of the Fair Work Commission decision approving the Agreement, Deputy President O'Neill, confirms that pursuant to s.205A(2) of the FW Act, the Workplace Delegates' rights term prescribed by the Award is taken to be a term of the Agreement. A copy of the term is provided at **Attachment A**.

2.4. While many of the rights prescribed in clause 27A of the Award complement existing rights enshrined in the Agreement, the rights enshrined in clause 27A of the Award apply in addition to any express rights provided for in other clauses of the enterprise agreement. Where both the Award and Agreement terms provide the same or similar right, the more beneficial term must be applied. The intended interaction between the Award and Agreement term is described in more detail in section 3 of this policy.

### 3. Rights of Workplace Delegates – Interaction between Award and Agreement terms

#### 3.1. Notifying the Employer of an Employee's status as a Workplace Delegate

3.1.1. Consistent with clause 27A.3 and 27A.4 of the Award, a Workplace Delegate will give the Employer written notice of their appointment, election or cessation as a Workplace Delegate. If requested, the Workplace Delegate must provide the Employer with evidence that would satisfy a reasonable person of their appointment or election.

### **3.2. Right of representation**

**3.2.1.** Clause 27A.5 of the Award provides that a Workplace Delegate may represent the industrial interests of eligible Employees who wish to be represented by the Workplace Delegate in matters including:

- consultation about major workplace change,
- consultation about changes to rosters or hours of work,
- resolution of disputes disciplinary procedures,
- enterprise bargaining where the Workplace Delegate has been appointed as a bargaining representative, or
- any process or procedure within the Agreement or policy of the Employer under which eligible Employees are entitled to be represented and which concerns their industrial interests.

**3.2.2.** The rights prescribed by clause 27A of the Award are reflective of existing representational rights already enshrined in the Agreement including:

- Consultation about major change – see clause 11.5 of the Agreement,
- Consultation about changes to rosters or hours of work – see clause 12.3 of the Agreement,
- Resolution of disputes – see clause 13.5 of the Agreement,
- Disciplinary Processes – see clause 27.5 of the Agreement,
- Enterprise Bargaining – Not relevant as the Agreement does not regulate enterprise agreement negotiations but the FW Act would apply, and
- Any other process which allows representation – see clauses 26.6 and 84.1(b) of the Agreement.

**3.2.3.** Given this Employers will be compliant with clause 27A of the Award by following the relevant provisions of the Agreement.

### **3.3. Entitlement to reasonable communication**

**3.3.1.** Employers will be compliant with clause 27A of the Award by following the relevant provisions of the Agreement.

**3.3.2.** A Workplace Delegate may communicate with eligible Employees for the purpose of representing their industrial interests. This includes discussing membership of the delegate's organisation and representation with eligible Employees. A Workplace Delegate may communicate with eligible Employees during working hours or work breaks, or before or after work.

**3.3.3.** Clause 84.4(c) and 84.4(d) of the Agreement provides Workplace Delegates to post written materials in the workplace and provides that Employees will be allowed reasonable access to electronic communications devices to facilitate communication with Employees provided that such communication is not offensive or improper.

**3.3.4.** Further clause 84.4(b) of the Agreement facilitates reasonable time release to perform representative functions.

### **3.4. Entitlement to reasonable access to the workplace and workplace facilities**

- 3.4.1.** The Agreement provides a broad general entitlement to 'reasonable access' to the workplace and facilities. The more specific list of facilities listed in the Award should be used by Employers as a list of the minimum expectations required to fulfil their obligations under clause 84.4(a) of the Agreement.
- 3.4.2.** Subject to the operational requirements of the Employer and the facilities available at a particular workplace, clause 27A.7 of the Award requires that the Employer must provide a Workplace Delegate with access to the following workplace facilities:
- a room or area to hold discussions that is fit for purpose, private and accessible by the Workplace Delegate and eligible Employees,
  - a physical or electronic noticeboard,
  - electronic means of communication ordinarily used in the workplace by the Employer to communicate with eligible Employees and by eligible Employees to communicate with each other, including access to Wi-Fi,
  - a lockable filing cabinet or other secure document storage area; and
  - office facilities and equipment including printers, scanners and photocopiers.
- 3.4.3.** In considering the operational requirements in this context, the Employer may have regard to the matters prescribed in clause 27A.7(b) of the Award.

