

# **IN THE FAIR WORK COMMISSION**

**Matter No.: AM2014/300**

***Fair Work Act 2009***

**Section 156 - 4 yearly review of modern awards**

**Award Flexibility**

**Social, Community, Home Care and Disability Services Industry Award 2010**

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| Lodged by:           | ASU   |
| Address for service: | Ground Floor, 116 Queensberry Street, Carlton South, VIC 3053 |
| Contact Person:      | Michael Rizzo   |
| Tel:                 | 03 9342 3400  |
| Email:               | <a href="mailto:mrizzo@asu.asn.au">mrizzo@asu.asn.au</a>      |

## IN THE FAIR WORK COMMISSION

Matter No.: AM2014/300

### Award Flexibility

#### ASU SUBMISSIONS ON THE MODEL TERM

1. This submission is filed in accordance with the Directions made by the Full Bench on 6 October 2015.
2. The ASU wishes to make supplementary submissions in relation to the wording of the model term as it applies to the *Social, Community, Home Care and Disability Services Industry Award 2010*.
3. Clause 28.2 of the SCHADS Award currently provides,

*By mutual agreement, a full-time or a part-time employee may be compensated by way of time off instead of payment of overtime (time for time) on the following basis:*

*(a) Time off instead of payment for overtime must be taken at ordinary rates within three months of it being accrued.*

*(b) Where it is not possible for an employee to take the time off, instead of payment for overtime, within the three month period, it is to be paid out at the appropriate overtime rate based on the rates of pay applying at the time payment is made.*

*(c) An employee cannot be compelled to take time off instead of overtime."*

4. If time off in lieu of overtime is not taken within a three month period, it is paid out at overtime rates **based on the rates of pay applying at the time payment is made.**
5. If rates of pay have increased during the three month period, this provision provides a benefit to employees and an incentive to employers to ensure that time off in lieu of overtime is facilitated in a timely fashion.
6. The ASU submits that this benefit to employees and incentive to employers should be maintained if the SCHADS Award is varied to include the model clause.
7. In order to ensure that the benefits of Clause 28.2 of the SCHADS Award are maintained for employees covered by that Award it is submitted that the model term should be varied as follows:

## 28.2 Time off in lieu of payment for overtime

(a) An employee may elect with the consent of the employer to take time off in lieu of payment for overtime at a time or times agreed with the employer, in accordance with clause 28.2

(b) The following requirements apply to time off in lieu of payment for overtime:

(i) A separate written agreement must be made by the employee and employer for each occasion on which overtime that has been worked is to be taken as time off in lieu. Each such agreement must be retained as an employee record and must:

(a) state when the employee started and ceased working the overtime hours;

(b) state that the employee and employer agree that the employee may take time off in lieu of payment for the overtime; and

(c) include a note in the following terms:

If requested by the employee at any time, the employer must pay the employee for any accrued entitlement to take time off in lieu of payment for overtime which the employee has not yet used. Payment must be made at the overtime rate applying to the overtime worked and must be made in the next pay period following the request.

(ii) Overtime taken as time off during ordinary time hours shall be taken at the ordinary time rate; that is, an hour for each overtime hour worked.

(iii) The time to be taken off in lieu of overtime must be agreed between the employee and employer and must be taken within six months of the overtime being worked. Otherwise, payment for the overtime must be made to the employee at over time rates applying at the time payment is made in the next pay period after that six month period.

(iv) Notwithstanding any other provision of clause 28.2 (b), if requested by an employee at any time, the employer must pay the employee for any accrued entitlement to take time off in lieu of payment for overtime which the employee has not yet used. Payment must be made at the overtime rate applying to the overtime worked and must be made in the next pay period following the request for payment.

(v) If, upon termination of employment, an employee has an accrued entitlement to take time off in lieu of payment for overtime which the employee has not yet used, the employee

must be paid for the overtime at the overtime rate applying at the time payment is made. ~~to the overtime worked.~~

- (c) An employee who is entitled to request a change in working arrangements under section 65 of the Fair Work Act 2009 may make a request under that section for time off in lieu of payment for overtime at a time or times specified in the request or at a time or times to be subsequently agreed with the employer. Clause 28.2 will apply to such time off in lieu. Pursuant to section 65 (5) of the Fair Work Act 2009, the employer may refuse such a request only on reasonable business grounds.
- (d) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off in lieu of payment for overtime.

Note: Under s.345 of the Fair Work Act 2009, a person must not knowingly or recklessly make a false or misleading representation about an employee's workplace rights under clause 28.2.