From: Kate Thomson [mailto:Kate.Thomson@Ablawyers.com.au]
Sent: Tuesday, 20 March 2018 4:33 PM
To: Chambers - Ross J
Cc: AMOD
Subject: AM2016/15 Plain Language Redrafting [ABLAW-ImanageDocs.FID153201]

Dear Associate

AM2016/15 Plain Language Re-drafting – Reasonable Overtime

We refer to the above and confirm we act on behalf of ABI and the NSW Business Chamber.

Attached by way of filing on behalf of our clients are further submissions in this matter.

We acknowledge these submissions are delayed and sincerely apologise for the delay in the provision of this document.

If you require further information please do not hesitate to let me know.

Yours sincerely

Kate Thomson
Associate
Australian Business Lawyers & Advisors

Suite 402, Level 4
Watt Street, Commercial Centre
Corner King and Watt Streets Newcastle NSW 2300
Tel: +612 4989 1003 | Mob: 0447 189 469 | Fax: +612 9954 5029
Web: www.ablawyers.com.au | LinkedIn

AUSTRALIAN BUSINESS
Lawyers & Advisors

Experts make things simple

20 March 2018
Our Ref: 20160583
Your Ref: AM2016/15

ABN 76 008 556 595

Suite 402, Level 4,
Watt Street Commercial Centre,
Corner King and Watt Streets,
NEWCASTLE NSW 2300

PO Box 481
Newcastle NSW 2300
DX 7858, Newcastle

t: 1300 565 846
f: +61 2 9954 5029
ablawyers.com.au

BY EMAIL amod@fwc.gov.au

The Associate to Justice I Ross AO
Fair Work Commission
Level 4, 11 Exhibition Street
MELBOURNE VIC 3000

Dear Associate

AM2016/15 - PLAIN LANGUAGE - REASONABLE OVERTIME

1.1 We act on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in respect of the above proceedings.

1.2 In accordance with the Statements issued on 22 December 2017 and 28 February 2018, below are our submissions in reply to other parties in respect of the removal of 'reasonable overtime' clauses in the following Awards:

(a) *Building and Construction General On-site Award 2010;*

(b) *Cleaning Services Award 2010;*

(c) *Electrical, Electronic and Communications Contracting Award 2010;*

(d) *Fast Food Industry Award 2010;*

(e) *General Retail Industry Award 2010* (**Retail Award**)*;*

(f) *Graphic Arts, Printing and Publishing Award 2010;*

(g) *Hair and Beauty Industry Award 2010;*

(h) *Hospitality Industry (General) Award 2010* (**Hospitality Award**)*;*

(i) *Joinery and Building Trades Award 2010;*

(j) *Manufacturing and Associated Industries and Occupations Award 2010; and*

(k) *Timber Industry Award 2010*

2. THE PROVISIONAL VIEW

2.1 The provisional view of the Full Bench in respect of these clauses is as follows:

[7] We have a provisional view to insert the note at para [3] of this Statement in all modern awards with clauses in the same terms as the Pharmacy Industry Award 2010 and to remove the reasonable overtime clauses that replicate s.62 of the NES in those awards as part of the plain language review in 2018.

2.2 The 'Note' referred to by the Full Bench is as follows:

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.

2.3 For illustrative purposes the Full Bench extracted clause 29.1 of the Retail Award in its Statement of 28 February 2018, which 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.*

2.4 For the avoidance of doubt, our clients confirm that they do not oppose the removal of the second part of this clause (29.1(b)) and its replacement with a 'Note' in the form decided by the Pharmacy Industry Award Full Bench. In the alternative, our clients also do not oppose the wording proposed by the Australian Industry Group (**AiG**) as outlined below at 3.1. This part of the clause is merely illustrative and does no more than assist parties in understanding the factors which pertain to reasonableness.

2.5 However, our clients do oppose the removal of the first part of the clause, which is the operative component permitting an employer to require an employee to work reasonable overtime. This is a long-standing feature of some Awards which is not reflected in the *Fair Work Act 2009* (Cth) (**FW Act**). Accordingly, its removal from the Awards in which it is currently found would represent a substantive change of the kind which is not intended to result from the plain language drafting project.

3. SUBMISSIONS IN REPLY

3.1 Our clients support the proposed wording for a new clause (including the 'Note') outlined by the AiG in its amended submission dated 1 March 2018, and its submissions dated 22 February 2018 and 9 March 2018 (the latter of which relates specifically to the Hospitality Award). The proposal is as follows:

> *'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.*

3.2 Our clients support the submission of Master Electricians Australia dated 6 March 2018.

3.3 Our clients do not support the submission of United Voice dated 9 March 2018, which relates specifically to the Hospitality Award 2010.

4. AMWU SUBMISSIONS

4.1 Our clients disagree with certain assertions made by the AWMU in its Submission dated 16 March 2018.

4.2 At [12] of its Submission, the AMWU asserts that the clause and Note proposed by AiG would have a practical effect which would be to '*seemingly exclude the NES entitlement'.*

4.3 Our clients do not agree with this assertion. The current clause 29.1(a) extracted above already has the effect of permitting an employer to require an employee to work reasonable overtime, subject to the other provisions of the clause. As already outlined, the other provisions of the clause are essentially a re-statement of factors found at section 62(3).

4.4 We acknowledge that the inclusion of 'Notes' in Modern Awards has been the subject of contention throughout the review process. However, if it is considered necessary to point the user of an Award to a provision of the Act (as is the case here), then a 'Note' rather than a clause is a preferable mechanism. This is so long as the Note does not act as *'a summary of, or operate as a link to, the NES*',[1] as indicated by the Pharmacy Award Full Bench.

4.5 The AMWU submission appears to be based on an erroneous belief that the AiG proposal (or any other similar formulation which retains the operative part of the clause) would extend the rights of employers (see [38] of its Submission). With respect, our clients consider this assertion to be misconceived. The clause in its current form already permits an employer to 'require' an employee to work overtime, so long as this does not fall foul of section 62. The issue here is not about any extension of the employer's prerogative, but rather ensuring that the plain language re-drafting project (and any resultant amendments to other awards) does not have the unintended consequence of altering or removing an existing entitlement.

4.6 If you have any questions, please contact Kate Thomson on (02) 4989 1003.

[1] [2017] FWCFB 344 at [207]

Yours sincerely

Luis Izzo
Director
Australian Business Lawyers & Advisors
(02) 9458 7640
luis.izzo@ablawyers.com.au

Kate Thomson
Lawyer
Australian Business Lawyers & Advisors
(02) 4989 1003
kate.thomson@ablawyers.com.au