Fair Work Commission

Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

Name

(Please provide the name of the person lodging the submission)

Gerard Dwyer

Organisation

(If this submission is completed on behalf of an organisation or group of individuals, please provide details)

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Modern Award Review Stream:

Arts and Culture:	☐
Job Security:	☐
Work and Care:	☐
Usability of awards:	☒

AM 2023/21 Making awards easier to use

SDA supplementary information submission

15th March 2024

1. In the consultation for the Retail and Fast Food Awards on the 12th March 2024, there was discussion about the AHA claim to alter the overtime clause in GRIA This claim is located in the Commission document 'Retail and Fast Food summary of submissions' on Page 24, Reference 72

2. The SDA has been able to locate the recent history of the current provision. This provision was determined by a Full Bench of the FWC in October of 2018.[1]

3. This decision was part of the 2014 Award review process and arose from plain language drafting of common clauses and this decision dealt with the reasonable overtime provision.

4. In brief in 12 awards there was a debate about the form and type of clause that was appropriate regarding reasonable overtime. This included the GRIA and FFIA . It should be noted that the Hospitality Award was also one of the 12 Awards (and the AHA was involved in proceedings)

5. In summary the Full Bench was required to decide upon 2 alternatives that were supported by various parties (one option had no support).

6. The proposed alternative from the AHA in the current proceedings (Making awards easier to use stream) was considered by the Full Bench and was rejected in preference for the wording that is now in GRIA.

> **[18]** We have decided to adopt Option 1. While the Commission has generally not reproduced the terms of the NES in modern awards the circumstances here warrant a different approach. The model term provides employers with a right to require an employee to work reasonable overtime hours; that right is subject to the terms of s.62. Given these circumstances and the history of these terms it is appropriate to replicate the terms of s.62(3) in these modern awards. The adoption of this course will ensure that the employers and employees covered by these awards will not need to refer to another instrument to determine whether overtime hours are reasonable or unreasonable. Option 1 provides clarity and ensures that these modern awards are simple and easy to understand. Further, as submitted by the HIA, Option 1 will reduce complexity for small businesses.[2]

7. The other 11 awards also had the same provision inserted.

8. For ease of reference the SDA attaches the relevant decision.

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[1] [2018] FWCFB 6680
[2] IBID PN 18

DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – reasonable overtime
(AM2016/15)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT MELBOURNE, 29 OCTOBER 2018

4 yearly review of modern awards – plain language re-drafting – reasonable overtime.

Background

[1] During proceedings related to the plain language re-drafting of the *General Retail Industry Award 2010* (the Retail award) an issue arose regarding the interaction between the 'reasonable overtime' provisions in clause 29.1 of that award and s.62 of the *Fair Work Act 2009* (Cth) (the Act). Clause 29.1 provides as follows:

> '**29.1 Reasonable overtime**
>
> (a) Subject to clause 29.1(b) an employer may require an employee other than a casual to work reasonable overtime at overtime rates in accordance with the provisions of this clause.
>
> (b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
>
> (i) any risk to employee health and safety;
>
> (ii) the employee's personal circumstances including any family responsibilities;
>
> (iii) the needs of the workplace or enterprise;
>
> (iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and
>
> (v) any other relevant matter.'

[2] The Commission issued statements on 22 December 2017[1] and 28 February 2018[2] identifying an additional 11 awards that contained the same (or substantially the same) 'reasonable overtime' provisions as in the Retail award (see Attachment A).

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[1] [2017] FWCFB 6884.

[2] [2018] FWC 1244.

[3] The current reasonable overtime clauses are based on the model clause arising from the *July 2002 working hours case*,[3] which is as follows:

> '**1.1** Subject to clause 1.2 an employer may require an employee to work reasonable overtime at overtime rates.
>
> **1.2** An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
>
> **1.2.1** any risk to employee health and safety;
>
> **1.2.2** the employee's personal circumstances including any family responsibilities;
>
> **1.2.3** the needs of the workplace or enterprise;
>
> **1.2.4** the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and
>
> **1.2.5** any other relevant matter.'

