

IN THE FAIR WORK COMMISSION

Matter No: AM2014/300

**4 YEARLY REVIEW OF MODERN AWARDS
COMMON ISSUE – AWARD FLEXIBILITY (TOIL)**

**OUTLINE OF SUBMISSIONS ON BEHALF OF THE AUSTRALIAN MINES AND METALS
ASSOCIATION INC.**

Introduction

1. The Australian Mines and Metals Association Inc. (**AMMA**) files these submissions in accordance with directions contained in the schedule of draft determinations published on 16 October 2015. The draft determinations were published further to the Full Bench decision issued on 6 October 2015 ([2015] FWCFB 6847).
2. AMMA was actively involved in the Part 10A Award Modernisation process and the most recent Transitional Review of modern awards under Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* in relation to a number of modern awards affecting the resource sector.
3. AMMA continues to have an interest in a number of resource industry related modern awards.
4. Paragraphs [4] – [5] of the statement of Justice Ross published on 7 April 2014 ([2014] FWC 2279) proposed a two-process as follows:

- (a) the Full Bench will issue an in principle decision, along with any draft determination for all modern awards;

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(b) interested parties will have an opportunity to comment on any draft determinations as they relate to each individual modern award and make submissions to tailor any provisions to specific awards.

5. AMMA's submissions are directed to the final model clause contained in the October decision and the "Schedule of revised draft determinations" (16 October 2015). AMMA's submissions on the model clause is in relation to the following industry specific modern awards:

- a) Hydrocarbons Industry (Upstream) Award 2010
- b) Mining Industry Award 2010
- c) Oil Refining and Manufacturing Award 2010
- d) Salt Industry Award 2010

TOIL Provisions in Resource Industry Modern Awards

6. AMMA notes a number of principles arising from an earlier Full Bench June decision (11 June 2015; [2015] FWCFB 3406), in relation to the annual leave common claims as follows:

- a) The modern awards objective is central to the Review (paragraph [6]);
- b) The broad scope of the four yearly review does not obviate the need for a merit argument to be advanced in support of a proposed variation (paragraph [22]);
- c) Proposals to vary 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 (paragraph [23]);

7. The Full Bench in its October decision reiterated at [7] the requirement that "[p]arties seeking a variation to a modern award must demonstrate it is necessary to achieve the modern awards objective".

8. At [70] the Full Bench indicated that "[s]ubject 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”.

9. AMMA submits that the final model clause substantively deviates from existing provisions contained in the following resource industry modern awards:

- a) Mining Industry Award 2010 – cl. 20.4
- b) the Oil Refining and Manufacturing Award 2010 – cl. 24.4
- c) Hydrocarbons Industry (Upstream Award) 2010 – cl. 26.4
- d) Salt Industry Award 2010 – cl. 23.4

10. The TOIL clause in the Mining Industry Award 2010, which is mirrored in the other modern awards listed above, provides as follows:

20.4 Time off instead of payment for overtime

[19.4 substituted by PR994464 from 01Jan10]

(a) An employee may elect, with the consent of the employer, to take time off instead of payment for overtime at a time or times agreed with the employer.

(b) The employee may take one hour of time off for each hour of overtime, paid at the employee's ordinary hourly base rate of pay.

11. Given AMMA's extensive involvement in the Part 10A proceedings and its effort to secure a number of flexibilities across key mining and hydrocarbons modern awards, AMMA continues to support retaining provisions (in this case, TOIL provisions) that have not caused substantive difficulties for employers or employees since modern awards commenced in January 2010.

12. AMMA submits that the existing TOIL provisions contained in resource industry modern awards are simple to understand and have been meeting the modern awards objective since they commenced in January 2010. They were subject of extensive submissions

and consideration during the Part 10A award modernisation process, including through the exposure draft process.

