

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain language re-drafting
Take-Home Pay Order
(AM2016/15)

06 November 2018

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/8 – PAYMENT OF WAGES

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**). It is issued in response to the invitation made by President Justice Ross in [2018] FWC 5810 (**the Statement**) inviting parties, at [11] to make submissions regarding the following take-home pay provision (**take-home pay clause**) contained in the standard Title and Commencement clause:

Neither the making of this award nor the operation of any transitional arrangements is intended to result in a reduction in the take-home pay of employees covered by the award. On application by or on behalf of an employee who suffers a reduction in take-home pay as a result of the making of this award or the operation of any transitional arrangements, the Fair Work Commission may make any order it considers appropriate to remedy the situation.

2. This submission addresses the following issues:
 - Whether there is a power to retain the take home pay clause in modern awards and if so, the relevant source of that power; and
 - If there is such a power, should the Commission exercise the discretion to retain the provision.
3. The Statement directed parties to file submissions by 6 November 2018. In short, Ai Group's position in relation to such matter is as follows:
 - There is no power under the *Fair Work Act 2009* (**FW Act**) to retain the provisions.
 - The only *potential* source of power for the inclusion in the award arises from regulation 3B.04(2) of the *Fair Work Transitional Provisions and Consequential Amendments) Regulations* which introduced into the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* a provision enabling awards to include terms providing Fair Work Australia with power to make orders remedying a reduction in an

employee's take-home pay. However, there is a potential tension between the retention of an award term pursuant to this provision and the operation of sections 136, 137 and 138 of the FW Act. In this regard we are particularly concerned that, in the current context, the continued retention of what was intended to be a transitional provision would be inconsistent with the operation s.138.

- It is ultimately unnecessary to determine whether there is a power to retain the provision as the Commission should not exercise its discretion to retain the clause. In support of this contention we argue that:
 - such provisions are unwarranted given the removal of relevant transitional arrangements from modern awards that originally justified their inclusion;
 - the provisions likely have little, if any, utility given the effluxion of time since the establishment of modern awards; and
 - the provisions are not *necessary* in the sense contemplated by s.138, having regard to the considerations identified in s.134 and the fact that the provisions would operate to maintain over-award entitlements beyond those otherwise provided for in the award derived element of the safety net.

2. WHETHER THERE IS A POWER TO RETAIN THE TAKE HOME PAY CLAUSE IN MODERN AWARDS

4. The take-home pay clauses found in clause 2 of each modern award were originally inserted in the course of the award modernisation process governed by the provisions contained in Part 10A of the *Workplace Relations Act 1996* (Cth) (**WR Act**) and the request made by the Minister for Employment and Workplace Relations under s 576C of the WR Act.

5. The matters which the WR Act enabled a modern award to deal with were defined in far broader terms than are contained in the equivalent provisions in Part 2-3 of the FW Act. Section 576J(2) of the WR Act provided:

576J Matters that may be dealt with by modern awards

General

- (1) A modern award may include terms about any of the following matters:

...

Other matters

- (2) A modern award may also include terms about any other matter specified in the award modernisation request to which the modern award relates.

6. The Minister's request for the Australian Industrial Relations Commission (**AIRC**) to undertake award modernisation envisaged the inclusion of transitional arrangements in modern awards at [12]:

The Commission may include transitional arrangements in modern awards to ensure the Commission complies with the objects and principles of award modernisation set out in this award modernisation request.

7. Retention of the take-home pay clause on the basis of the power of the AIRC to include clauses about matters specified in the award modernisation request would be anachronous and would arguably conflict with the provisions contained in Part 2-3 of the FW Act which govern the content of modern awards.
8. Exposure drafts released toward the end of 2014 originally removed the take-home pay clause. Ai Group supported the removal of this clause and in a supplementary submission made to the Commission on 13 November 2014 for the Group 1 Exposure Drafts, Ai Group made the followings observations:

14. The take home pay order clause was inserted in all modern awards by the Australian Industrial Relations Commission (AIRC) during the award modernisation process. In its decision regarding transitional provisions to be included in Priority and Stage 2 awards,¹ the Full Bench made the intention behind the clause clear:

