

IN THE FAIR WORK COMMISSION

Matter No.: AM2020/103

ACTU, AWU, SDA, UWU POSITION

Overview

1. The ACTU and its affiliates are not presently seeking to advance a case for changes to be made to the relevant awards. The onus for making changes should rest with the party seeking those changes. The ACTU and affiliates seek that sufficient time be allowed for any proposals to be scrutinised.
2. The ACTU and its affiliates submit that the broad changes being contemplated to matters such as loaded rates, exemption rates and classification structures should not be made unless they are necessary, supported by evidence and, accord with the overarching provisions of the Fair Work Act 2009 (Cth.).
3. The changes being contemplated are significant and may leave workers worse off. This must be avoided. Where a specific proposed change is put forward, the ACTU and its affiliates will give consideration to the proposal, however we will oppose changes where their effects cannot be predicted or where those effects:
 - a. Reduce workers' remuneration or entitlements;
 - b. Require workers to work greater or more anti-social hours or otherwise reduce the work/life balance of workers;
 - c. Have disparate effects within a workplace, such as the reallocation of hours, or the loss of opportunities for some workers.
 - d. Comparatively disadvantage cohorts of workers, such as young workers or women; or,
 - e. Otherwise leave workers worse off or erode the existing safety net in any way.
4. The context in which this matter arises is one where employer non-compliance with wage and entitlement obligations in the retail and hospitality industries is rife. A further source of employer non-compliance occurs through failures to comply with associated provisions, such as record-keeping. A rigorous process is required to ensure that all proposals are adequately scrutinised and do not potentially entrench, promote or otherwise enable wage theft.
5. Flexibility should not be taken to be synonymous with cost-reduction. Flexibility can be achieved without reducing workers' take-home pay and other entitlements. Similarly,

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reduction of working conditions is not the objective of this process. No worker should be worse off as a result of changes that flow from this process.

6. Registered Unions must be enabled to play a central role in ensuring compliance with any adopted and implemented proposal.
7. In addition to making out the threshold case for change, employers and their representatives must also be required make out their arguments in relation to any proposal which they make.
8. In light of: the significant risks employees will face; the potential for inadequate safeguards; and, the potential for proposals to leave workers worse off; there should be a high bar set in relation to the case for making any changes.
9. What follows are the procedural requirements that the Unions propose for this matter. Further substantive principles will need to be developed in response to tangible proposals which are made. These considerations are put without prejudice as to any position which might be taken in relation to any particular proposal, or to the threshold case for change being made out at all.

Process

10. Any proposal to vary an award as part of this matter should be made by way of application and accompanied by draft orders. Proposals should be accompanied by submissions, which outline the legal and industrial case for change as well as the evidence in support of those submissions.
11. The exercise should be evidence-based. No changes should be made unless they are supported and justified by evidence of:
 - a. The reasons that the change is necessary;
 - b. The extent to which the change will address the reasons put forward in support of it;
 - c. The effect that the change will have on current and prospective workers, including calculations and modelling.
12. Choice and opting-in must be considered independently of safeguards, compliance and whether workers are better off under any proposal. Arrangements which have the potential to undermine the existing safety net should not be permissible, even if they are voluntary.
13. The timelines should allow for the ACTU and their affiliated unions to engage with and receive feedback from their members and workplace leaders in order to respond to proposals that are made, as well as to inform workers of their current rights and how any proposal may alter them. Employers should facilitate this.
14. If any change is made, the FWC must have the power to deal with and arbitrate any dispute arising from the adoption of loaded or exemption rates, or in relation to classification, including whether any process or substantive requirements have been met.