### **3.5. Entitlement to reasonable access to training**

- 3.5.1.** The Agreement entitlement is more beneficial than the Award entitlement and complying with the Agreement provision will ensure compliance with the Award entitlement.
- 3.5.2.** Clause 82 of the Agreement provides that an Employee nominated by the Union as their representative in the workplace can access as a minimum five days per calendar year to attend training where the Employer is satisfied that the course of training is likely to contribute to a better understanding of industrial relations, occupational health and safety, safe work practices, knowledge of award and other industrial entitlements and the upgrading of Employee skills in all aspects of trade union functions. The Agreement provisions does not contain minimum notice and evidence requirements.
- 3.5.3.** Clause 27A.8 of the Award requires the Employer to provide a Workplace Delegate with access to up to 5 days of paid time during normal working hours for initial training and at least one day each subsequent year, to attend training related to representation of the industrial interests of eligible Employees.
- 3.5.4.** While the minimum notice and evidence requirements from the Award provision apply by virtue of the Award provision being read as a term of the Agreement, Employers should treat these requirements as a guide and continue to reasonably consider all request for access to training under clause 82 of the Agreement.

## **4. Responsibilities of Workplace Delegates**

- 4.1.** The FW Act requires that Workplace Delegates must fulfil their duties and obligations as a worker. This includes following reasonable policies and procedures such as:
- 4.1.1.** the code of conduct,
- 4.1.2.** workplace health and safety, and
- 4.1.3.** acceptable use of information communication technology (ICT) resources.

4.2. Workplace Delegates must not hold up or prevent:

4.2.1. the normal performance of work,

4.2.2. workers exercising their right to freedom of association.

## 5. Evidence requirements

5.1. As required by the FW Act, before seeking to exercise a right or entitlements under clause 27A of the Award, a Workplace Delegate must give the employer written notice of their appointment or election as a Workplace Delegate. If requested, the Workplace Delegate must provide the employer with evidence that would satisfy a reasonable person of their appointment or election.

5.2. An Employee who ceases to be a Workplace Delegate must give written notice to the employer within 14 days.

## 6. Protections for Workplace Delegates

6.1. Section 350A of the FW Act makes it clear that an Employer of a Workplace Delegate must not:

6.1.1. unreasonably fail or refuse to deal with the Workplace Delegate; or

6.1.2. knowingly or recklessly make a false or misleading representation to the Workplace Delegate; or

6.1.3. unreasonably hinder, obstruct or prevent the exercise of the rights of the Workplace Delegate under this Act or a fair work instrument (which includes the Award and Agreement).

6.2. Workplace Delegates rights are subject to the general protections regime outlined in the FW Act. This regime protects Workplace Delegates from a range of unlawful actions, including (but not limited to), adverse action, coercion or misrepresentation due to being a Workplace Delegate or for an Employee wishing to exercise their right to be represented.

6.3. Further clause 84.3 of the Agreement provides that an Employee shall not be dismissed or injured in their employment or have their employment altered to their prejudice, or be threatened with prejudicial or injurious treatment or with dismissal by reason of their status as an Workplace Delegate, engagement in lawful activities as a Workplace Delegate or on the basis of their membership of a Union or participation in lawful Union activities. Subject to operational requirements and relevant approvals (where required by the Agreement or Award provision) Employers should not unreasonably hinder Workplace Delegates fulfilling their representative functions.

### **Making decisions under this policy**

Under s.20(1) of the *Public Administration Act 2004*, the public service body head has all the rights, powers, authorities and duties of an Employer, which will usually be delegated to staff within their Department or Agency. Employers should ensure that any actions under this policy are only taken by an Employee with the delegation to do so. Each Department and Agency should give effect to this policy in accordance with its own delegations.

### **Dispute resolution**

An Employee who is directly affected by a decision made or action taken pursuant to clause 13 of the Agreement may apply for a review of actions under the Employer's review of actions policy or seek to resolve a dispute through the Resolution of Disputes procedure at clause 13 of the Agreement.

## Further Information

Employees should refer to their Department or Agency's intranet for information on procedural requirements, systems and approval delegations.

For further information and advice please contact your local Human Resources or People and Culture Unit (or equivalent).

## Related policies or documents

### Common Policies

- Clause 26 – Management of Unsatisfactory Work Performance
- Clause 27 – Management of Misconduct

All policies can be found at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>.

Authorised by Industrial Relations Victoria:

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If you print and store this document, you may be looking at an obsolete version. Always check the latest version of this document at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>.

## Attachment A - Clause 27.A of Award – Workplace Delegates Rights

### 27A. Workplace delegates' rights

**27A.1** Clause 27A provides for the exercise of the rights of workplace delegates set out in section 350C of the Act .

**NOTE:** Under section 350C(4) of the Act , the employer is taken to have afforded a workplace delegate the rights mentioned in section 350C(3) if the employer has complied with clause 27A.

**27A.2** In clause 27A:

- (a) employer means the employer of the workplace delegate;
- (b) delegate's organisation means the employee organisation in accordance with the rules of which the workplace delegate was appointed or elected; and
- (c) eligible employees means members and persons eligible to be members of the delegate's organisation who are employed by the employer in the enterprise.

