CFMEU
CONSTRUCTION

IN THE FAIR WORK COMMISSION
Matter Number: AM2016/15

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

4 yearly review of modern awards – plain language re-drafting – reasonable overtime model term
(AM2016/15)

SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) ON THE DRAFT DETERMINATIONS

28th November 2018

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Introduction

1. The Fair Work Commission (the Commission) is currently undertaking a 4 yearly review of modern awards (the Review) as required by s.156 of the *Fair Work Act 2009* (the FW Act). On the 16th November 2018 the Full Bench issued a Statement and Directions ([2018] FWCFB 7006) regarding the reasonable overtime model term and draft determinations for the 12 awards identified in Attachment A to the Decision issued on 29th October 2018 ([2018] FWCFB 6680). The Statement referred to paragraph [25] of the Decision and the foreshadowed position that any tailoring of award specific clauses would be addressed after the publication of draft determinations.[1]

2. The 12 awards, for which draft determinations were published on the Commission's website, included the following awards which the CFMMEU (Construction and General Division) (CFMMEU C&G) has an interest in:

   - *Building and Construction General On-site Award 2010*
   - *Joinery and Building Trades Award 2010*
   - *Manufacturing and Associated Industries and Occupations Award 2010*

3. The CFMMEU C&G has identified an issue in regard to the draft determinations for the three awards referred to above, and submits that the clauses proposed to be inserted into the awards should be varied for the reasons set out in this submission below.

4. The Statement included directions that any party proposing a variation to the draft determination should file submissions by 4.00pm on Wednesday 28th November 2018. This submission is made in accordance with those directions.

CFMMEU C&G Proposed Variation

5. The variation proposed by the CFMMEU C&G to the draft determinations is common to all three awards. The variation is to delete the words "other than a casual" from paragraph (a) in each clause so that it would then read:

   > (a) Subject to s.62 of the Act and this clause, an employer may require an employee to work reasonable overtime hours at overtime rates.

6. The issue of the inclusion of the words "other than a casual" was a matter identified by the Full Bench in the 29th October 2018 Decision ([2018] FWCFB 6680), as one that could be

[1] [2018] FWCFB 7006 at paragraphs [2] and [3]

addressed in the settlement of the relevant variations.[2] The Full Bench also observed that the extension of the reasonable overtime term to casuals required further consideration and that there was also a question about whether s.62 of the *Fair Work Act 2009* (the Act) applies to casual employees.[3]

7. During the hearing of the matter on 23rd October 2018 the President, Justice Ross, expressed the following view,

> *"How I was proposing to deal with that issue is this, if an award presently contains the words, "other than a casual" then we'd keep them. That is the model term X.1 would be adopted. In relation to Retail, Hair and Beauty and Fast Food, we would delete the words "other than a casual" because they have been removed by another decision."* (PN6 of transcript)

8. The CFMMEU C&G submits that the current reasonable overtime clauses in the *Building and Construction General On-site Award 2010* (clause 36.1), *Joinery and Building Trades Award 2010* (clause 30.1), and *Manufacturing and Associated Industries and Occupations Award 2010* (clause 40.2) do not include the words "other than a casual". Therefore the current provisions under these awards apply to all employees including casuals. Consistent with the view expressed by the President the words "other than a casual" should therefore not be included in the reasonable overtime clauses for these three awards.

9. It should also be noted that both the *Building and Construction General On-site Award 2010* (clause 14.6), *Joinery and Building Trades Award 2010* (clause 12.6) contain specific penalty rates for casuals required to work overtime.

10. A further reason why the words should not be included is s.62 of the Act which provides 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:

[2] [2018] FWCFB 6680 at paragraph [21]
[3] Ibid at paragraph [23]

(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

(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.

Authorised leave or absence treated as hours worked

(4) For the purposes of subsection (1), the hours an employee works in a week are taken to include any hours of leave, or absence, whether paid or unpaid, that the employee takes in the week and that are authorised:

(a) by the employee's employer; or

(b) by or under a term or condition of the employee's employment; or

(c) by or under a law of the Commonwealth, a State or a Territory, or an instrument in force under such a law.

11. There is no exclusion in the Act to say that s.62 does not apply to casuals, therefore on its plain reading it applies to casuals. This is consistent with other provisions of the NES where casuals are either specifically excluded or have specific provisions which apply to them (e.g. s.65(2)(a) and (b), s.67(1) and (2), s.86, s.95, and s.106), or casuals are not excluded (e.g. s.102, s.104, and s.108).

12. Including the words "other than a casual" would in effect seek to exclude casuals from the benefits of s.62(2). This is not permissible, as s.55 of the Act specifically provides that a modern award must not exclude the NES or any provision of the NES. The words "other than a casual" should therefore be deleted.