AM2013/26

s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

Application by South East Water Corporation
(AM2013/26)
Water Industry Award 2010

(ODN AM2008/92)
[MA000113 Print PR991080]

Sydney

10.09AM, THURSDAY, 31 JULY 2014

THE FOLLOWING PROCEEDINGS WERE CONDUCTED VIA VIDEO LINK AND RECORDED IN SYDNEY
THE SENIOR DEPUTY PRESIDENT: There are no appearances here in Sydney. We only have appearances in Melbourne.

MS PAUL: If it please the commission, Paul initial V for the (indistinct) from South East Water as well as Australian Industry Group.

MR RIZZO: Your honour, Rizzo on behalf of the ASU.

MR FOOKS: If the commission pleases, my name is Fooks initial T for APESMA. With me is Ms Baulch, initial J.

THE SENIOR DEPUTY PRESIDENT: Yes, thank you Mr Fooks. Now, I thought we would start by ensuring we all have the same documents and make sure that the bench isn’t missing anything that you think has previously been forwarded. I will just run through the documents I have quickly. At an appropriate time when you’re making submissions I assume you will seek to tender them and we will then mark them. Apart from the originating amended applications I should indicate that in the case of South East Water we have the outline of submissions together with a number of annexures and I might note that in relation to annexure referred to, I think, as annexure 3 there has been as recently as yesterday an update to that. That document is a document which provides a summary of the predecessor awards in the Water, Sewerage and Drainage Services Industry, that is the predecessors to the modern award.

Now, I don’t need to identify three statements that were previously filed by South East Water as I understand there is no intention to rely upon them and they have been withdrawn. Additionally in the case of both South East Water and AIG we have received some short submissions that primarily go to the objectives of the modern awards, the particular objectives within the modern awards objective that are said to support the making of the variations sought. In the case of the ASU we have some submissions dated the 19th – not too sure what month it is. It’s just got Thursday the 19th 2014. 19 June?

MR RIZZO: 19 June.

THE SENIOR DEPUTY PRESIDENT: Yes, good. 19 June. That originally had some attachments to it being a preferred and alternative clauses sought by the ASU but I will later make an observation about some amendments to those clauses and identify those documents. In the case of APESMA we have submissions dated 1 July 2014 and I think in more recent times we have received a document, I don’t know if it’s dated but it’s a document described as being in response to attachment 3 to the AIG submissions. It comprises a chart which lists a number of predecessor awards together with some comments about those awards and then in turn it attaches a number of extracts from the government salaries clauses of awards.
Now, then finally I had my chambers send to each of you on 25 July a document which has attached to it three clauses and we describe them as the AIG South East Water proposed clause, the ASU preferred clause and the ASU alternative clause. Unless anything is said by any of you we would think it best that the submissions concentrate on those clauses insofar as there is an argument between you about the content of an annualised salary clause should one be placed in the Water Industry award. All right, having said all that I think the first thing is to ensure that we’re not missing anything so I start with you first Ms Paul. Anything we should have received that I have not identified?

MS PAUL: (indistinct) in respect of clauses. I attached to them the attachment (indistinct)

THE SENIOR DEPUTY PRESIDENT: The first thing you’re going to have to do is try yes, yes, we just missed a few comments that you made.

MS PAUL: Sorry, your honour. If I may, what we sought to attach is an amended attachment (indistinct) last night. We have also appended a number of extracted clauses just more for ease of reference.

THE SENIOR DEPUTY PRESIDENT: Yes. I was going to ask you about that. There’s a number of clauses from a subset of the predecessor awards within the relevant industry. For example, there’s the Melbourne Water award, Parks Victoria award, Sydney Water, Hunter Water. Now, they’re only a small number, of course, of the awards referred to in that chart that is said to be in the Water and Sewerage Industry. What do you want us to do about these clauses in relation to that subset of awards, Ms Paul? Do you want them to be marked or what - - -

MS PAUL: Your honour, we might just be referring to them. I don’t particularly need to have them marked for my purpose. It was more for ease of the commission. (indistinct) appended a number of other clauses as well from those predecessor awards. What we are seeking by (indistinct) referencing the email in the submission and attachment 3 as amended.

THE SENIOR DEPUTY PRESIDENT: All right. Let me just have a look at that. Yes, it just seems to me that if one or the other of you are relying on what is or is not or was or was not in the respective awards that are listed as being in the Water, Sewerage and Drainage Services Industry we should probably have all of the clauses. I know some of them are being relied on on the basis to assert the negative, namely if you look at the award you will see that the clause doesn’t have an annualised salary. The only way we’re going to follow what each of you are going to be saying is the relevance of those predecessor awards did or didn’t have is if we have copies of the extracts from each of them.

I haven’t done the exercise but I’m assuming a combination of all of the ones that were extracted and annexed to the APESMA submission together with these ones
that came in yesterday from you, Ms Paul, we’d be getting pretty close to having an extract from all of the awards.

