



Fair Work Commission: 4 Yearly Review of Modern Awards

OUTLINE OF SUBMISSIONS IN REPLY

AM2014/300—AWARD FLEXIBILITY

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OUTLINE OF SUBMISSIONS

FILED ON BEHALF OF AUSTRALIAN BUSINESS INDUSTRIAL AND THE NSW BUSINESS CHAMBER LTD

1. BACKGROUND

- 1.1 Australian Business Industrial (**ABI**) is registered under the *Fair Work (Registered Organisations) Act 2009* and has some 4,200 members. The NSW Business Chamber Ltd (**NSWBC**) is registered under the (NSW) *Industrial Relations Act 1996* and is a State registered association recognised pursuant to Schedule 2 of the *Fair Work (Registered Organisations) Act 2009* with some 18,000 members.

2. PREVIOUS DIRECTIONS

- 2.1 The Commission issued a decision in relation to the award flexibility common issue [2015] FWCFB 6847 (**October Decision**) on 6 October 2015.

- 2.2 At [69] of the October Decision, the Full Bench found as follows:

Subject to what may be put about the circumstances pertaining to particular modern awards our general view is that the variation of modern awards to incorporate the model term is necessary to ensure that each modern award provides a fair and relevant minimum safety net, taking into account the s.134 considerations (insofar as they are relevant) and would also be consistent with the objects of the Act.

- 2.3 Further to the October Decision, a schedule of draft determinations was published on the Commission's website proposing the variation of 113 modern awards.
- 2.4 Parties have been asked to file fresh submissions in respect of a whether a particular modern award should not be varied to incorporate the model Time off in lieu of payment for overtime term (**Model TOIL term**).
- 2.5 These submissions are made by Australian Business Industrial and the NSW Business Chamber Ltd (**ABI/NSWBC**) in accordance with the Commission's directions and in reply to the submissions filed by other parties in these proceedings including those of Ai Group.

3. RELEVANT PRINCIPLES

- 3.1 It is relevant to note that the general view of the Commission to vary or include a TOIL provision in 113 modern awards was not contemplated by the claims of the parties in these proceedings. In that respect, the Commission has previously found:

[155] We are not bound by either the terms of the relief sought by a party nor by the scope (i.e. the awards to be varied) of the variations proposed. Context is important in this regard.

[156] These issues arise in the 4 yearly review of all modern awards. The Review is essentially a regulatory function and the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. The role of modern awards and the nature of the Review are quite different from the arbitral functions performed by the Commission in the past. In the Review context, the Commission is not creating an arbitral award in settlement of an inter partes industrial dispute—it is reviewing a regulatory instrument.¹

- 3.2 Irrespective of the source of a proposed variation, ABI/NSWBC notes the finding of the Full Bench in the Preliminary Issues decision that:

[s]ome proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made....

¹ [2015] FWCFB 3406 at [155] – [156]

In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.²

4. STANDARD TERMS

- 4.1 ABI/NSWBC acknowledge that the adoption of standard model terms across all modern awards is likely to have a bearing on s 134(1)(g) of the *Fair Work Act 2009* in facilitating a simple and easy to understand modern award system. Indeed modern award terms which are incidental to the operation of a term of the NES or permissible terms which give conditional flexibility might often be in standard terms, as are many of the NES provisions, but this is not a statutory requirement.
- 4.2 The simplification of the modern award system through the use of standard or 'model' terms would likely be most apparent for businesses who engage employees under multiple modern awards. For businesses that engage employees under a single modern award, a decision to replace an existing term with a new 'model' term, particularly in circumstances where the model term is more complex or prescriptive, is less likely to facilitate a simpler or easy to understand system.
- 4.3 These considerations must also be balanced against the fact that many modern awards (including awards in the 113 awards which are to be varied) already contain TOIL provisions and, prima facie, currently satisfy the modern awards objective. In order to displace that prima facie position, the Preliminary Issues decision requires probative evidence in support of the variation.
- 4.4 Where no evidence has been heard displacing the prima facie position that existing awards currently satisfy the modern awards objective and where the variation of those awards would result in the placing of further limitations, restraints and regulatory burden on business, ABI/NSWBC submit that the Model TOIL term should not be adopted. In the present circumstances, this is particularly relevant to awards, for example the *Clerks – Private Sector Award 2010 (Clerks Award)*, where existing TOIL arrangements do not place on employers and employees:
- (i) a time restriction on when TOIL is required to be taken; and
 - (ii) a requirement that the agreement to take TOIL be evidenced in writing in a specific form.