**27A.3** Before exercising entitlements under clause 27A, a workplace delegate must give the employer written notice of their appointment or election as a workplace delegate. If requested, the workplace delegate must provide the employer with evidence that would satisfy a reasonable person of their appointment or election.

**27A.4** An employee who ceases to be a workplace delegate must give written notice to the employer within 14 days.

### 27A.5 Right of representation

A workplace delegate may represent the industrial interests of eligible employees who wish to be represented by the workplace delegate in matters including:

- (a) consultation about major workplace change;
- (b) consultation about changes to rosters or hours of work;
- (c) resolution of disputes;
- (d) disciplinary processes;
- (e) enterprise bargaining where the workplace delegate has been appointed as a bargaining representative under section 176 of the Act or is assisting the delegate's organisation with enterprise bargaining; and
- (f) any process or procedure within an award, enterprise agreement or policy of the employer under which eligible employees are entitled to be represented and which concerns their industrial interests.

### 27A.6 Entitlement to reasonable communication

(a) A workplace delegate may communicate with eligible employees for the purpose of representing their industrial interests under clause 27A.5. This includes discussing membership of the delegate's organisation and representation with eligible employees.

(b) A workplace delegate may communicate with eligible employees during working hours or work breaks, or before or after work.

## **27A.7 Entitlement to reasonable access to the workplace and workplace facilities**

**(a)** The employer must provide a workplace delegate with access to or use of the following workplace facilities:

- (i)** a room or area to hold discussions that is fit for purpose, private and accessible by the workplace delegate and eligible employees;
- (ii)** a physical or electronic noticeboard;
- (iii)** electronic means of communication ordinarily used in the workplace by the employer to communicate with eligible employees and by eligible employees to communicate with each other, including access to Wi-Fi;
- (iv)** a lockable filing cabinet or other secure document storage area; and
- (v)** office facilities and equipment including printers, scanners and photocopiers.

**(b)** The employer is not required to provide access to or use of a workplace facility under clause 27A.7(a) if:

- (i)** the workplace does not have the facility;
- (ii)** due to operational requirements, it is impractical to provide access to or use of the facility at the time or in the manner it is sought; or
- (iii)** the employer does not have access to the facility at the enterprise and is unable to obtain access after taking reasonable steps.

## **27A.8 Entitlement to reasonable access to training**

Unless the employer is a small business employer, the employer must provide a workplace delegate with access to up to 5 days of paid time during normal working hours for initial training and at least one day each subsequent year, to attend training related to representation of the industrial interests of eligible employees, subject to the following conditions:

**(a)** In each year commencing 1 July, the employer is not required to provide access to paid time for training to more than one workplace delegate per 50 eligible employees.

**(b)** The number of eligible employees will be determined on the day a delegate requests paid time to attend training, as the number of eligible employees who are:

- (i)** full-time or part-time employees; or
- (ii)** regular casual employees.

**(c)** Payment for a day of paid time during normal working hours is payment of the amount the workplace delegate would have been paid for the hours the workplace delegate would have been rostered or required to work on that day if the delegate had not been absent from work to attend the training.

**(d)** The workplace delegate must give the employer not less than 5 weeks' notice (unless the employer and delegate agree to a shorter period of notice) of the dates, subject matter, the daily start and finish times of the training, and the name of the training provider.

**(e)** If requested by the employer, the workplace delegate must provide the employer with an outline of the training content.



(f) The employer must advise the workplace delegate not less than 2 weeks from the day on which the training is scheduled to commence, whether the workplace delegate's access to paid time during normal working hours to attend the training has been approved. Such approval must not be unreasonably withheld.

(g) The workplace delegate must, within 7 days after the day on which the training ends, provide the employer with evidence that would satisfy a reasonable person of their attendance at the training.

#### **27A.9 Exercise of entitlements under clause 27A**

(a) A workplace delegate's entitlements under clause 27A are subject to the conditions that the workplace delegate must, when exercising those entitlements:

(i) comply with their duties and obligations as an employee;

(ii) comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources;

(iii) not hinder, obstruct or prevent the normal performance of work; and

(iv) not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.

(b) Clause 27A does not require the employer to provide a workplace delegate with access to electronic means of communication in a way that provides individual contact details for eligible employees.

(c) Clause 27A does not require an eligible employee to be represented by a workplace delegate without the employee's agreement.

**NOTE:** Under section 350A of the Act, the employer must not:

(a) unreasonably fail or refuse to deal with a workplace delegate; or

(b) knowingly or recklessly make a false or misleading representation to a workplace delegate; or

(c) unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate under the Act or clause 27A.

#### **27A.10 Interaction with other clauses of this award**

Other clauses of this award may give additional or more favourable entitlements to Workplace Delegates (however described). If an entitlement of a Workplace Delegate under another clause of this award is more favourable to the delegate than an entitlement under clause 27A, the entitlement under the other clause applies instead of the entitlement under clause 27A.