IN THE FAIR WORK COMMISSION

Matter No.: AM2016/15 Plain Language – reasonable overtime
Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following submission to the Fair Work Commission in response to the AiGroup Submission 22 February 2018[1] which was responsive to the Full Bench Statement [2017] FWCFB 6884.[2]

2. The President published a Statement 28 February 2018 which provided for submissions in reply to the AiGroup submission to be lodged by 16 March 2018.[3]

3. The AiGroup submission 22 February 2018 proposes that Awards should retain a clause which provides an express right for an employer to "require an employee to work reasonable overtime."

4. This submission will outline why the Full Bench should not adopt the AiGroup's clause and also should not remove the current clauses about the "*requirement to work reasonable overtime*" which exist in the Modern Awards in question without making a clear statement in a decision about what the changes mean in relation to the substantive entitlement for employees.

5. In particular this submission will address the following:

    a. The AiGroup's proposal excluding the NES;

    b. The high rate of non-compliance in Australian workplaces;

    c. The individual approach to disputes is failing to support compliance;

    d. Knowledge of award reliant workers about award terms;

    e. Impact of Award terms on Workplace culture;

    f. The FWC Statements and Decisions to date about the issue;

    g. The NES definition of unreasonable hours versus the Award definition of unreasonable; and

    h. The AMWU's proposal.

6. The AMWU's proposal is for the current clause which the AiGroup wishes to retain to be deleted because its effect is to exclude the NES entitlement. However, the part of the "reasonable overtime" clause currently in awards which outlines specific characteristics to be taken into account in determining unreasonable overtime should remain if the Commission determines that the NES is less favourable to employees than the current Award term for reasonable overtime.

[1] AiGroup Submission in AM2016/15 Plain Language 22 February 2018
[2] Statement [2017] FWCFB 6884
[3] Statement [2018] FWC 1244

The AiGroup's Proposal excludes the NES

7. The AMWU opposes the AiGroup's proposals, because its effect appears to be to exclude the NES.

8. The AiGroup's proposal is as follows:

> "XX. Subject to section 65 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."

9. The relationship between section 62 and the employer right to "require an employee to work reasonable overtime" is unclear from the AiGroup's proposal.

10. To a lay person reading the clause, it expresses a clear intention to provide an employer with a right to require an employee to work reasonable overtime.

11. The note which refers the reader to section 62 doesn't have any effect as a term of the Award.

12. Reading the AiGroup's proposed clause together with the note, the practical effect would be to seemingly exclude the NES entitlement and give the employer something to point to which supports their direction to the employee.

13. In the current environment where:

    a. A not insignificant number of employers are engaged in business models that involve non-compliance,

    b. workers must individually take action to enforce their rights;

    c. workers are unaware of their rights and entitlements; and

    d. union density is declining;

    the AiGroup's proposal should be rejected by the Commission.

Australian workplaces have high rates of non-compliance

14. The high profile cases of 7 Eleven's systemic wage theft uncovered by Fairfax and the ABC's 4 Corners[4] revealed the tip of the iceberg.

15. The publicly available evidence continues to reveal more of the iceberg and the extent of non-compliance in Australian workplaces. Media reports continue to be

[4] https://www.smh.com.au/interactive/2015/7-eleven-revealed/

published about allegations of wage theft across the economy including by familiar household names such as Dominos[5] and Caltex.[6]

Wage Theft from International Students and Backpackers Endemic

16. A report published late last year by the University of New South Wales, Sydney and the University of Technology, Sydney revealed that wage theft was endemic across Australia amongst international students and backpackers.[7] Specifically, the report found:

> "A quarter of all international students earn $12 per hour or less and 43% earn $15 or less in their lowest paid job.
>
> A third of backpackers earn $12 per hour or less and almost half earn $15 or less in their lowest paid job.
>
> Workers from Asian countries including China, Taiwan and Vietnam receive lower wage rates than those from North America, Ireland and the UK. Chinese workers are also more likely to be paid in cash."

Fair Work Ombudsman – Western Sydney Campaign

17. The Fair Work Ombudsman's (FWO) campaigns indicate that at least in some regions, there is a high level of non-compliance. While these regions may not be representative of the broader economy, they still reveal an alarming level of non-compliance that exists across randomly selected workplaces.

