

IN THE FAIR WORK COMMISSION

Matter No: AM2014/300

Award Flexibility

ASU FURTHER SUBMISSIONS ON THE MODEL TERM

1. These submissions are filed in accordance with the consent directions proposed by the ASU and Australian Business Industrial and NSW Business Chamber on 22 December 2015 following the Award Flexibility hearing on 10 December 2015.
2. The purpose of the Award Flexibility hearing on 10 December 2015 was to hear submissions from interested parties who contend that a particular modern award should not be varied to incorporate the model time off in lieu of payment for overtime (TOIL) term, or that the draft determination does not correctly reflect the outcome of the decisions in this matter.
3. The ASU filed submissions on 9 November 2015 in accordance with directions issued by the FWC with the Schedule of Draft Determinations on 16 October 2015.
4. The ASU's submissions sought a variation of the model (TOIL) term in relation to the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS Award). The variation sought to preserve the current entitlement in Clause 28.2 of the SCHADS Award that any untaken time off in lieu of overtime is paid out at overtime rates **based on the rates of pay applying at the time payment is made.**
5. During the hearing on 10 December 2015, the ASU made additional submissions in relation to the nature of the Social, Community, and Disability Services Industry, with reference to the evidence filed in the application made by the ASU and other unions for an Equal Remuneration Order covering the Social Community and Disability Services Industry (see PN2073 - PN2105 of the Transcript). This evidence was referred to in the Full Bench's decision in [2011] FWA 2700 dated 16 May 2011 (the Decision).
6. [225] of the Decision noted Australian Bureau of Statistics data which indicate that for workers in the Other social assistance group (879), any overtime worked is much less likely to be paid and more likely to be provided as time off in lieu.
7. This data was reinforced by the summary of evidence of the Applicants' employee witnesses which is Appendix A of the Decision. The summary contains

many references to workers working unpaid overtime and either receiving time off in lieu or no compensation. The summary also refers to workers accruing time off in lieu but not having the time to take this time off.

8. At the conclusion of the ASU's additional submissions, Justice Ross asked Judith Wright, appearing for the ASU, about the ASU's position if the ASU's submissions are not accepted, namely, whether the ASU would prefer to retain the current SCHADS Award clause, or accept the Model Term without the provision relating to payment at the rate prevailing at the time payment is made. (see PN2092 - PN2094 of the Transcript)
9. The ASU sought leave to file further submissions in relation to this issue.
10. Following consultation with ASU Branches, the ASU submits that its preference is to retain clause 28.2 of the SCHADS Award in the event that the ASU's submissions made on 9 November 2015 and 10 December 2015 are not accepted by the Fair Work Commission.
11. The ASU notes that the process in relation the taking of time off in lieu of payment for overtime is improved by the Model Term. However the ASU remains concerned about the high rate of overtime being taken as time off in lieu in Social, Community, and Disability Services Industry, and the intensity of work, creating a situation where employees are not always provided with the capacity to take that time off.
12. In the circumstances, it is appropriate that the current benefit, whereby overtime rates are paid out on the rates of pay applying at the time the payment is made is retained. This provides both a benefit to employees and an incentive to employers to ensure that time off in lieu of overtime is facilitated for employees in a timely fashion.

Filed on 23 December 2015 by

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