13. AMMA further submits that in the context of existing industry specific provisions, there needs to be probative evidence to demonstrate that a) the current term is no longer meeting the modern awards objective and b) a substitute term is required because it is necessary, as opposed to being desirable, to meet the modern awards objective (*Tracey J in Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*, [2012] FCA 480 at 46).
14. As the Full Bench observed in its July decision (at [14]), “one of the matters the Commission is required to take into account is the need to ensure a ‘stable’ modern award system (s. 134(1)(g)). The need for a stable modern award system supports the proposition that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation”.
15. In the June (annual leave common issues) decision, the Full Bench determined (at [155]) that it is “...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” and that the “[r]eview 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 (at [156]). Notwithstanding these observations, AMMA submits that where the Commission or party is proposing to replace an existing term in a modern award, there needs to be probative and cogent evidence which demonstrates that such a change is necessary to achieve the modern awards objective.
16. AMMA cannot ascertain industry specific evidence outlined in the July or October Full Bench decisions, which demonstrates that the existing terms in the modern awards outlined at paragraph [9] herein should be replaced by a different term dealing with the same subject matter.
17. AMMA notes that the Full Bench in its July decision at [108] observed that “it appears that a TOIL clause is better characterised simply as an award term permitted under s.139(1)(b) and/or (c) and/or (d) and/or (h) of the Act”. The Full Bench in its July decision

reiterated the importance of following previous Full Bench decisions stating at [42] that “[i]t is appropriate that the Commission take into account previous decisions relevant to any contested issue. As we have mentioned, previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The particular context in which those decisions were made will also need to be considered”. AMMA submits that previous Full Bench decisions of the AIRC which created extant modern award terms during the Part 10A award modernisation process are particularly relevant in this context.

18. AMMA opposes the replacement and insertion of the model clause in relevant resource industry modern awards, which already provide for TOIL.

19. First, the model clause would require a separate written agreement to be entered into for each TOIL occasion. Currently, the majority of resource companies utilise payroll software (ie. SAP or other similar platforms) to process TOIL arrangements.

Administratively, companies process TOIL arrangements similar to the way they treat annual leave. To introduce a new requirement in resource industry modern awards for a separate written agreement per occasion, will likely lead to fewer employers either implementing TOIL arrangements in their workplace or agreeing to employee requests for TOIL, due to the increased prescription and regulatory burden imposed on employers.

AMMA submits that the requirement for a separate written agreement should be obviated where the TOIL arrangement on each occasion is contained in an employee's records.

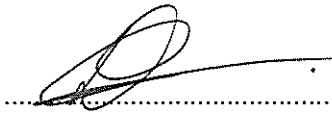
Employers are currently required to keep overtime and leave information in an employee's record under the *Fair Work Act 2009* (the Act). A cross-reference in the model term could be made to s.535 of the Act and the relevant Fair Work Regulations 2009.

20. Regulation 3.34 requires an employer to make and keep a record that specifies either a) number of overtime hours worked by the employee during each day or b) when the employee started and ceased working overtime hours. Regulation 3.36 requires employers to make and keep a record that sets out a) any leave that the employee takes and b) the balance (if any) of the employee's entitlement to that leave from time to time.

The requirement for a separate written agreement under the model clause appears overly bureaucratic and may inevitably be counter-productive to the considerations in subparagraphs 131(1)(c) and (d) of the Act.

21. Second, the model clause would create new restrictions as to when time off in lieu of overtime must be taken. There is no equivalent prescription in resource industry modern awards which contain a TOIL term.
22. Third, the model term would also allow an employee to unilaterally revoke TOIL and require an employer to pay an employee for any accrued entitlement. If TOIL has not been taken, the employee must be paid the worked overtime. There is no equivalent prescription in resource industry modern awards which contain a TOIL term.
23. Fourth, the model term would require unused TOIL to be paid out on termination at the overtime rate that applied. There is no equivalent prescription in resource industry modern awards which contain a TOIL term.
24. AMMA also notes the model term departs from existing terms in resource industry modern awards by:
 - a) Deeming a request for TOIL made pursuant to s.65 of the Act to be a request under the model term; and
 - b) Specifically prohibiting employers from exerting undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off in lieu of payment of overtime.
25. There are no equivalent provisions in resource industry modern awards which contain a TOIL term.
26. In relation to the creation of a specific prohibition against undue influence or undue pressure, AMMA submits that whilst a term which seeks to prohibit such conduct (akin to the prohibition under s.344) may be desirable, in the absence of cogent evidence, it is unclear how such a clause is *necessary* to achieve the modern awards objective under s.138. Whilst such a term may be ancillary to a matter contained in s.139 of the Act, it is unlikely that it could be characterised as an incidental or machinery term under s.142 of the Act.

27. AMMA submits that the existing TOIL terms in resource industry modern awards have been and are meeting the modern awards objective under the Act, and should not be replaced by the model term.

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Australian Mines and Metals Association Inc.

9 November 2015