18. A recent regional campaign by the FWO in Western Sydney suburbs populated by a high number of Culturally and Linguistically Diverse workers reveals the extent non-compliance these Western Sydney suburbs.

> "*Almost two-thirds (64 per cent) of the 197 businesses audited by the Fair Work Ombudsman during the campaign were found to be non-compliant with workplace laws.*"[8]

19. Businesses selected for participation in this FWO campaign were selected randomly, with a higher weighting assigned to those industry sectors from which the FWO had received higher numbers of Requests for Assistance.[9]

20. The FWO's Western Sydney Campaign is in a sense self selecting, because it specifically targeted an area where requests for assistance were increasing (in contrast to the reducing number across the state) and where there is a high proportion of "workplace participants from a CALD background." However, the

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[5] https://www.smh.com.au/interactive/2017/the-dominos-effect/
[6] https://www.smh.com.au/business/careers/caltex-accused-of-squeezing-service-station-operators-and-workers-20161123-gsvgal.html
[7] https://newsroom.unsw.edu.au/news/business-law/backpackers-international-students-suffer-widespread-wage-theft-report-finds and https://www.smh.com.au/business/careers/wage-theft-endemic-across-australia-20171119-gzol3l.html
[8] The Western Sydney Campaign Report – Fair Work Ombudsman at page 7
[9] The Western Sydney Campaign Report – Fair Work Ombudsman at page 5

methodology also indicates that for the particular suburbs in question, the businesses were selected randomly.

21. Businesses who were not members of employer associations had an extremely higher rate of non-compliance rate of 70% in the Western Sydney Campaign, compared with an average of 51% non-compliance across all FWO Campaigns. Interestingly, being a member of an employer organisation still resulted in a non-compliance rate of 42% in the Western Sydney Campaign, as compared with an average of 35% non-compliance across all FWO campaigns.[10]

22. The size of the business did not change the level of compliance. Whether the business had less than 15 or 15 and more than 15 employees did not change the rate of non-compliance which was 64% for the Western Sydney campaign. This is different to the average across all FWO campaigns, which found high compliance amongst the larger businesses.[11]

23. The existent of non-compliance across Australian workplaces in addition to establishing a strong case for changing the current laws affecting compliance, also strongly tells against the Commission accepting the AiGroup's clause, which would simply create another opaque veil under which an employer can attempt to assert a right they don't have.

The individual approach to disputes is not supporting compliance

24. There has been a shift in the industrial relations system from having the dominant mechanism for enforcing rights and entitlements being a collective one to having the dominant mechanism being an individual one for Award reliant employees.

25. This means the onus is on individuals to attain the wherewithal to enforce or assert their rights and entitlements against the employer. The power imbalance between an individual award-reliant employee and an employer is not insignificant.

26. Employers have a range of strategies which they can deploy to supress or "manage" employee disputes to be resolved in the employer's favour. Strategies can include veiled threats of employment termination or disciplinary action around unrelated matters. The employer may also wield threats of stifling promotion, refusing favourable leave arrangements, refusing requests for flexible work arrangements or refusing training requests.

27. Many of these may not be strictly legal, but establishing behaviour attached to the requisite motive is now widely understood to be extremely difficult following the High Court's decision in *Barclay,*[12] followed by subsequent High Court[13] and Federal Court decisions[14] further tightening the narrow crevice through which successful general protections claims must squeeze through to be successful.

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[10] The Western Sydney Campaign Report – Fair Work Ombudsman at page 10 - 11
[11] The Western Sydney Campaign Report – Fair Work Ombudsman at page 10 - 11
[12] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 (Barclay)
[13] *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41
[14] *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* [2015] FCAFC 76

28. Whilst not all employers engage in this way with their employees, and the AMWU does not present evidence about the extent of such tactics, it is self evident that they do exist from the cases where the law allowed the "mind of the employer" to be their defence, but more importantly the capacity for these strategies to exist with impunity has a much greater effect on workplaces.

29. The ongoing amicable relationship between an employer and an employee is something that is often put at risk when an employee wishes to formally commence individually exercising their rights and/or enforcing their entitlements. Its self-evident that this pressure may result in employees refraining from asserting their rights.

