

## IN THE FAIR WORK COMMISSION

AM2019/5

### 4 YEARLY REVIEW OF MODERN AWARDS

#### PROFESSIONAL EMPLOYEES AWARD 2010

#### SUBMISSIONS IN RESPONSE TO 15 SEPTEMBER 2020 STATEMENT

##### 1. INTRODUCTION

- 1.1 On 22 April 2020, the Commission delivered a decision (**the Decision**) in these proceedings, identifying concerns with the current drafting of clause 18 of the *Professional Employees Award 2010* (**the Award**) as well as identifying what the Commission stated were deficiencies in the Ai Group and APESMA joint proposal to vary clause 18.
- 1.2 On 28 August 2020, APESMA and Ai Group filed submissions (respectively, the **APESMA Submissions** and the **Ai Group Submissions**) responding to the Decision.
- 1.3 On 15 September 2020, the Commission released a Statement in relation to the Award, requesting that any interested party respond to the submissions filed.
- 1.4 ABI & NSWBC have members employing employees covered by the Award and make the following submissions.

##### 2. ABI & NSWBC POSITION

- 2.1 ABI & NSWBC support the primary position that has been put by Ai Group to vary the Award, as outlined at paragraph 13 of the Ai Group Submissions.
- 2.2 In the alternative, ABI & NSWBC support the secondary position advanced by Ai Group should the primary position not be accepted by the Commission.
- 2.3 ABI & NSWBC oppose the draft determination filed by APESMA on 28 August 2020.

2.4 ABI & NSWBC identify the following three grounds in particular in support of their position:

- (a) Concerns have been raised by the Commission in relation to the lack of enforceable minimum standards with respect to working additional hours and that the Award contains no provision for recording/reconciling such additional hours. ABI and NSWBC submit that these matters can be adequately addressed without inserting an overtime penalty into the Award (as sought by APESMA).
- (b) The relevant work activity being covered has never had overtime penalty provisions and to insert such provisions would require a cogent case supported by probative evidence.
- (c) The employees being regulated by this Award perform work that is distinct from other types of work performed under Award regulation and the application of overtime penalty rates for this industry is not appropriate.

### **3. ADDRESSING THE CONCERNS RAISED BY THE COMMISSION**

3.1 At paragraph 59 of the Decision, the Commission notes three primary concerns with the existing clause 18:

- (a) the Award does not prescribe additional compensation for unsociable hours of work;
- (b) no enforceable minimum standard is implemented for working unsociable hours (including no provision for record keeping and reconciliation); and
- (c) employees covered by the Award are disadvantaged when compared to other modern awards with more advantageous provisions (including other awards covering professional/managerial employees).

- 3.2 In relation to the first two concerns<sup>1</sup>, these may be addressed without inserting an overtime penalty into the Award.
- 3.3 By way of example, Ai Group has proposed that a note be inserted into the Award, directing the parties to the operation of section 62 of the Fair Work Act 2009 (**FW Act**). The note referencing the operation of section 62 alerts parties to the fact that working additional hours is prohibited by the Act where such hours are unreasonable.
- 3.4 Section 62 requires parties to contemplate whether the arrangements in place for additional hours are reasonable having regard to each specific case - taking into account a range of matters, including whether additional remuneration is provided for such work.
- 3.5 As such, it is not the case that employees are left with no protections when additional hours of work are performed.
- 3.6 If necessary, the Commission could build on the Ai Group primary position by inserting into the Award a requirement that an employer keep a record of additional hours worked (above 38 per week). Whilst this is not ABI/NSWBC's preferred course of action, such an approach would ensure records are kept of hours worked so that arrangements can be reviewed and additional hours monitored - addressing the concern identified in paragraph 59 of the Decision.
- 3.7 Should the Commission retain any concern about the working of additional hours for employees covered by this Award, the alternate position advanced by Ai Group goes even further - ensuring employees are either:
- (a) afforded an additional payment for working additional hours of at least the Award's base minimum hourly rate; or
  - (b) provided with time off in lieu for additional hours (complete with record keeping obligations at proposed clause 14B.3(h)).

