

# 4 YEARLY REVIEW OF MODERN AWARDS

**Submission**

Plain Language Re-drafting

Reasonable Overtime

(AM2016/15)

6 March 18



# PLAIN LANGUAGE RE-DRAFTING – REASONABLE OVERTIME (AM2016/15)

## 1. INTRODUCTION

1. Master Electricians Australia (MEA) is a trade association representing electrical contractors, recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. MEA currently has a membership base of approximately 3000 electrical contractors in Australia. MEA understands the current and potential issues facing electrical contractors today.
2. This submission is made in response to the Commission's Statement<sup>1</sup> regarding the removal of the reasonable overtime clauses that replicates s.62 of the NES. MEA opposes the removal of the clause 26.2 from the Electrical, Electronic and Communications Contracting Award 2010 that allows employers to direct employees to work reasonable overtime.

## 2. RETAINING THE PROVISION

3. MEA supports the submissions of AI Group of the 22 February 2018.
4. Retaining the provision that communicates to employees an employer may direct employees to work reasonable overtime in the Electrical Modern Award is crucial in maintaining the rights of the employer; particularly in an industry that relies heavily on attendance to emergency call outs, to make an electrical installations safe for the public, or to allow for the continuation of a business's machinery. For example, in mining or manufacturing operations that operate 24 hours a day. We say that the removal of the provision / wording affects the ability of the employer to be able to require employees to work overtime as section 62 of the *Fair Work Act* does not communicate in our industry the importance of employers requirement to have overtime completed.
5. MEA agrees that the sub section that pertains to refusal to work unreasonable hours is duplication of the National Employment Standards (NES) and may be removed from the award for the sake of brevity, however we submit this will cause employers and employees not to fully understand their rights and cause confusion, therefore we support it remaining.
6. By way of background; on 23 July 2002 the Australian Industrial Relations Commission handed down its decision in relation to the ACTU's reasonable hours application which sought to entitle an employer to require an employee to work reasonable overtime at overtime rates, and entitling an employee to refuse to work overtime in certain circumstances. The Commission decided it was appropriate to award a "test case

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<sup>1</sup> [2017] FWCFB 6884.

standard”, this provision was inserted into federal awards at the time. The decided provision follows:

“1.1 Subject to clause 1.2 an employer may require an employee to work reasonable overtime at overtime rates.

7. This decision confirmed a longstanding right of employers, through award terms, to require employees to work reasonable overtime and is currently used in the Electrical, Electronic and Communications Contracting Award 2010. The Commission noted the need to balance the circumstances of the employer with the needs of the employee. The removal of this provision from awards goes against the previous decision of the Commission to balance the circumstances of the employee and employer.
8. The ability of the employer to direct workers to undertake reasonable overtime has been a long relied on historical right of employers. If it is removed, the industry may see a rise in the number of employers using casual employees and labour hire companies to combat the flexible working demands of the industry including night and weekend work. Casualisation in the electrical industry will have a severe negative impact given the volatile skills availability and long lead time of apprentices. Our workforce is very transient and mobile, and employers may have great difficulty sourcing relevant qualified and experienced workers to meet the needs of customers and therefore rely on their current workers filling the variable additional hours that present in a short period of time.
9. In addition, the Electrical Contracting award presently has shift provisions which are highly restrictive. The definition of a continuous shift worker means an employee regularly engaged to work in a system of consecutive shifts throughout the 24 hours of each of at least five consecutive days without interruption and who is regularly rostered to work those shifts.

Under clause 24.10 it states that shift work can only be done subject to the following conditions:

- (i) A shift consist of not more than eight hours, inclusive of crib time. Provided that by mutual agreement between the employer and an employee or majority of employees concerned, a shift can consist of up to 12 hours;
- (ii) Except at the regular change over of shifts an employee must not be required to work more than one shift in each 24 hours;
- (iii) 20 minutes must be allowed to continuous shiftworkers each shift for crib which must be counted as time worked; and
- (iv) An employee must not be required to work for more than five hours without a break for a meal.