[4] When determining the model clause a Full Bench of the Australian Industrial Relations Commission decided that the clause should:

- balance considerations of both employers and employees in determining whether additional hours are reasonable; and
- include a reference to the 'well-established' right of an employer to require an employee to work reasonable overtime.[4]

[5] *The July 2002 working hours case* was determined under a different legislative regime. Maximum weekly hours are now dealt with in s.62 of the Act, as follows:

> **'62 Maximum weekly hours**
>
> *Maximum weekly hours of work*
>
> (1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
>
> (a) for a full-time employee – 38 hours; or
>
> (b) for an employee who is not a full-time employee – the lesser of:
>
> (i) 38 hours; and

[3] *Re Working Hours Case July 2002* (2002) 114 IR 390 at 394.

[4] *Re Working Hours Case July 2002* (2002) 114 IR 390 at 430 and 394.

(ii) the employee's ordinary hours of work in a week.

Employee may refuse to work unreasonable additional hours

(2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.

Determining whether additional hours are reasonable

(3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:

(a) any risk to employee health and safety from working the additional hours;

(b) the employee's personal circumstances, including family responsibilities;

(c) the needs of the workplace or enterprise in which the employee is employed;

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;

(j) any other relevant matter.

…'

[6] The Commission expressed a *provisional*[5] view that the reasonable overtime provisions in the awards listed at Attachment A be deleted and a note in the following terms be inserted:

'NOTE: Under the NES (see section 62 of the Act) an employee may refuse to work additional hours if they are unreasonable. Section 62 sets out factors to be taken into account in determining whether the additional hours are reasonable or unreasonable.'[6]

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[5] [2018] FWCFB 6884 at [7]

[6] [2017] FWCFB 344 at [205]-[209], [2017] FWCFB 3337 at [3].

[7] Interested parties were invited to make submissions in relation to our *provisional* view. In subsequent submissions the Employer groups opposed the removal of sub-clause (a) of the existing clauses on the basis that this would remove the employer right to require an employee to work reasonable overtime and would result in a substantive change in award conditions for employers. They supported the deletion of sub-clause (b) on the basis that it replicates the NES entitlement. Ai Group proposed that the following clause and note be inserted into the overtime clauses of the awards listed in Attachment A:

> '**XX.** Subject to section 62 of the Act, an employer may require an employee to work reasonable overtime at overtime rates.
>
> NOTE: Under section 62 of the Act an employee may refuse to work additional hours if they are unreasonable. Section 62 sets out factors to be taken into account in determining whether the additional hours are reasonable or unreasonable.'[7]

[8] The AMWU and CFMMEU opposed the deletion of sub-clause (b) on the basis that additional 'employer friendly' factors that appear in the NES but not sub-clause (b) would result in more weight being given to employer friendly factors when determining the reasonableness of additional hours under the NES than there currently would be under the award. They also submitted that sub-clause (a) should be deleted because it has the practical effect of displacing the NES and would result in an imbalance of rights in favour of the employer as employees would be unlikely to know that they could refuse to work unreasonable additional hours.

[9] In a decision published on 17 September 2018[8] (the September 2018 decision) we *provisionally* determined the issue arising from the interaction between the reasonable overtime clauses at Attachment A and s.62 of the Act. In that decision we rejected the clause and accompanying note proposed by Ai Group on the basis that it did not provide a '*fair* and relevant minimum safety net' within the meaning of the modern awards objective; in short, the proposed clause lacked the requisite balance.

[10] Nor were we attracted to the retention of sub-clause (b) in its current form – it refers only *some* of the s.62(3) considerations and its retention is apt to confuse. The AMWU's proposal was no better as it simply sought to excise what it characterised as 'employer friendly' factors.

[11] We concluded that there was a need to formulate a term which makes explicit *both* the employers right to require an employee to work reasonable overtime and an employee's right to refuse to work unreasonable additional hours. In our view a clause in the following terms satisfied that need:

> **x. Reasonable overtime – model term**
>
> x.1 Subject to s.62 of the Act and this clause, an employer may require an employee - other than a casual - to work reasonable overtime hours at overtime rates.
>
> x.2 An employee may refuse to work overtime hours if they are unreasonable.

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[7] Ai Group Submission – 22 February 2018 at paragraph [6]; Ai Group Submission – 9 March 2018.

[8] [2018] FWCFB 5749

x.3 ***Options 1, 2 or 3***

[12] Options 1, 2 and 3 are set out at Attachment B. Interested parties were invited to comment on whether option 1, 2 or 3 should be included in the model term.

