Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Plain Language Re-drafting – Reasonable Overtime (AM2016/15)

16 October 2018

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE RE-DRAFTING

– REASONABLE OVERTIME

1. On 17 September 2018, the Fair Work Commission (**Commission**) issued a decision[1] concerning 'reasonable overtime' provisions contained in 12 modern awards (**Decision**). The Decision settles the terms of a 'model reasonable overtime' clause (**Model Term**), with the exception of the final subclause (**Clause X.3**), in relation to which the Commission proposed three alternate forms of words. At paragraph [56] of the Decision, interested parties were invited to comment on which of the three options should be included in the Model Term.

2. The Australian Industry Group (**Ai Group**) continues to rely on its submission of 2 October 2018 (**October Submission**). This reply submission is filed in response to the written submissions of:

    a) The Australian Manufacturing Workers' Union (**AMWU**);[2]

    b) The Construction, Forestry, Maritime, Mining and Energy Union – Construction and General Division (**CFMMEU**);[3]

    c) The Shop, Distributive and Allied Employees' Association (**SDA**);[4]

    d) The Health Services Union (**HSU**);[5]

    e) Australian Business Industrial and the New South Wales Business Chamber (**ABI**);[6]

[1] *4 yearly review of modern awards – reasonable overtime* [2018] FWCFB 5749.

[2] Undated.

[3] Dated 28 September 2018.

[4] Dated 27 September 2018.

[5] Dated 2 October 2018.

[6] Dated 3 October 2018.

f) The Housing Industry Association (**HIA**);[7]

g) The National Retail Association (**NRA**);[8] and

h) The Pharmacy Guild of Australia (**PGA**).[9]

'Option 1'

3. Ai Group submits that 'Option 1' should not be adopted (as proposed by the AMWU, CFMMEU, SDA, HSU and HIA) for the reasons articulated in Ai Group's October Submission.

Proposed Amendments to 'Option 1'

4. Some of the aforementioned parties who have proposed the adoption of 'Option 1' have also sought certain amendments to it.

5. Ai Group relies on the following submissions to the extent that the Commission decides that, despite Ai Group's primary position, 'Option 1' will be adopted.

Amendments to Subclause (d)

6. The HIA submits that subclause (d) should be amended to remove the reference to "penalty rates" "to ensure consistency within modern awards"[10] because "the term 'overtime rates' is sufficient and is consistent with the language of modern awards"[11].

7. Ai Group does not agree with the HIA's submission. For example, the *Graphic Arts, Printing and Publishing Award 2010* requires that for overtime worked on a public holiday, an employee must be paid in accordance with clause 41 of the award.[12] Clause 41 of the award prescribes higher rates of pay to which an employee is entitled for all work performed on a public holiday (ordinary

[7] Dated 2 October 2018.

[8] Dated 20 September 2018.

[9] Dated 2 October 2018.

[10] Paragraph 2.3.4 of the submission.

[11] Paragraph 2.3.5 of the submission.

[12] Clause 33.5 of the *Graphic Arts, Printing and Publishing Award 2010*.

hours and overtime). The higher rates are not characterised by the award as "overtime rates" and to the extent that any such characterisation might be attributed to them, they would most accurately be described as "penalty rates".

8. Ai Group agrees with the HIA's submission[13] that the hyperlink at subclause (d) should be deleted.

Amendments to Subclause (i)

9. The HIA submits that subclause (i) be amended as follows:

> **(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~~.

10. Ai Group does not agree that the reference to s.63 of the Act should be deleted from subclause (i).

11. Section 63(1) of the Act permits the inclusion of an award term providing for the averaging of hours of work over a specified period, provided that the average weekly hours over the period specified do not exceed the amounts specified in ss.63(1)(a) and 63(1)(b).[14] However, an award term may provide for average weekly hours that exceed those amounts "if the excess hours are reasonable for the purposes of s.62(1)" of the Act.[15]

12. In addition, a legislative note follows s.63(2):

> Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with averaging terms in a modern award or enterprise agreement (whether the terms comply with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging terms will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

13. Subclause (i) of the proposed Clause X.3 requires that consideration be given to whether the additional hours are in accordance with averaging terms

[13] Paragraph 2.3.6 of the submission.