10. This further highlights the electrical contracting industries need to ensure that an employer can require reasonable and additional overtime, should the Commission see fit to remove the overtime requirement it must in our view be accompanied by a relaxation in the shift work provisions.
11. Provisions giving employers the right to require employees to work a reasonable amount of overtime are common in awards, enterprise agreements and contracts of employment. In the case of *BHP Coal v CFMEU*<sup>2</sup> the Federal Court established the employer's workplace right to direct employees to work reasonable overtime.
12. BHP Coal argued that in maintaining an overtime policy on site in contradiction to the enterprise agreement in place that the CFMEU had taken adverse action against the company. Breaching s417 of the Fair Work Act by engaging in industrial action. Justice Collier confirmed BHP Coal's entitlement to require overtime was clearly a workplace right under s341(1)(a).
13. The prevailing principal of this decision being that employees refusing to do reasonable overtime was found to be a form of industrial action. The current section of the electrical contracting award demonstrates the industries propensity / commonality of overtime and its reliance on it. Removing this wording and relying on section 62 of the Act where the propensity / commonality is not as prevalent, we submit, lessens the employers ability to direct an employee to work additional overtime. Removal of the provision in the electrical industry we believe will lead to increased disputation and affect sections such as section 417 of the Fair Work Act
14. Award provisions which demonstrate the industries propensity / commonality of overtime and the industry's reliance on it have been common in federal and state awards over many years The clauses in the state awards requiring employees to work reasonable overtime are set out below:

The QLD *Electrical Contracting Industry Award - State 2003*<sup>3</sup> contained provisions for what was considered unreasonable overtime, giving employees an opportunity to refuse the request:

*6.2.6 Systematic overtime shall not be worked; it shall be considered such when 3 continuous weeks' overtime has been worked:*

*Provided that clause 6.2.6 shall not apply when extra labour is not available forthwith.*

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<sup>2</sup> BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FCA 1291 (2 December 2013)

<sup>3</sup> Electrical Contracting Industry Award - State 2003 Reprint of Award - 10 December 2009

<<http://www.qirc.qld.gov.au>>

6.2.7 *The assignment of overtime by an employer to an employee shall be based on specific work requirements and the practices of "one in, all in" overtime shall not apply.*

*The Electrical Contracting Industry (SA) Award* also contributes to the longstanding provision outlining:

6.3.5 *An employer may require an employee to work reasonable overtime at overtime rates and such employees shall work overtime in accordance with such requirements.*

*Electrical Contracting Industry (WA) Award R 22 of 1978*

12 (2) (f) (i) *An employer may require any employee to work reasonable overtime at overtime rates, and such employee shall work overtime in accordance with such requirement.*

15. A unintended consequence of the removal of the directions to do overtime can be seen in Western Australia (WA). WA is a state where there is a significant number of employers covered by State Legislation and thus the State Award. By removing the wording that demonstrates the industries propensity / commonality that overtime and its reliance on it is a requirement in the National Award, we are creating a situation whereby more uncertainty is brought into the industrial relations system. Again, we believe leading to more disputation.
16. A significant section of our industry, across the country, work as contractors for electrical retailers and distribution network providers. In periods of adverse weather conditions employers need to be able to direct reasonable overtime where it is safe to do so. All companies in these situations have safe work method statements and safety systems in place to manage weather conditions but a removal of a clear requirement to direct reasonable overtime may effect services or restoration of services.
17. The National Employment Standards are a minimum of standards that cannot be displaced, however MEA submits that the electrical contracting overtime clause as it currently stands, does not displace those minimums. MEA believes that the award clarifies for the employees in that industry that Overtime is a feature which may be required and directed by the employer, subject to the NES requirements. Given the features of the industry including impediments such as mobility of labour, variable skill demand/shortages and the emergent nature of the industry, our submission to remove this clause and rely on section 62 of the Act will introduce disputation confusion and complexity into the industry that currently does not exist.



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