Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

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

22 February 2018

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PLAIN LANGUAGE RE-DRAFTING – REASONABLE OVERTIME (AM2016/15)

1. INTRODUCTION

1. This submission is made in response to the Commission's Statement[1] of 22 December 2017 in the 4 Yearly Review of Modern Awards – Plain Language Re-drafting proceedings.

2. In its Statement, the Full Bench said:

> [7] We have a *provisional* view to insert the note at para [3] of this Statement in all modern awards with clauses in the same terms as the *Pharmacy Industry Award 2010* and to remove the reasonable overtime clauses that replicate s.62 of the NES in those awards as part of the plain language review in 2018. Any interested party who opposes the *provisional* view are directed to file a written submission by 4.00 pm on Thursday, 22 February 2018.

3. Ai Group opposes the Commission's *provisional view* in respect of the following awards:

- *Building and Construction General On-site Award 2010;*
- *Cleaning Services Award 2010*;
- *Electrical, Electronic and Communications Contracting Award 2010*;
- *Fast Food Industry Award 2010*;
- *General Retail Industry Award 2010*;
- *Graphic Arts, Printing and Publishing Award 2010*;
- *Hair and Beauty Industry Award 2010*;
- *Joinery and Building Trades Award 2010*;

[1] [2017] FWCFB 6884.

- *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**);

- *Timber Industry Award 2010*.

4. Ai Group opposes the removal of the provisions which give employers an express right to require employees to work a reasonable amount of overtime from each of the awards.

5. The reason for our opposition is explained in section 2 of this submission.

6. We propose that the following provision be included in each of the abovementioned awards:

> **XX.** Subject to section 62 of the Act, an employer may require an employee to work reasonable overtime at overtime rates.
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> NOTE: Under section 62 of the Act an employee may refuse to work additional hours if they are unreasonable. Section 62 sets out factors to be taken into account in determining whether the additional hours are reasonable or unreasonable.

2. THE IMPORTANCE OF RETAINING THE LONGSTANDING AWARD RIGHT OF EMPLOYERS TO REQUIRE EMPLOYEES TO WORK REASONABLE OVERTIME

7. Award provisions which provide an express right for employers to require employees to work overtime have been common in federal awards for over 70 years, as confirmed in the following extracts from Australian Industrial Relations Commission's (**AIRC's**) *2002 Working Hours Decision*:[2]

> "**[52]**…Provision for an employer to require that an employee work reasonable overtime is a feature of many awards and has its origin in the decision of the Commonwealth Court of Conciliation and Arbitration in the *Standard Hours Inquiry 1947*[3]*.."*
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[2] PR072002, Giudice J, Ross VP, McIntyre VP, Gay C and Foggo C.

[3] (1997) 74 IR 446 at p. 458.

[277]…..Award provisions requiring an employee to work reasonable overtime are common…"

8. As identified above, award clauses requiring employees to work a reasonable amount of overtime can be traced back to a 1947 decision of the Commonwealth Court of Conciliation and Arbitration.

9. The clauses in the Metal Industry Award and the Manufacturing Award that give employers the right to require employees to work a reasonable amount of overtime are set out below:

- ***Metal Trades Award 1952***[4]

Compulsory Overtime

14(k)(i) An employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement.

(ii) No organization party to this award shall in any way whether directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of this clause.

(iii) This sub-clause shall remain in operation until otherwise determined by the authority competent to do so under the Conciliation and Arbitration Act.

- ***Metal Industry Award 1971***[5]

Requirements to Work Reasonable Overtime

21(b) An employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement.

- ***Metal Industry Award 1984*** (when the award was made in 1984)

Requirement to work reasonable overtime

21(b) An employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement.

[4] (1951-52) 73 CAR 324 at 440.

[5] (1971) 141 CAR 389 at 431.

- ***Metal Industry Award 1984*** (as varied[6] by Keogh DP in 1987 in accordance with the Second Tier Decision)

  Requirement to work reasonable overtime

  21(b) An employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement.

  The assignment of overtime by an employer to an employee shall be based on specific work requirements and the practice of ***"one in, all in"*** *overtime shall not apply.*

- ***Metal, Engineering and Associated Industries Award 1998*** (prior to the *2002 Working Hours Decision*)

  6.4.2 Requirement to Work Reasonable Overtime

  An employer may require any employee to work reasonable overtime at overtime rates and the employee shall work overtime as required.

  6.4.3 One in, All in does not Apply

  The assignment of overtime by an employer to an employee is based on specific work requirements and the practice of "one in, all in" overtime must not apply.

- ***Metal, Engineering and Associated Industries Award 1998*** (as varied to reflect the *2002 Working Hours Decision*)

  6.4.2 Requirement to Work Reasonable Overtime

  6.4.2(a) Subject to clause 1.2 an employer may require an employee to work reasonable overtime at overtime rates.

  6.4.2(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

  (i) any risk to employee health and safety;

  (ii) the employee's personal circumstances including any family responsibilities;

  (iii) the needs of the workplace or enterprise;

  (iv) the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and

  (v) any other relevant matter."

[6] Print H0120.

6.4.3 <u>One in, All in does not Apply</u>

The assignment of overtime by an employer to an employee is based on specific work requirements and the practice of "one in, all in" overtime must not apply.

10. The removal of the employer right in subclause 40.2(a) of the Manufacturing Award, and the equivalent clauses in the other nine awards referred to above, would remove a very important right that is widely relied upon by employers.