¹ *Award Modernisation* [2009] AIRCFB 800

“[20] We deal next with the possibility of reductions in take-home pay. The provisions of Part 3 of Schedule 5 to the Transitional Act are concerned with the maintenance of take-home pay. They deal with what happens when an employee suffers a reduction in take-home pay as a result of a modern award coming into operation. It is to be implied that the provisions do not apply to employees who commence employment after the modern award has come into operation. So while the provisions are concerned with what happens when the modern award comes into operation, they do not deal with the potential for reductions in take-home pay resulting from the operation of the transitional provisions. As will be seen, the model provisions permit a phased reduction in pre-modern award conditions if they were more beneficial for employees than the modern award. For that reason we think it is important to provide protection for new employees from reductions in take-home pay which otherwise might result from the operation of the transitional provisions. The model provision specifies that neither the making of the award nor the operation of the transitional provisions is intended to result in a reduction in take-home pay. It also indicates that Fair Work Australia may make an order to remedy a reduction in take-home pay. This provision will complement the power to make take-home pay orders in item 9 of Schedule 5 to the Transitional Act. The model provision reads:

“Neither the making of this award nor the operation of any transitional provision is intended to result in a reduction in the take-home pay of employees covered by the award. On application by or on behalf of an employee who suffers a reduction in take-home pay as a result of the making of this award or the operation of any transitional provision, Fair Work Australia may make any order it considers appropriate to remedy the situation.”²

15. It is self-evident from the above passage that the Full Bench inserted the take-home pay clause into modern awards because the take home pay provisions in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* did not apply to:
 - employees who commenced employment after modern awards came into operation on 1 January 2010;
 - reductions in take home pay resulting from the operation of the transitional provisions in modern awards.
16. On 31 December 2014 the clause will have no work to do because the transitional provisions in awards will have come to an end, and the clause will be obsolete.

² *Award Modernisation* [2009] AIRCFB 800.

17. It is consistent with the modern awards objective to delete obsolete clauses to ensure that awards are simple and easy to understand (s.134(1)(g)). The removal of obsolete clauses is necessary to achieve the modern awards objective (s.138).
18. Given that the take home pay order clause will have achieved the purpose for which it was drafted on 31 December 2014, it should be deleted from each award with effect from 1 January 2015.
19. ...
20. ...Take home pay orders were designed to prevent an employee suffering a reduction in take-home pay as a result of a modern award coming into operation. In 2009, the AIRC decided to extend the concept that was in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* to new employees and to cover transitional provisions. The extension was for a specific short-term purpose. That purpose expires on 31 December 2014.
21. The source of the Commission’s power to insert an award provision providing for the making of a take home pay order is not in the FW Act. Significantly:
 - The Commission’s award-making powers concern the maintenance of a “minimum safety net of terms and conditions” (s.134(1)) and the effect of a take home pay order is typically to require the maintenance of payments which are above the safety net.
 - Award provisions giving the Commission the power to make a take home pay order are not matters that may be included in modern awards (see Subdivision B of Division 3 of Part 2-3);
 - Award provisions giving the Commission the power to make a take home pay order are not matters that must be included in a modern award (see Subdivision C of Division 3 of Part 2-3); and
 - Section 136 prohibits awards including terms unless they are terms that may be, or must be, included in modern awards.
22. The Commission’s power to insert a provision into an award giving it the power to make take home pay orders is found in Regulation 3B.04 ... of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*. This Regulation was made through the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* and amended through the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 3)*.
23. It can be seen that this Regulation, in particular paragraph 13A(1), provides a discretionary power to the Commission to:

“...include terms that give FWA power to make an order (a **take-home pay order**) remedying a reduction in take-home pay suffered by an employee or outworker, or a class of employees or

outworkers, as a result of the making of a modern award or the operation of any transitional arrangements in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay).” (Regulation 3B.04 13A(1))

24. The Explanatory Statement for the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* ... provides the following explanation about Regulation 3B.04:

“Regulation 3B.04 modifies Schedule 5 of the Act to ensure that modern awards can contain provisions which confer power on FWA to make take-home pay orders.

The AIRC, as part of the award modernisation process, included transitional provisions in modern awards allowing FWA to make take-home pay orders. The award take-home pay provisions allow FWA to make orders to remedy reductions in an employee’s take-home pay caused by the making of the modern award or the operation of transitional arrangements in the award.

The Government is concerned to ensure that it is not open to argue that the take-home pay provisions in modern awards are invalid because, as a statutory body, FWA only has the powers conferred on it by statute (not by the terms of an award). The protection afforded by such provisions in modern awards assists in ensuring that the award modernisation process does not result in the take-home pay of employees being reduced. Consequently, the Government considers it desirable that there be no doubt about the validity of such provisions in modern awards. This regulation removes any such doubt.