5. CLERKS

- 5.1 Further to the above submission, ABI/NSWBC submit that the Model TOIL term should not be adopted into the Clerks Award. The Clerks Award is distinctive in that it applies to more businesses than any other modern award and applies widely across large, medium and small business.
- 5.2 At clause 27.5, the Clerks Award states:

27.5 Time off instead of overtime

(a) An employee may elect, with the consent of the employer, to take time off instead of payment for overtime that would otherwise be payable under this clause at a time or times agreed with the employer.

(b) Overtime taken as time off during ordinary time hours must be taken at the ordinary time rate that is an hour for each hour worked.

(c) An employer must, if requested by an employee, provide payment, at the rate provided for the payment of overtime in the award, for any overtime worked under this clause where such time has not been taken within four weeks of accrual.

- 5.3 In the submission of ABI/NSWBC, no probative evidence has been heard which displaces the prima facie position that the Clerks Award (inclusive of its existing TOIL clause) currently satisfies the modern awards objective.
- 5.4 Given that prima facie position, it follows that there exists no onus to demonstrate on a merit or evidentiary basis that the existing clause should be retained.

² *Preliminary Issues Decision* at [60]

- 5.5 Notwithstanding the above, on a merit basis, ABI/NSWBC submit that the content and brevity of the existing TOIL clause in the Clerks Award ensures that it is simple and easy to understand as required by subsection 134(1)(g)) of the *Fair Work Act*. Further, the introduction of the Model TOIL term into the Clerks Award will introduce considerable new administrative burdens on employers and employees, particularly in relation to the creation of a separate written agreement for each occasion where a TOIL arrangement is entered into and a requirement to take the relevant TOIL within 6 months.
- 5.6 This difficulty is advanced on a reasonably pragmatic basis. In the submission of ABI/NSWBC there needs to be a practical balance between the need to evidence an agreement between employee and employer to enter into a TOIL arrangement and the imposition of administrative requirements that would dissuade employees and employers from entering into TOIL arrangements.
- 5.7 In requiring parties to enter into a written agreement which prescribes mandatory content, the Model TOIL term will introduce a considerably increased risk that employers and employees under the Clerks Award will enter into TOIL arrangements which, while agreed upon and mutually beneficial, are defective as to form.
- 5.8 In the submission of ABI/NSWBC, the administrative requirements of the Model TOIL term will serve to disincentivise employers and employees from entering into TOIL arrangements, negatively impacting business including on productivity, employment costs and the regulatory burden (s.134(1)(f) as well as restricting flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)).
- 5.9 On the basis of the above submission, ABI/NSWBC submit that the Model TOIL term should not be included in the Clerks Award and that the existing clause should be retained.

6. SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

- 6.1 We refer to the '*ASU Submissions on the Model Term*' filed in respect of Social, Community, Home Care and Disability Services Industry Award.
- 6.2 ABI/NSWBC do not consider the variation proposed by the ASU to be necessary and further that such variation will undercut the apparent purpose of the imposition of a Model TOIL term, to create uniformity among awards.

7. SUBMISSIONS OF AUSTRALIAN MINES AND METALS ASSOCIATION AND THE NATIONAL FARMERS FEDERATION

- 7.1 ABI/NSWBC support and endorse the submissions of AMMA in respect of:
- (a) *Mining Industry Award*;
 - (b) *Oil Refining and Manufacturing Award*;
 - (c) *Hydrocarbons Industry (Upstream) Award*; and
 - (d) *Salt Industry Award*.
- 7.2 As noted by AMMA, existing provisions should be retained in circumstances where such provisions have not caused substantive difficulties for employers or employees since their introduction in 2010 and where no evidence has been produced that demonstrates that the provisions do not meet the Modern Awards Objective.
- 7.3 For similar reasons, ABI/NSWBC support and endorse the submissions of National Farmers Federation in respect of the:
- (a) *Horticulture Award*; and
 - (b) *Pastoral Award*.

8. TOIL-FREE AWARDS

- 8.1 For clarity, ABI/NSWBC endorse Ai Group's submissions that, where no current TOIL provision exists in an existing award, the Model TOIL Term should be adopted.