30. In the context, if the AiGroup's proposed clause is adopted, the practical choice a worker may have is between:

    a. Refusing to work the "required" overtime and leaving work to attend to family responsibilities, and taking the risk of a legal dispute; or

    b. Accepting the "requirement to work overtime" and ensure an ongoing amicable relationship with their employer.

31. The choice they make will be influenced by how adequately resourced they feel to engage in a dispute with their employer. Of course there are many other factors, such as the personal and monetary benefits that are to be gained through each option which would weigh on the employee. However, these other factors do not negate from the real impact that a workers' personal resources have on whether they assert their rights in an individualistic system.

32. Its clear that some employees would be more inclined, particularly where they do not have the support of a union, to choose to preserve the amicable relationship and endure short term disadvantage of not being able to assert their rights to refuse unreasonable overtime.

33. The effect of the current system which is based around individual enforcement is a further consideration which supports the Commission rejecting the AiGroup's proposed clause.

The impact of plain language terms on workplace culture

34. The impact of the plain language text of a Modern Award on workplace culture is another consideration the Commission should take into account. The workplace culture is the atmosphere within which employees may or may not question an employer's requirements or directions. While industrial relations reporters (such as Workplace Express and Thomson Reuters Workforce Daily) and the Commission's decision have an impact on shaping workplace culture, the Award's express terms and the way that employers using them have the most direct impact on workplace culture.

35. Although there may be a "note" referring to legislation, the express right proposed by the AiGroup's clause is a difficult proposition to displace, even for lawyers, let alone Award reliant workers. While notes referring to legislation excite the

interest of lawyers and industrial relations professionals, they're unlikely to provide any comfort to an Award reliant employee being asked to work overtime for the first time by an employer half an hour before they are due to clock off.

36. The fact of employers holding all the information against employees with a low awareness of their minimum entitlements results in a workplace culture where the plain meaning of the words have greater resonance than any legal footnote. The wider the gap between the plain meaning and the actual legal effect of words, the greater the risk of non-compliance.

37. Approving the AiGroup's proposed clause empowering employers to "require overtime", while referring employees through a "note" to the NES, will be like arming the employer with a Barrister in a dispute, while giving the employee a telephone number to seek assistance from a help line.

38. It is clear from the AiGroup's submissions that it intends to advise its members that they would have a right to direct employees to perform overtime at overtime rates, if their proposed clause is adopted.

39. This advice along with the text of the AiGroup's proposed clause itself will cultivate a workplace culture that extends the employers' claimed rights beyond what their actual legal rights may be.

40. The potential impact of the AiGroup's clause on workplace culture point to a finding that it would contribute to making the safety net less fair and supporting the Commission rejecting the AiGroup's proposal.

Knowledge of workers about Award terms

41. The knowledge of employees about the Award and its terms is another relevant factor. There has been evidence before the Commission about the knowledge of Award terms in the present review. The FWC commissioned a report which was produced by EY Sweeney and published on the Commission's website in May 2016, which found the following about employees:

> "*When compared to employers, employees had lower levels of knowledge about the modern award system. While the majority of employees were aware that there was a system in place to provide minimum wages and a set of minimum conditions, many could not confidently explain how the modern award system operates to provide that safety net*
>
> > *"I don't really know much about the awards. I pretty much just look at my payslip and see how much I have been paid. I don't know what else is out there"*
> >
> > *(Employee, small business – Health Care and Social Assistance)*
> >
> > *"I think we are on an award, you have to be on an award legally, but what that specific award is, I have no idea"*
> >
> > *(Employee, medium business – Transport, Postal and Warehousing)"*

Older employees tended to be more aware and knowledgeable about the modern award system, with many comparing it to the previous systems.

Those employees that were able to provide some information, tended to be aware and knowledgeable about the modern award that covers them, in their current role.

> *"As far as I know, it [classification levels] is judged by the age and the experience of the person and also what qualifications they have"*
>
> *(Employee, small business – Manufacturing)*

In some cases, an employee's primary experience actively interacting with the modern award system was prompted by commencing a new job or role, or if they had a concern that they were being underpaid or not receiving their correct or full entitlements. If employees thought they were receiving their correct wages, conditions and entitlements, then they had no reason to review their applicable modern award.