New item 13A is intended to allow modern awards to include terms protecting the take-home pay of a broader class of employees than the take-home pay provisions in Part 3 of Schedule 5 to the Act. Modern awards include provisions allowing new employees (i.e. those employed after the commencement of the modern award) to obtain a take-home pay order with respect to reductions in take-home pay that occur as a result of the transitional arrangements in the award (a reference to the phasing in of differences between the pay rates in pre-modernised awards and modern awards). This is different to the take-home pay provisions in Part 3 of Schedule 5 which require the employee to be employed in the same position as the position he or she was employed in immediately before the modern award came into operation (see item 8(3)(b) of Schedule 5 to the Act). The validation of these provisions in modern awards furthers the commitment made by the Government that the award modernisation process not reduce the take-home pay of employees.”

25. It can be seen from the above that the then Minister made the Regulation for the purpose of validating a transitional provision that the AIRC had inserted into awards for a specific purpose and for a limited and defined period of time. The then Minister clearly did not make the Regulation to create sweeping new, ongoing rights for employees and unions under awards.
 26. The Regulation was made under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, which highlights the intended transitional nature of the Commission's powers and award provisions which result from the exercise of those powers.
 27. ...
 28. It is not appropriate, necessary or consistent with the modern awards objective to give take home pay orders an ongoing role in the award system. To do so would be inconsistent with Parliament's intention. If Parliament had intended that take home pay orders have an ongoing role, take home pay order provisions would have been inserted in Part 2-3 of the FW Act.
 29. Accordingly, the take home pay order clause should be deleted from modern awards with effect from 1 January 2015."
9. In its Decision issued on 23 December 2014, the Fair Work Commission (**FWC**) decided to retain the take-home pay clause with the intention that it be removed in the course of the next modern award review.³ This Decision did not address the fundamental point in these proceedings concerning the power of the Commission to retain the clause. The Decision made to retain the take-home pay clause followed submissions from the ACTU that the orders authorised by the award provision are not restricted to 'modernisation-related' reductions in take-home pay.⁴
10. The concerns expressed by the ACTU regarding the continued relevance of the take-home pay clause may rest on a mistaken interpretation of the scope available to the FWC to make an order pursuant to a take-home pay clause in a modern award. As explained above, the take-home pay clauses are arguably underpinned by Reg 3B.04 of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Cth) (**TPCA Regulations**) which inserted Item 13A (reproduced below):

³ [2014] FWCFB 9412. [16].

⁴ Further submissions of the ACTU: Stage 1 Exposure Drafts, 31 October 2014, item 6.

13A Modern award terms giving FWA power to make take-home pay orders

(1) A modern award may include terms that give FWA power to make an order (a take-home pay order) remedying a reduction in take-home pay suffered by an employee or outworker, or a class of employees or outworkers, as a result of the making of a modern award or the operation of any transitional arrangements in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay).

11. Reg. 3B.05 of the TPCA Regulations inserts item 8A(4) into the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**TPCA Act**) as follows:

- (4) An employee suffers a **modernisation-related reduction in take-home pay** if:
- (a) FWA made an order varying a modern award; and
 - (b) the modern award:
 - (i) starts to apply to the employee when the award comes into operation; or
 - (ii) starts to apply to the employee when the order varying the award comes into operation; and
 - (c) the employee is employed in the same position as (or a position that is comparable to) the position he or she was employed in immediately before the modern award came into operation; and
 - (d) the amount of the employee's take-home pay for working particular hours, or for a particular quantity of work, after the order varying the modern award comes into operation is less than what would have been the employee's take-home pay for those hours, or that quantity of work, immediately before the award came into operation; and
 - (e) the reduction in the employee's take-home pay is attributable to the order varying the modern award.

12. As was made clear in the *Explanatory Statement for the Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010* (No. 1), Reg. 3B.04 was inserted to enable Fair Work Australia to insert clauses into modern awards allowing new employees (i.e. those employed after the commencement of the modern award) to obtain a take-home pay order with respect to reductions in take-home pay that occurred as a result of the introduction of a modern award or the transitional arrangements in the award

(a reference to the phasing-in of differences between the pay rates in pre-modernised awards and modern awards). The regulation was not inserted to enable clauses to be inserted in modern awards giving a power to the FWC to make take-home pay orders to prevent loss of pay resulting from any transitional arrangement.

