Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

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

20 November 2018

4 YEARLY REVIEW OF MODERN AWARDS
AM2016/15 PLAIN LANGUAGE RE-DRAFTING TAKE-HOME PAY CLAUSE-

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes this reply submission in relation to the two outstanding issues pertaining to clause 1 – Title and commencement in all modern award exposure drafts.

2. Ai Group files this submission pursuant to the Statement issued by the Fair Work Commission (FWC) on 16 October 2018.[1]

3. In our submission dated 6 November 2018, Ai Group set out its views in relation to the removal of the current take-home pay clause in all modern awards. Ai Group continues to rely on this submission.

4. Ai Group has considered the submission of the Australian Manufacturing Workers Union (**AMWU**) dated 8 November 2018.

5. We do not believe that the AMWU's submission raises any arguments which diminish the approach detailed in our submission of 6 November 2018.

6. The FWC's Statement of 16 October 2018 invited parties to make submissions addressing the following:

   - 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 FWC exercise the discretion to retain the provision.

7. Ai Group notes that the AMWU's submission does not address the first of these points. To the extent that the AMWU has raised arguments in favour of the FWC

[1] [2018] FWC 5810.

exercising any existing discretion to retain the take-home pay clause, Ai Group submits that these should be rejected for the reasons outlined hereunder.

2. APPLICATION OF LIMITATIONS PERIODS IN DIVISION 4 OF PART 4-1 OF THE FAIR WORK ACT

8. At [6] of the 8 November 2018 Submission, the AMWU submits that that FWC "should retain the take home pay order clause, at least until the statutory limitation period that *might* apply to orders relating to the transitional Schedules has elapsed. This would be a further period until July 2020" (emphasis added).

9. In support of this submission, the AMWU refers to the limitations periods currently available under ss 544 and 545(5) of the *Fair Work Act 2009* (Cth) (**FW Act)**.

10. The relevant provisions of the *FW Act* are as follows:

> ***544 Time limit on applications***
>
> *A person may apply for an order under this Division in relation to a contravention of one of the following only if the application is made within 6 years after the day on which the contravention occurred:*
>
> *(a) a civil remedy provision;*
>
> *(b) a safety net contractual entitlement;*
>
> *(c) an entitlement arising under subsection 542(1).*
>
> *Note 1: This section does not apply in relation to general protections court applications or unlawful termination court applications (see subparagraphs 370(a)(ii) and 778(a)(ii)).*
>
> *Note 2: For time limits on orders relating to underpayments, see subsection 545(5).*
>
> *…*
>
> ***545 Orders that can be made by particular courts***

...

Time limit for orders in relation to underpayments

> *(5) A court must not make an order under this section in relation to an underpayment that relates to a period that is more than 6 years before the proceedings concerned commenced.*

11. Other than merely stating that the option to seek a take-home pay order from the FWC is a "quick and just alternative to seeking orders from the Court (if there are any)",[2] the AMWU have not indicated how limitations periods applicable to applications to the Federal Court or Federal Circuit Court under ss 544 and 545(5) are relevant to an order made pursuant to a take-home pay clause.

12. Ai Group submits that it is unhelpful, for the purpose of resolving the outstanding issues related to the take-home pay clause to make such a direct comparison with the limitations periods applying under the *FW Act* in relation to applications to a relevant Court. It is notable that ss 544 and 545(5) are not concerned with creating new rights and obligations in order to mitigate against loss brought about by the Award modernisation process or related transitional arrangements. The 6-year limitations periods contained in Division 4 of Part 4-1 of the Act clarify the time limits beyond which applications relating to a relevant *contravention* are time-barred. These provisions are concerned with applications made owing to asserted contraventions of existing rights rather than an application for appropriate orders remedying reduced entitlements arising out of the award modernisation process and any associated transitional arrangements.

13. As outlined in Ai Group's submission of 6 November 2018, the take-home pay clause was intended to allow employees engaged following the commencement of a modern award to obtain a take-home pay order with respect to reductions in pay that occurred as a result of the introduction of a modern award or the transitional arrangements in a modern award. It is a transitionary clause and as such, its purpose did not envisage the FWC retaining a power to make take-

[2] AMWU Submission 8 November 2018, at [5].

home pay orders in perpetuity. By contrast, ss 544 and 545(5) set limitation periods which apply in the context of applications for orders relating to various contraventions of a relevant provision or entitlement. The legal and policy framework relevant to the take-home pay clause is distinct from that of ss 544 and 545(5) and the diversity of matters to which the 6 year limitation period applies.