Participating employees' low levels of involvement with the modern award system was also reflected in their perceptions of workplace conditions, entitlements and their conceptualisation of pay. For them, the key aspect of any remuneration package was the "end-of-week" pay. It was difficult for employees to separate wages rates, entitlements and conditions. For this reason, employees' discussions regarding the modern award system and majority clauses tended to focus on pay."[15]

42. The report seems to support common sense, which would suggest that Award-reliant workers, particularly younger workers without any workplace or disputes experience are less likely to know what Award applies to them or even know the specific obligations that Awards might require them to comply with.

43. Low employee awareness of Award entitlements and conditions along with the AiGroup's proposed clause would combine to create a workplace culture that extends the employers' claimed rights beyond what their actual legal rights may be.

44. In summary, the AiGroup's proposed clause should be rejected by the Commission because of the factors outlined above:

    a. The AiGroup's proposal may be perceived to exclude the NES;

    b. The high rate of non-compliance in Australian workplaces;

    c. The current individual approach to disputes;

    d. Low level of knowledge of award reliant workers about award terms;

    e. The negative impact of the proposed clause on Workplace culture.

[15] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/report.pdf at page 22

The FWC Statements and Decisions to date about the issue

45. The current record of statements from the FWC on the matter are indicative of what a future court of commission might make of the decision to remove the clauses. It appears from what is currently on record, there is an inference arising out of the Plain Language process that the change is not intended to effect a change in the legal position. There is a clear indicate in the Statement 22 December 2017[16] that the Full Bench is rejecting the assertion made by a party that the change is a substantive change and the bench makes the statement that clauses are "replicated" by s.62.

46. The first decision 20 January 2017 which inserted the note referencing the NES, and giving reasons indicated as follows:

> "**Clause 20 – Overtime**
>
> [205] Clause 20 of the revised exposure draft provides as follows:
>
> > NOTE: Under the National Employment Standards (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.
> >
> > **20.1 Application of overtime for full-time employees**
> >
> > An employer must pay a full-time employee at the overtime rate for any hours worked at the direction of the employer:
> >
> > > (a) in excess of the number of hours specified in clause 9—Full-time employment or 13.3 (maximum daily hours); or
> > >
> > > (b) between midnight and 7.00 am.
> >
> > **20.2 Application of overtime for part-time employees**
> >
> > An employer must pay a part-time employee at the overtime rate for any hours worked at the direction of the employer:
> >
> > > (a) in excess of the number of hours that the employee has agreed to work under clause 10.4 and 10.10 (part-time employment); or
> > >
> > > (b) between midnight and 7.00 am.
> >
> > NOTE: A part-time employee can agree to work additional ordinary hours under clause 10.10 on the terms applicable to hours worked by a casual employee up to the maximum hours set

[16] Statement [2017] FWCFB 6884 paragraph [2] is the only summary of a parties' view. Paragraph [7] notes the clauses replicate s.62 of the NES.

out in clause 13.3 (maximum daily hours) and clause 9—Full-time employment.

[206] The Pharmacy Guild submit that the note should be removed because the Commission determined that any summaries of NES entitlements or links to legislation would not be included in legal instruments.

[207] We disagree. The Note at the beginning of the clause does not purport to be a summary of, or operate as a link to, the NES but merely points the reader to section 62.

[208] The interested parties have reached a consent position in relation to the SDA's substantive claim with respect to overtime.

[209] Clause 20 will be redrafted to take into account the consent position of the parties in relation to the SDA's substantive claim. All parties will have an opportunity to comment on the revised clause."[17]

47. The next statement is the President's Statement which contained an information note 27 October 2017.[18] That statement did not make any decisions, but referred parties to a document with analysis conducted by the FWC for comment.

48. The next statement is Full Bench Statement 22 December 2017 which outlined the provisional view to which the AiGroup responded and to which this submission is responding to. That statement makes the assertion that the clauses in the modern awards in question "replicate" s.62 of the NES.

49. If there is a replication and there is no change in the legal position, then the AMWU has no opposition to the provision view. However, if there is likely to be a change in the legal position, then the AMWU opposes any change which would result in employees losing their right to refuse overtime, which they currently have.

The NES entitlement versus the current Award entitlements

50. An analysis of the NES term and the current Award terms reveals that there are some differences which may result in a different interpretation.