13. The scope for a take-home pay order made pursuant to a modern award, whilst broader than that for an order made under either the FW Act or the TCPA Act, is confined to responding to reductions in take-home pay incurred by employees as a result of the award modernisation process.
14. The limitations on the availability of take-home pay orders made under a modern award were clarified by the Full Bench of the FWC in the *Penalty Rates – Transitional Arrangements Decision*⁵ (also reproduced in the Statement) as follows:

[100] Item 13A of the TPCA Act and the take-home pay order clauses in modern awards are limited to reductions in take-home pay suffered by employees as a result of the award modernisation process, including as a result of any transitional arrangements phasing in differences between the pay rates in pre-modernised awards and modern awards. Item 13A was inserted to address both the inclusion of take-home pay order terms in modern awards, and their scope, which expands the class of employees eligible to seek a take-home pay order to include employees employed after the commencement of modern awards (who are not eligible for a take-home pay order under Part 3, item 9 of Schedule 5 to the TPCA Act).

[101] Any reductions in take-home pay arising from the Penalty Rates decision will not be attributable to the award modernisation process or any residual issues arising from that process, but, rather, will result from the variation of specified modern awards as part of the 4 yearly review of modern awards. It follows that take-home pay orders are not available to mitigate the impact of the proposed reduction in Sunday (or public holiday) penalty rates.

15. The FWC's status as a statutory body allows it only those powers which are conferred on it by the legislature⁶ or which are necessary and incidental to the exercise of its jurisdiction and powers.⁷ The 'take-home pay clause' was

⁵ [2017] FWCFB 3001, [100]-[101].

⁶ For example, *MacMahon Contractors Pty Limited v CFMEU* [2005] AIRC 1011, [14] (Giudice J, Lawler VP, Raffaelli C); *Church v Eastern Health* [2014] FWCFB 810, [16] (Ross J, Hatcher VP, Wilson C).

⁷ *Sabanayagam v St George Bank Limited* [2016] NSWCA 145, [123] (Sackville AJA).

originally inserted for a transitional purpose relating to the introduction of the modern awards and associated transitional arrangements. The award modernisation process was finalised in 2010. The transitional arrangements arising out of the award modernisation process ceased to apply from 31 December 2014. No orders can be made pursuant to the take-home pay clause in each modern award which may reasonably be considered necessary to further the original transitional purpose associated with addressing reductions in pay flowing from the phasing-in of the difference between pay rates in pre-modernised awards and modern awards.

16. The plain language re-draft of the modern awards is taking place in the context of the 4-yearly modern award review. The capacity of the FWC to exercise its modern awards powers in this context is limited by s 138 of the FW Act:

138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

17. The terms which may or must be included in a modern award are set out in section 136 of the FW Act. Section 136(1)(a) points to subdivision B of Division 3 of Part 2-3 as setting out the terms which may be included in a modern award. Section 139 which falls within Subdivision B, outlines the general categories of terms which may be included:

- (1) A modern award may include terms about any of the following matters:
 - (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:
 - (i) skill-based classifications and career structures; and
 - (ii) incentive-based payments, piece rates and bonuses;
 - (b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;

- (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
- (d) overtime rates;
- (e) penalty rates, including for any of the following:
 - (i) employees working unsocial, irregular or unpredictable hours;
 - (ii) employees working on weekends or public holidays;
 - (iii) shift workers;
- (f) annualised wage arrangements that:
 - (i) have regard to the patterns of work in an occupation, industry or enterprise; and
 - (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
 - (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;
- (g) allowances, including for any of the following:
 - (i) expenses incurred in the course of employment;
 - (ii) responsibilities or skills that are not taken into account in rates of pay;
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
- (h) leave, leave loadings and arrangements for taking leave;
- (i) superannuation;
- (j) procedures for consultation, representation and dispute settlement.

(2) Any allowance included in a modern award must be separately and clearly identified in the award.

18. As outlined above, the take-home pay clause deals with reductions in take-home pay incurred by employees as a result of the award modernisation process. It is not “about” any of the matters referred to in 139(1).
19. Incidental and machinery terms in modern awards are provided for in section 142 of the FW Act:

142 Incidental and machinery terms

Incidental terms

- (1) A modern award may include terms that are:
 - (a) incidental to a term that is permitted or required to be in the modern award; and
 - (b) essential for the purpose of making a particular term operate in a practical way.