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<sup>1</sup> We address the third concern at section 5 below

- 3.8 These measures specify a prescriptive type of payment/compensation arrangement that must apply for the working of any additional hours by employees covered by the Award.
- 3.9 These measures are targeted at Levels 1 and 2 of the Award, which attract lower levels of remuneration which are more aligned to other Award pay rates.
- 3.10 From levels 3 to 6, the remuneration provided is very high compared to most other awards (\$66,396 - \$90,213) and accordingly these salaries, when combined with section 62 of the FW Act, should ensure appropriate remuneration and conditions are being afforded to employees for additional hours of work.

#### **4. THE WORK HAS NOT CUSTOMARILY ATTRACTED OVERTIME PENALTIES**

- 4.1 The main pre-modern awards that governed the activities now covered by the Award are identified in the Ai Group submissions of 30 September 2019. These are:
- (a) *Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998;*
  - (b) *Technical Services Professional Engineers (General Industries) Award 1998*
  - (c) *Scientific Services Professional Scientists Award 1998*
  - (d) *Information Technology Industry (Professional Employees) Award 2001*
  - (e) *Telecommunications Industry (Professional Employees) Award 2002*
- 4.2 None of the above awards compelled employers to pay an overtime penalty to employees for periods of additional hours worked.
- 4.3 Rather, they afforded the parties a substantial degree of flexibility to determine the arrangements to apply for additional working hours.
- 4.4 To now insert overtime penalties into the Award for additional hours of work would constitute a substantial departure from the existing safety net.

- 4.5 Accordingly, APESMA is required to demonstrate cogent reasons supporting the change, supported by probative evidence.<sup>2</sup>
- 4.6 Whilst evidence has been filed in the proceedings, ABI and NSWBC reiterate the concerns advanced about the reliability of this evidence outlined at section 10 of the Ai Group Submissions and contend that the evidentiary threshold for the types of changes presently sought has not been met.

## **5. WORK PERFORMED IS DISTINCT**

- 5.1 The work performed by employees engaged under the Award is distinct.
- 5.2 Firstly, employees must be degree qualified, which is not required in many other modern awards.
- 5.3 Secondly, in many (but not all) Awards, degree qualified professionals and senior managerial staff are excluded from award coverage. This is reflected in the terms of the *Miscellaneous Award*, which is intended as the 'catch-all' award to ensure all employees who were ordinarily award covered prior to 2010 retain award coverage. Clause 4.2 of the *Miscellaneous Award* expressly excludes professional employees from its coverage, which serves as an acknowledgement of the traditional lack of award-coverage for these types of employees.
- 5.4 Thirdly, the wage rates payable are substantially higher than those applicable in other awards. This is particularly the case for Levels 3 - 5, where pay rates exceed those applicable under any classification in many awards (by way of example, they exceed all rates applicable under awards covering large numbers of employers such as the *Clerks- Private Sector Award, Manufacturing and Associated Industries and Occupations Award, Building and Construction General On-Site Award, General Retail Industry Award, Restaurant Industry Award and Hospitality Industry (General) Award*).

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<sup>2</sup> 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues*

5.5 The higher salaries payable naturally explain why additional hours can be voluntarily worked by professionals without additional remuneration. It also explains why so many consent awards have been made historically without unions seeking to introduce overtime payments into the awards.

5.6 Having regard to these matters, it is not necessarily the case that the employees are “*disadvantaged when compared to other modern awards with more advantageous provisions*”. This is particularly the case where managerial employees covered by other awards are not receiving the same high level of base remuneration as that provided under the Award.

## **6. CONCLUSION**

6.1 For the reasons advanced above and for the reasons advanced in the Ai Group Submissions, ABI & NSWBC commend the primary position outlined by Ai Group and oppose the claim by APESMA to insert overtime penalties into the Award.

**Filed for and on behalf of ABI & NSWBC**

30 September 2020