[14] Section 63(1) of the Act.

[15] Section 63(2) of the Act.

included in a modern award under s.63 of the Act. Section 62(3)(i) of the Act requires the same.

14. The deletion of the reference to s.63 of the Act from subclause (i) of the proposed Clause X.3 would substantively alter its effect. Read literally, it would then require that consideration be given to any award averaging term, regardless of whether it complies with s.63 of the Act; whilst s.62(3)(i) of the National Employment Standards (**NES**) would continue to require that consideration be given only to award averaging terms permitted by s.63 of the Act. Put simply, the HIA proposal would potentially introduce an obligation to take into account matters not contemplated by s.62(3)(i).

15. The amendment proposed by the HIA would therefore create an inconsistency between the Model Clause and the NES, which would give rise to complex considerations that arise under s.55 of the Act.

16. For the purposes of avoiding any such inconsistency and ensuring that the relevant awards are simple and easy to understand, the first amendment proposed by the HIA should not be adopted.

17. Ai Group agrees that the reference to s.64 of the Act should be deleted from subclause (i).

18. Section 64 enables an employer and award/agreement free employee to agree in writing to an averaging arrangement. Section 64 is not of any relevance in the context of an employee covered by a modern award and therefore, the second amendment proposed by HIA should be adopted.

19. The SDA submits that "averaging terms are not relevant to the Fast Food Industry Award 2010 and the Hair and Beauty Industry Award 2010"[16] and that accordingly, subclause (i) of the proposed Clause X.3 should be deleted and the following note should be included at the end of the clause:

> Note: 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 agreement agreed to by the employee and employee under section 64 must be taken into account if relevant.[17]

20. The SDA's submission proceeds on an erroneous premise. Both of the awards referenced in its submission include terms permitting the averaging of ordinary hours under s.63 of the Act. For instance:

    a) Clause 28.1 of the *General Retail Industry Award 2010*; and

    b) Clause 28.2 of the *Hair and Beauty Industry Award 2010*.

21. Accordingly, the SDA's submission should not be accepted and the changes it has proposed should not be made. To the extent relevant, we refer also to the submissions made above regarding the amendments proposed by the HIA.

<u>An Additional Subclause (j)</u>

22. The HSU[18], SDA[19] and the AMWU[20] submit that 'Option 1' should be amended by inserting an additional subclause (j), which requires that "any other relevant matter" must be taken into account in determining whether overtime hours are reasonable or unreasonable.

[16] Paragraph 15 of the submission.

[17] Paragraph 15 of the submission.

[18] Paragraph 6 of the submission.

[19] Paragraph 12 of the submission.

[20] Paragraph 4 of the submission.

23. We agree that 'Option 1' should be varied to insert a new subclause (j) in the same terms as s.62(3)(j) of the *Fair Work Act 2009* (**Act**). This is because:

a) There is no apparent rationale for limiting the factors that are to be taken into account when determining whether overtime hours are reasonable.

b) As a matter of merit, the clause *should* require that consideration be given to any other relevant matters.

c) There are complex questions concerning the interaction between the Model Term and s.63(3) of the Act (being a term of the NES) that may arise pursuant to s.55 of the Act if s.63(3) is not replicated in full. For example, a question might arise as to whether Clause X.3 *excludes* s.63(3) of the Act and therefore, it is of no effect.

'Option 3'

24. Ai Group supports:

a) The submissions of ABI;[21] and

b) the submissions of the PGA[22] and NRA[23] to the extent that they state that 'Option 3' should be adopted,

for the reasons articulated in its October Submission.

[21] Paragraphs 2.2 – 2.4 of the submission.

[22] Paragraph 5 of the submission.

[23] Page 3 of the submission.