11. Section 62 of the *Fair Work Act* does not provide an express right to an employer to require employees to work overtime. It only provides an express right for an employee to refuse an employer's request or direction to work additional hours if the additional hours are 'unreasonable'. It is important that both parties have express rights. In this regard, the following extracts from the AIRC's *2002 Working Hours Decision* are relevant:

> **[247]** We turn now to the 15 factors listed in subclause 1.2. We note, as was pointed out by many opponents of the claim, that the factors all relate to the circumstances of the employee and none to the circumstances of the employer. It is apparent that the formation of a view as to whether hours of work are unreasonable or not requires that the circumstances of both the employee and the employer be considered. The ACTU placed reliance on decisions about reasonable overtime. These decisions, however, make it clear that the circumstances of both employee and employer must be looked at. For instance, in Metal Trades Employers Association v Boilermakers Society of Australia, the Commonwealth Industrial Court (Dunphy and Morgan JJ) said at page 334:
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> > "reasonable overtime is not one way; it must be considered in relation to the worker's conditions and also in relation to the employer's business . . ."
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> The absence from subclause 1.2 of any factors relating to the circumstances of the employer constitutes, in our view, a serious defect in the subclause. While we note that the ACTU contends that the 15 factors are not exhaustive, a clause specifying 15 factors all related to the employee's circumstances, and none relating to the employer's, may well be interpreted as giving greater weight to the specified factors than to other factors.
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> **[278]** In our opinion, it is desirable that the test case provision should provide some guidance to the parties on the matters which should be taken into account in deciding whether the working of overtime would result in an employee working unreasonable hours. We have considered whether the factors listed in subclause 1 of the ACTU's claim should be included. We have already indicated that the absence of any factors referable to the circumstances of the employer is a serious defect in the ACTU list. We shall include reference to the circumstances of the employer. We are also conscious that the provision must be capable of application to a broad range of situations. For

that reason we think it is preferable to deal with matters on a general level rather than to attempt to list every factor which might possibly be relevant. We do not intend that the provision should, as a general rule, be applied so as to interfere with rostered overtime particularly when the roster has been agreed in advance. Partly for that reason we shall include reference to the amount of notice (if any) which has been given of the requirement to work overtime and to the amount of notice (if any) given by the employee of the intention to refuse the overtime. The provision is only intended to be included in awards that specify ordinary time and provide for overtime. It will include a reference to the well established right of an employer to require an employee to work reasonable overtime. The provision we have decided on is the following:

"**1.1** Subject to clause 1.2 an employer may require an employee to work reasonable overtime at overtime rates.

1.2 An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

1.2.1 any risk to employee health and safety;

1.2.2 the employee's personal circumstances including any family responsibilities;

1.2.3 the needs of the workplace or enterprise;

1.2.4 the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and

1.2.5 any other relevant matter."

[279] An employee's right to refuse to work overtime in circumstances where the working of such overtime would result in the employee working unreasonable hours is implicit in the existing award provisions dealing with the obligation to work reasonable overtime. But we think that there are a number of advantages in making such a right explicit and moreover the evidence before us supports the creation of an award right of the type we have determined. The provision of an explicit right to refuse to work overtime in the circumstances specified will provide employees with a firmer basis upon which to refuse to work unreasonable overtime. In this context the ANOP Study recounts that some of the employees in the focus groups expressed the view that providing employees with the right to say no to working overtime was a positive step.

[280] The criteria we have adopted in relation to the exercise of the right to refuse to work overtime are also generally supported by the material before us. A majority of the employer respondents (64.3 per cent) to Professor Benson's survey of AIG and AHEIA members supported an employee's right to refuse to work overtime on a particular day on the basis of the employee's family responsibilities. Further, the survey respondents overwhelmingly supported the inclusion of criteria referring to the needs of the business (95.2 per cent) and to an employer's responsibility to provide a safe and healthy work environment (93.6 per cent).

[281] The creation of an explicit right also has the advantage of providing an opportunity for overtime issues to be raised at an early stage. Any issues about the appropriateness of the exercise of such a right can be quickly determined through the

dispute settlement mechanism in the relevant award. A weakness in the current reasonable overtime provisions is that an employer may be found to be in breach of the provision some time after the working of the overtime in question. The new award right will provide the potential for greater certainty for both employers and employees.

12. Section 62 of the *Fair Work Act* was undoubtedly based on subclause 1.2 in the AIRC's model clause. However, it does not appear to be based on subclause 1.1. This is perhaps due to the fact that provisions giving employers the right to require employees to work a reasonable amount of overtime are common in awards, enterprise agreements and contracts of employment.

13. We understand that the intention of the Commission's plain language re-drafting exercise is not to alter important rights and entitlements of employers or employees under modern awards. Removing the provisions from awards that give employers an express right to require employees to work a reasonable amount of overtime conflicts with this intention.

14. The longstanding clauses which give employers the right to require employees to work a reasonable amount of overtime are the product of a series of Full Bench decisions of the Commission's predecessors over the past 70 years. Such decisions should not be departed from; and particularly not as an outcome of a plain language re-drafting exercise.

15. In the *Preliminary Jurisdictional Issues Decision* for the 4 Yearly Review of Awards, the Commission highlighted the importance of following previous Full Bench decisions unless there are cogent reasons for not doing so: (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
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> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial

Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (Cetin):

> "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission 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.[7]

16. For the reasons outlined above, there are cogent reasons why the award provisions which give employers an express right to require an employee to work a reasonable amount of overtime should not be removed from the awards that are identified in paragraph 3 of this submission.

17. The following provision should be inserted into each of the awards:

> **XX.** Subject to section 62 of the Act, an employer may require an employee to work reasonable overtime at overtime rates.
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> NOTE: Under section 62 of the Act an employee may refuse to work additional hours if they are unreasonable. Section 62 sets out factors to be taken into account in determining whether the additional hours are reasonable or unreasonable.

[7] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].