[13] Submissions were received from:

- Australian Industry Group (Ai Group);
- Australian Business Industrial and NSW Business Chamber (ABI);
- Australian Hotels Association (AHA);
- Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU);
- Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU);
- Electrical Trades Union of Australia (ETUA);
- Health Services Union (HSU);
- Housing Industry Association (HIA);
- National Retail Association (NRA);
- The Pharmacy Guild of Australia (PGA);
- Shop, Distributive and Allied Employees' Association (SDA); and
- United Voice.

[14] A summary of the submissions received was published on 18 October 2018 and a short oral hearing was held on 23 October 2018 to finalise the issue.

[15] United Voice, ETUA, AMWU, HIA, HSU, SDA and CFMMEU submitted Option 1 should be adopted. ABI, AHA, Ai Group, PGA and NRA submitted Option 3 should be adopted. No party supported the adoption of Option 2.

[16] The submissions in support of Option 1 may be summarised as follows:

- it has the benefit of clarity and removes the need to refer to another instrument, the need to refer to another instrument to determine whether overtime hours are reasonable or unreasonable 'provides added complexities for small businesses';[9] and

[9] AHA submission 2 October 2018 at para 2.2.1

- the need for overtime to be worked can arise at short notice and may require quick access to the applicable laws: 'inclusion of the factors in an express term in the modern award means it will be a single step process thereby minimising delays'.[10]

[17] Those opposing Option 1 (and supporting Option 3) submit that:

- Option 1 replicates the factors listed in s.62(3) and has the effect of 'entrenching a legislative standard in the modern awards system' and 'this is neither necessary (in the sense contemplated by s.138 of the Act) nor appropriate';[11]

- in the event that s.62(3) was amended 'then the provisions of the modern awards affected would no longer be harmonious with the provisions of the Act';[12]

- Option 3 has the benefit of brevity and ensures that the relevant awards are simple and easy to understand, while it may require a reader of the award to refer to another instrument 'that is not an uncommon feature of the modern awards system' and 'is an inevitable feature of the scheme of the Act and the modern awards system'.[13]

[18] We have decided to adopt Option 1. While the Commission has generally not reproduced the terms of the NES in modern awards the circumstances here warrant a different approach. The model term provides employers with a right to require an employee to work reasonable overtime hours; that right is subject to the terms of s.62. Given these circumstances and the history of these terms it is appropriate to replicate the terms of s.62(3) in these modern awards. The adoption of this course will ensure that the employers and employees covered by these awards will not need to refer to another instrument to determine whether overtime hours are reasonable or unreasonable. Option 1 provides clarity and ensures that these modern awards are simple and easy to understand. Further, as submitted by the HIA, Option 1 will reduce complexity for small businesses.

[19] We accept that s.62(3) may be subject to amendment, but that provides no impediment to the adoption of Option 1. In the event of legislative amendment it will be a simple matter to vary the terms of the relevant awards to reflect any such amendment.

[20] In the event we decide to adopt Option 1, it was generally agreed that the reference to 'an averaging arrangement agreed to by the employer and employee under s.64' be deleted from clause X.3(i) of the model term and that an additional paragraph, clause X.3(j) 'any other relevant matter', be added to the model term. We agree with the proposed changes and will amend the model term accordingly. The revised model term is as follows:

x. Reasonable overtime – model term

x.1 Subject to s.62 of the Act and this clause, an employer may require an employee - other than a casual - to work reasonable overtime hours at overtime rates.

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[10] HSU submission 2 October 2018 at para 5

[11] Ai Group submission 2 October 2018 at para 2

[12] NRA submission 20 September 2018 page 3

[13] Ai Group submission 2 October 2018 at para 2(c)

x.2 An employee may refuse to work overtime hours if they are unreasonable.

x.3 In determining whether overtime hours are reasonable or unreasonable for the purpose of this clause the following must be taken into account:

(a) any risk to employee health and safety from working the additional hours;

(b) the employee's personal circumstances, including family responsibilities;

(c) the needs of the workplace or enterprise in which the employee is employed;

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) whether the additional hours are in accordance with averaging terms in this award inserted pursuant to section 63 of the Act, that applies to the employee; and

(j) any other relevant matter.

[21] Further, in its submission the NRA drew our attention to the fact that the words 'other than a casual' in clause X.1 of the model term are not a feature of the current term in the *Retail Award*; the *Fast Food Industry Award 2010* or the *Hair And Beauty Industry Award 2010*. These awards were varied by the Part-time and Casuals Full Bench[14] to remove the words 'other than a casual' from the reasonable overtime term. These variations came into effect on 1 January 2018.