51. Its also important to note that the current Award entitlements arose out of the *Working Hours Test Case* 2002.[19] Prior to this decision, there is a recommendation[20] and a decision[21] on the record which refer to employers disciplining or giving warnings to employees for refusing overtime. The Working

[17] Pharmacy Industry Award 2010 – 4 yearly review of modern awards – Plain language drafting issues [2017] FWCFB 344
[18] Statement [2017] FWC 5589
[19] *Working Hours Case* (2002) 114 IR 390
[20] https://www.fwc.gov.au/documents/decisionssigned/html/pr912667.htm
[21] https://www.fwc.gov.au/documents/decisionssigned/html/pr906250.htm

Hours Test Case acknowledged that around 23 per cent of wage and salary earners in Australia were working "extended hours" over 44 hours a week at that time.[22]

52. The NES entitlement includes a right of an employee to refuse work beyond 38 hours (or their ordinary hours in a week, whichever is lesser) if the additional hours are "unreasonable."

53. In determining whether the hours are unreasonable, a series of characteristics are outlined by the NES to be taken into account.

54. The Award entitlement includes an express right of an employer to require an employee to work reasonable overtime at overtime rates. However, it is qualified by a right of an employee to refuse to work overtime, in circumstances where the working of such overtime would result in the employee working hours which are unreasonable. In assessing whether the hours are unreasonable, regard is had to a series of characteristics.

55. The series of characteristics of the circumstances to be taken into account in the the Award are also in the NES. However, there are some characteristics in the NES which were not listed in the Award. Those characteristics are:

    a. "(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;

    b. "(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;"

    c. "(h) the nature of the employee's role, and the employee's level of responsibility;

    d. "(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 the employee under section 64."

56. These four characteristics are particularly important as they relate to the Manufacturing and Associated Industries and Occupations Award 2010 (the Manufacturing Award) and other award which contain overtime penalty rates.

Overtime Rates of Pay

57. The NES requires to be taken into account, whether an employee is paid overtime rates in determining if the hours are reasonable. Whereas the current Award clause does not include such a consideration. This points to the NES possibly allowing for weight to be given to a factor that supports the employer's direction, which is not specifically identified in the Award term.

Usual patterns of work in the industry

[22] *Working Hours Case* (2002) 114 IR 390 at page 417 paragraph 76

58. The NES requires to be taken into account, what the usual patterns of work in the industry are. Whereas, those are not a consideration in the current award term, which is set against the background of the usual pattern of work in the industry. This points to the NES possibly allowing for weight to be given to a factor that supports the employer's direction, whereas the Award term may not specifically take this into account.

Employee's role and the level of responsibility

59. The NES requires to be taken into account what the employee's specific role is and their level of responsibility. The Award term doesn't specifically mention this factor. This points the NES possibly allowing for weight to be given to a factor that supports the employer's discretion, whereas the award term may not specifically take this into account.

Averaging terms

60. This particular criteria is not going to have an impact if the Commission does decide to delete the current Award term. The current Manufacturing Award contains averaging provisions. However because averaged ordinary hours of work are not additional hours, the reasonable overtime provisions don't arise.

"Any other relevant matter"

61. The AMWU acknowledges that both the NES and the Award term include that "any other relevant matter" as a factor. This may mean that the express factors which exist in the NES, may have been relevant matters in the Award term in any event. However, whether an express factor is given more or less weight than a factor which is given weight because it is considered "relevant" is unclear.

62. It is difficult to discern exactly how much weight a decision maker is going to give to each issue and how they eventually arrive to the value judgement.

"Must be taken into account" versus "having regard to"

63. The NES stipulates that the factors "Must be taken into account," while the Award term uses the phrase "having regard to." These differences do not appear to result in any practical difference to the global consideration of the factors where they are enlivened.

The AMWU Proposal

64. If the Commission agrees that the NES would result in more weight be given to employer friendly factors than would otherwise by the case under the current Award terms for reasonable overtime, then AMWU proposes that the current clause describing the factors be retained, which does not give any additional weight or primacy to certain factors which are a feature of the Award. The proposed clause is as follows:

> 40.2 Right to refuse unreasonable hours

(a) 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.

End

16 March 2018