14. The AMWU submission acknowledges that the Transitional Schedules in each modern award have ceased to have effect.[3] Ai Group reiterates the point made in our submission of 6 November 2018 that following the removal of relevant transitionary arrangements from modern awards that justified the take-home pay clause's inclusion, this clause no longer had any work to do. The assertion that the take-home pay clause should be retained in all modern awards until the expiration of a six-year limitation period is not supportable by any statement made at the time of the award modernisation process. The removal of the take-home pay clauses from each modern award will not diminish the right of an employee to make an application to a Court where relevant rights which applied whilst the transitory arrangements were on foot have been contravened.

15. Ai Group also submits that it would be inappropriate to assume, without clear justification, that the take-home pay clause should be retained until a date six years after the removal of the relevant transitory schedules from all modern awards, as contended by the AMWU, under circumstances where the FWC has already decided to remove the absorption clause.

16. In its decision to remove the 'absorption clause' from all modern awards, the FWC concluded that it was transitional in nature and that its intent was to enable employers to absorb increases resulting from the implementation of modern awards into existing over award payments.[4] In concluding that its retention was no longer necessary as a result of the finalisation of the transition period

[3] Ibid, [3].

[4] [2015] FWCFB 6656

following the modern award review, the FWC made the following comments concerning the absorption clause (footnotes omitted):

> ***[36]*** *The model absorption provision was subsequently considered by a Full Bench of Fair Work Australia in 2010 in the context of an application by Ai Group to insert an absorption provision with wider application than the standard provision. In that case the Full Bench considered clause 2.2 to be a "transitional" clause observing that:*
>
> > *'**[19]** The intent of the clause is that where monetary obligations increase as a result of the implementation of modern awards, employers should be able to absorb those increases into existing overaward payments. Nevertheless, the award clause adopted to reflect this intent is confined to the treatment of award obligations themselves, and does not extend to regulating any additional matters in contracts of employment. There may be some examples of contractual entitlements to overaward payments irrespective of the nature and extent of award obligations. However in the vast majority of cases, it is likely no such entitlement will exist. The wording of the clause is permissive, not mandatory, and does not modify the effect of any ongoing entitlement to overaward payments. Further, the clause is a transitional clause. It does not have application beyond the transitional period.' (emphasis added)*
>
> ***[37]*** *It is clear from the above observation (and from the AIRC discussion of 2 September 2009…) that the **absorption** clause was intended to be transitional. The purpose of the clause was to facilitate the transition from pre-modernised instruments to modern awards. The clause was not directed at overaward payments in the traditional sense but rather at payments referable to pre-modernisation obligations in award or agreement based transitional instruments. The AIRC decided that the phasing arrangements to the modern award system would take place as follows:*
>
> *'We have decided that phasing should commence on 1 July 2010. The effect will be that where the phasing provisions are included in an award the pre-modern award conditions relating to minimum wages, casual and part-time loadings, Saturday, Sunday, public holidays, evening and other penalties and shift allowances will continue to apply until 1 July 2010 when the modern award obligations will commence … There will be a further four instalments on 1 July of each year concluding on 1 July 2014.'*
>
> ***[38]*** *The transition to modern awards was effectively complete on 1 July 2014. It is not necessary to retain the **absorption** clause in order to facilitate the finalisation of the transition process (emphasis added).*

17. If the FWC concludes that it still has power to make take-home pay orders, it would be incongruous, given the FWC's decision in relation to the purpose of the absorption clause, to remove a clause allowing employers the capacity to

absorb moneys subject to a take-home pay order into overaward payments, whilst retaining the ability to make such an order.

3. TAKE-HOME PAY ORDERS FOLLOWING REMOVAL OF THE CLAUSE

18. At [5] of its submission, the AMWU states:

> *…It may be unclear to an applicant whether the clause applying to their period of employment in 2014 is still alive in conferring jurisdiction on the Commission to make take home pay orders if the Award at the time they uncovered the issue did not contain that clause.*

19. To the extent that the abovementioned statement rests on the premise that the FWC will retain the capacity to issue a take-home pay order following removal of the clause from all modern awards, it should be disregarded. An amendment to all modern awards removing the take-home pay clause will function to remove the FWC's capacity to make a take-home pay order.

20. Ai Group does not therefore accept the AMWU's statement, that removal of the take-home pay clause may reduce clarity to a potential applicant as to their rights in seeking a take-home pay order relating to a period of employment in 2014.