[22] We propose to issue draft variation determinations in respect to *all* the awards in Attachment A, in the same terms as the revised model term. The issues raised by the NRA can be addressed in the settlement of the relevant variations. We note that a similar issue is said to arise in the *Hospitality Industry Award 2010*. 'Tailoring' may also be required in relation to the reference to 'averaging terms' in clause X.3(i).

[23] We would observe that the extension of the reasonable overtime term to casuals requires further consideration. It appears that the matter was not the subject of any real debate

[14] [2017] FWCFB 3541

in the Part-time and Casuals proceedings and that the variations made by that Full Bench were simply consequent upon the decision to provide that casuals were to be paid overtime rates in certain circumstances. It seems to us that this issue is one of some complexity. The capacity for an employer to *require* a causal to work reasonable overtime seems inimicable to the nature of casual employment. There is also a question about whether s.62 applies to casual employees. These issues can be further explored in the settlement of the variation determinations in respect of the relevant awards.

[24] In the September 2018 decision we said that, subject to the finalisation of clause X.3, it was our *provisional* view that the variation of the awards in Attachment A to insert the model term to replace the existing reasonable overtime provisions is *necessary* to achieve the modern awards objective. In reaching that view we took into account the considerations in s.134(1)(a) to (h). The matters in s.134(1)(a), (b), (c), (d), (e) and (h) are not relevant to the variation of these awards to insert the model term. We also indicated that the variation was consistent with s.134(1)(da), insofar as it refers to the working of additional hours at overtime rates. As to s.134(1)(f), we accepted that such a variation will give rise to some, albeit not significant, increase in regulatory burden. As to s.134(1)(g) we were of the view that the variation of these awards in the manner proposed will make them simpler and easier to understand by providing greater consistency between the award term and the NES. We adhere to these *provisional* views.

[25] Draft variation determinations will now be published. Our *provisional* view will only be displaced in respect of any particular award if it is demonstrated that there are matters or circumstances particular to that award which compel the conclusion that the achievement of the modern award objective for that award does not necessitate the variation of the award to insert the model term. One such matter may be the interaction between the model term and other provisions in that award.

PRESIDENT

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Appearances:

L Hogg for Australian Business Lawyers, Australian Business Industrial and the New South Wales Business Chamber.

P Ryan for the Australian Hotels Association.

R Bhatt for the Australian Industry Group.

M Nguyen for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU).

A Ambihaipahar for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

L Regan for the Housing Industry Association.

Z Blandfort for The Pharmacy Guild of Australia.

N Dabarera for United Voice.

Hearing details:

2018.

Brisbane, Sydney, Melbourne, Canberra (video hearing).

23 October.

ATTACHMENT A

Building and Construction General On-site Award 2010, cl 36.1;

Cleaning Services Award 2010, cl 28.1;

Electrical, Electronic and Communications Contracting Award 2010, cl 26.1;

Fast Food Industry Award 2010, cl 26.4;

General Retail Industry Award 2010, cl 29.1;

Graphic Arts, Printing and Publishing Award 2010, cl 33.1;

Hair and Beauty Industry Award 2010, cl 31.1;

Hospitality Industry (General) Award 2010, cl 33.1

Joinery and Building Trades Award 2010, cl 30.1;

Manufacturing and Associated Industries and Occupations Award 2010, cl 40.2;

Pharmacy Industry Award 2010, note at cl 26;

Timber Industry Award 2010, cl 30.11.

ATTACHMENT B—Options for model term clause X.3

Option 1

X.3 In determining whether overtime hours are reasonable or unreasonable for the purpose of this clause the following must be taken into account:

(a) any risk to employee health and safety from working the additional hours;

(b) the employee's personal circumstances, including family responsibilities;

(c) the needs of the workplace or enterprise in which the employee is employed;

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64.

Option 2

X.3 In determining whether overtime hours are reasonable or unreasonable for the purpose of this clause the factors set out in s.62(3) of the Act are to be taken into account.

NOTE: The factors in s.62(3) are:

(a) any risk to employee health and safety from working the additional hours;

(b) the employee's personal circumstances, including family responsibilities;

(c) the needs of the workplace or enterprise in which the employee is employed;

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64.

(j) any other relevant matter.

Option 3

X.3 In determining whether overtime hours are reasonable or unreasonable for the purpose of this clause the factors set out in s.62(3) of the Act are to be taken into account.