Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

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

2 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 submits that 'option 3', as proposed at paragraph [54] of the Decision, should be adopted in preference to 'option 1' and 'option 2'. This is because:

   a) 'Option 1'[2] would have the effect of entrenching a legislative standard in the modern awards system. This is neither necessary (in the sense contemplated by s.138 of the *Fair Work Act 2009* (**Act**)) nor appropriate.

   b) 'Option 1' and 'option 2' would have the effect of replicating the factors listed at s.62(3) of the Act in the relevant awards. This is neither necessary (in the sense contemplated by s.138 of the *Fair Work Act 2009* (**Act**)) nor appropriate. It would also be inconsistent with the approach typically adopted by the Commission and its predecessors, which has been to resist reproducing the terms of the National Employment Standards (**NES**) in modern awards.[3]

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

[2] *4 yearly review of modern awards – reasonable overtime* [2018] FWCFB 5749 at [52].

[3] See for example *Award Modernisation* [2008] AIRCFB 1000 at [34].

c) As the Commission observed in the Decision, 'option 3' has the benefit of brevity[4] and ensures that the relevant awards are simple and easy to understand[5]. Further, it does not give rise to the concerns we have identified at paragraphs (a) and (b) above. Finally, whilst it may require a reader of the award to "refer to another instrument"[6], that is not an uncommon feature of the modern awards system. Many award terms operate in conjunction or interact with various provisions contained in the Act (whether in the NES or otherwise) and therefore necessarily require the reader to reference both the award and the Act. That is an inevitable feature of scheme of the Act and the modern awards system. A desire to avoid the need to refer to two instruments should not override the concerns we have raised in respect of 'option 1' and 'option 2'.

3. Finally, we do not apprehend the directions contained in the Commission's Decision as requiring or inviting submissions about issues arising from the adoption of the model clause in specific awards at this time. Rather, we understand that the Commission intends to issue draft determinations once a decision has been made in respect of Clause X.3, after which interested parties will be given an opportunity to raise any award-specific issues.[7] Accordingly, we have not sought to do so in this submission.

[4] *4 yearly review of modern awards – reasonable overtime* [2018] FWCFB 5749 at [55].

[5] Section 134(1)(g) of the Act.

[6] *4 yearly review of modern awards – reasonable overtime* [2018] FWCFB 5749 at [55].

[7] *4 yearly review of modern awards – reasonable overtime* [2018] FWCFB 5749 at [58] – [59].