Machinery terms

- (2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

20. The take-home pay provision it is not 'incidental to' a term permitted or required by s.136 to be included in a modern award, and it is not a machinery term.
21. The modern awards objective referred to in s.138 and set out in s.134 is to "*ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*" taking into account the considerations in s.134(1)(a)-(h).
22. As stated in the *Penalty Rates Decision*, 'relevance' in the context of s.134 is intended to convey that a modern award should be suited to contemporary circumstances.⁸ The take-home pay clause relates only to reductions in pay arising out of the making of the modern awards and associated transitional arrangements. It is not apparent that the provisions have any work to do in contemporary circumstances.
23. Additionally, the retention of the take-home pay clause cannot be necessary for the provision of a minimum safety net. As stated by the FWC in its Decision concerning the 'absorption clause'⁹:

Modern awards are part of the minimum safety net of terms and conditions established by the Act. It is not the function of such a minimum safety net to regulate the interaction between minimum award entitlements and overaward payments. Such matters are adequately dealt with by the common law principles

⁸ [2017] FWCFB 1001, [120].

⁹ [2015] FWCFB 6656, [74].

of set off to which we have referred and should be left to individual employers and employees to determine.

24. The take-home pay clause relates only to orders intended to mitigate against loss of pay arising out of the creation of a modern award. As such, orders made pursuant to this clause cannot concern minimum rates of pay but rather 'overaward payments'.
25. The take-home pay clause can no longer fulfil the transitional purpose for which it was originally included as outlined in the Award modernisation process¹⁰ and the Explanatory Statement for the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)*. The clause is not 'about' any matter referred to in cl 139(1) nor is it an incidental or machinery term as defined in s 142 of the FW Act.
26. The take-home pay clause is not conducive to the provision of a 'fair and relevant minimum safety net of terms and conditions'. Crucially, its retention is not *necessary* to achieve the modern awards objective¹¹ and as such cannot be retained within awards.

3. IF THERE IS A POWER TO RETAIN THE TAKE HOME PAY CLAUSE IN MODERN AWARDS, SHOULD THE FWC EXERCISE THE DISCRETION TO RETAIN THE PROVISION?

27. As outlined above, the utility of retaining the take-home pay clause in all modern awards is not apparent and would potentially be negligible. A significant period of time has elapsed since the creation of the modern awards and the transitional arrangements contemplated by the provisions have now been removed from awards. The transitional pay provisions in Schedule A to the modern awards ceased to apply at the end of 2014.

¹⁰ *Award Modernisation* [2009] AIRCFB 800, [20].

¹¹ As contemplated by s.138

28. The retention of the take-home pay clause is not necessary in the sense contemplated by s.138. It would not further the modern awards objective. In addition to the reasons outlined above, none of the considerations in s.134(1)(a)-(h) weigh in favour of retention of the clause. Moreover, retention of the clause directly conflicts with the considerations referred to in s.134(1)(g) in that the inclusion of a superfluous clause cannot assist in the maintenance of a simple, easy to understand, stable and sustainable modern award system.
29. As has been made clear in this submission, the take-home pay clause was inserted into all modern awards to address potential loss of pay resulting from the creation of modern awards or associated transitional arrangements. As the modern awards were created on 1 January 2010 and the transitional arrangements ceased to apply from 31 December 2014, this renders the clause obsolete.
30. If the FWC concludes that the potential remains for an order to be made, the passage of time should weigh against the appropriateness of any order. It would be unfair to enable an application to be made against an employer so long after the events giving rise to the application took place. Such matters should weigh against the Commission exercising any discretion to retain the provisions.
31. The utility of a take-home pay order being made should be considered in light of Reg 3B.04 of the TPCA Regulations (reproduced above) which prevent orders being made in relation to minor or insignificant reductions in pay and require the FWC to ensure such an order is expressed so that if take-home pay payable to an employee or outworker under the modern award increases after the order is made, there is a corresponding reduction in any amount payable to the employee or outworker under the order. The minimum rates of pay and numerous allowances have increased eight times for almost all award-covered employees since the making of the modern awards in the context of the *Annual Wage Review*. Any remaining reduction resulting from the creation of the modern awards or any transitional arrangements would potentially be so insignificant as to be negligible and would be further diminished by future minimum wage increases.

32. Finally, in exercising any existing discretion to remove the take-home pay clause, it is relevant to consider the fact that, in its Decision on 23 December 2014, the FWC indicated its intention to remove the clause in the next four yearly review.¹² This decision was made in the earlier stages of the current review, at which point it was unlikely the Full Bench or any of the participants in the proceedings were aware that the current review would still be proceeding in late-2018. Given the extensive passage of time since the introduction of the modern awards and indeed since the abovementioned Decision in 2014, the FWC should amend all modern awards to remove the take-home pay clause.

¹² [2014] FWCFB 9412, [17].