MASTER ELECTRICIANS AUSTRALIA

Lead.Connect.

4 April 2017

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Sent via email to: eec.sen@aph.gov.au

Dear Sir/Madam,

I refer to the inquiry into the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017.*

Our experience with the four yearly review has been generally positive. With the assistance of the Commission, parties have been able to resolve a significant amount of ambiguities and make editorial corrections to awards that assist both employees and employers. For the most part this has occurred through agreement between the parties.

MEA does acknowledge that the compulsory requirement to review all awards can be onerous and, in principle, we do support plans to remove the necessity for a systematic four yearly review of modern awards. However, we are concerned that, without a regular formal review, there will be no opportunity for parties to resolve ambiguities or interpretations surrounding a modern award.

Background

The need for a mechanism that would allow parties to engage with the Fair Work Commission (FWC) to resolve modern award ambiguities is demonstrated by the recent decision from Commissioner Spencer in *All Trades Queensland [2016] FWC 2832*, and the subsequent Full Bench appeal, *All Trades Queensland V CFMEU and Others [2017] FWCFB 12.* The decision answered questions concerning, what was referred to as, the Queensland One Big Order (OBO).

The case addressed whether the Notional Agreement Preserving State Awards (NAPSA), which relates to traineeships and apprenticeships, continues to operate post 1 January 2014. The Full Bench of the FWC found that NAPSA does not continue to operate post 1 January 2014.

This decision meant that the Fair Work Ombudsman's (FWO) advice from 1 January 2014 to 12 August 2016, namely, that trainees and apprentices could be paid based on a Queensland Award post 1 January 2014, was incorrect. As a result, many employers in Queensland, including some MEA members, now face a back-pay liability exceeding $10,000 per individual apprentice. Had parties been provided with an opportunity to engage with the FWC regarding the issue prior to the FWC determination, the financial damage to affected employers could have been significantly less, or avoided entirely.

T: 1300 889 198 F: 1800 622 914
PO Box 2438, Fortitude Valley, QLD 4006
info@masterelectricians.com.au
masterelectricians.com.au

Queensland Level 2, 57 Berwick St, Fortitude Valley, QLD 4006
New South Wales Suite 4, Level 3, 100 George St, Parramatta, NSW 2150
Victoria Level 1, 20A, 75 Lorimer St, South Wharf, VIC 3006
South Australia 4A Northcote St, Torrensville, SA 5031
Western Australia Unit B2, 20 Tarlton Cr, Perth Airport, WA 6105

MASTER ELECTRICIANS AUSTRALIA

Lead.Connect.

In the 2012 Award Review and the Apprenticeship case MEA raised the OBO with both the FWC and Queensland Government including how it was being implemented and ultimately when it should cease. We are also aware of the attempts of other parties to resolve this issue.

The issue

Currently, section 158 of the *Fair Work Act* does not contain a mechanism to make an application for interpretation and or for clarification of an ambiguity. This was never contemplated due to the requirements under the four-year review.

As the legislation stands, there must be a dispute with an employer to bring about a determination. Disputes that proceed to a hearing are not common and most employers cannot bear the cost of such a matter. Nor can a single employer afford to contest the opinion of the FWO through the Federal Circuit Court. The risk of losing such a case only compounds the cost.

Historically, the FWC and its predecessors, Fair Work Australia and the Australian Industrial Relations Commission, have tried to maintain a low-cost jurisdiction to resolve workplace disputes. Anecdotally this trend over the past 20 years has seen increasing reliance on law firms and solicitors to undertake hearings and an increase in their appearance at conciliation conferences.

The *Fair Work Act* through the Ombudsman's office has filled a valuable enforcement role, however when disputes concerning interpretations arise between multiple parties, the only alternative is to proceed to the Federal Court to defend or prosecute the claim. Many of MEA's members have disagreed with a FWO interpretation, however none have had the time or money to defend what ultimately was the correct interpretation.

Recommendation

In place of the four-yearly review, MEA recommends a mechanism be included in the legislation that would allow parties to commence a proceeding for clarification where it can be demonstrated that employers, unions and/or the Ombudsman have differing interpretations. This would remove the need for a single employer to incur the costs of commencing a case or Associations having to initiate these proceedings at their own expense in federal courts. Other parties could be permitted to join the case to provide evidence, counter views and offer interpretations, if they so exist.

To affect this change in the legislation, section 158 of the Act could accommodate an additional item to allow:

> *"an application to vary or omit or include a term to redress an ambiguity or interpretation in a modern award."*

T: 1300 889 198 F: 1800 622 914
PO Box 2438, Fortitude Valley, QLD 4006
info@masterelectricians.com.au
masterelectricians.com.au

Queensland Level 2, 57 Berwick St, Fortitude Valley, QLD 4006
New South Wales Suite 4, Level 3, 100 George St, Parramatta, NSW 2150
Victoria Level 1, 20A, 75 Lorimer St, South Wharf, VIC 3006
South Australia 4A Northcote St, Torrensville, SA 5031
Western Australia Unit B2, 20 Tarlton Cr, Perth Airport, WA 6105

MASTER ELECTRICIANS AUSTRALIA

Lead.Connect.

The inclusion of this provision would allow the removal of the four-yearly review of modern awards, without compromising the ability of affected parties to clarify interpretations and resolve any ambiguities.

Should you have any questions regarding the above please do not hesitate to contact Mr Jason O'Dwyer, National Manager Advisory Services

Yours faithfully,

Malcolm Richards
CEO

T: 1300 889 198 F: 1800 622 914
PO Box 2438, Fortitude Valley, QLD 4006
info@masterelectricians.com.au
masterelectricians.com.au

Queensland Level 2, 57 Berwick St, Fortitude Valley, QLD 4006
New South Wales Suite 4, Level 3, 100 George St, Parramatta, NSW 2150
Victoria Level 1, 20A, 75 Lorimer St, South Wharf, VIC 3006
South Australia 4A Northcote St, Torrensville, SA 5031
Western Australia Unit B2, 20 Tarlton Cr, Perth Airport, WA 6105