PN17
MS PAUL: Yes, your honour, I believe we would.

PN18
THE SENIOR DEPUTY PRESIDENT: All right.

PN19
MS PAUL: If it assists your honour I might go through that so that we can clarify them (indistinct) separately if that assists.

PN20
THE SENIOR DEPUTY PRESIDENT: Yes, all right. You identify what the extracts were from which awards that you sent in yesterday with your updated attachment 3.

PN21
MS PAUL: Yes, your honour. I might (indistinct) identify the outline of the APESMA extracts.

PN22
THE SENIOR DEPUTY PRESIDENT: For the time being I’m just going to put these extracts from this subset of those awards to one side, am I, and you’re going to come to then later?

PN23
MS PAUL: Yes, your honour.

PN24
THE SENIOR DEPUTY PRESIDENT: We’re still on the topic of what documents any of the parties think we should have had and I did not announce earlier so that’s the only document from you, Ms Paul?

PN25
MS PAUL: Yes, your honour (indistinct)

PN26
THE SENIOR DEPUTY PRESIDENT: Mr Rizzo, do we seem to have everything that you believe you filed and would be before us?

PN27
MR RIZZO: Yes your honour, that’s correct.

PN28
THE SENIOR DEPUTY PRESIDENT: Good, thanks. Mr Fooks?

PN29
MR FOOKS: Yes (indistinct)

PN30
THE SENIOR DEPUTY PRESIDENT: All right. At some stage you will each need to seek to tender the documents. We will then mark it. Have you reached any agreement as to how you wish to proceed this morning? We would have thought maybe Ms Paul would go first and Mr Rizzo and Mr Fooks you can sort out amongst yourselves who would go next. Yes? I think before you start,
Ms Paul, Mr Fooks could you just indicate to me if the position of APESMA is to oppose any annualised salary going into the award.

MR FOOKS: Yes that is correct. We oppose a variation of the (indistinct) award.

THE SENIOR DEPUTY PRESIDENT: Do I understand your position is to oppose any of the three clauses that my chambers sent to the parties on 25 July.

MR FOOKS: That is correct.

THE SENIOR DEPUTY PRESIDENT: Do I understand from your submissions your alternative position is that if a clause was to go in you support the ASU.

MR FOOKS: That’s correct.

THE SENIOR DEPUTY PRESIDENT: All right, thanks. That might then impact on, Mr Rizzo and Mr Fooks, it being perhaps appropriate Mr Fooks goes next after Ms Paul and he addresses well, it seems to me there is a discrete issue here about whether any clause goes in at all and the two of you need to talk about how you might address that. I might come back to it, I don’t have a current view on that. Ms Paul, at this stage I take it the only basis upon which you understand opposition to any clause going in is that which has been put in the APESMA submissions.

MS PAUL: Yes, your honour.

THE SENIOR DEPUTY PRESIDENT: All right. After you hear Mr Fooks you might need to reply on that matter. For the time being Ms Paul, you say whatever you want to say about the clause you seek and what you want to say about why we should be persuaded to, if we were to put in a clause, why it should not be one in the terms sought by the ASU, either its preferred clause or alternative clause.

MS PAUL: Yes your honour. Would you like me to (indistinct) question specifically?

THE SENIOR DEPUTY PRESIDENT: You tender the documents whenever you wish. This is probably a good time.

MS PAUL: Firstly we seek to tender our outline of submissions filed 10 June.

THE SENIOR DEPUTY PRESIDENT: Yes. That has how many attachments to it?
MS PAUL: It has three attachments.

THE SENIOR DEPUTY PRESIDENT: Yes. That will become, I suppose South East Water’s the applicant, isn’t it.

MS PAUL: Yes, it is.

THE SENIOR DEPUTY PRESIDENT: SEW1 I think is the first exhibit. I don’t think I’ve marked anything prior to today.

EXHIBIT #SEW1 APPLICANT'S OUTLINE OF SUBMISSIONS DATED 10 JUNE 2014

MS PAUL: No you haven’t, your honour.

THE SENIOR DEPUTY PRESIDENT: All right.

MS PAUL: It starts with that your honour and if I may also tender the documents, the letter headed submission filed 1 July by AIG.

THE SENIOR DEPUTY PRESIDENT: Just a minute. I’m trying to find that. I’ve got your submissions of 24 July, Ms Paul. Yes, yes I see. So on 1 July you have a submission there yes, it’s just two pages. That will become SEW2.

EXHIBIT #SEW2 SUBMISSIONS OF APPLICANT DATED 1 JULY 2014

MS PAUL: The third submission filed on 24 July, your honour.

THE SENIOR DEPUTY PRESIDENT: Yes. That submission again is two pages also by the earlier submission addressing the modern awards objectives you say would be met with the insertion of an annualised salary clause and that will be marked SEW3.

EXHIBIT #SEW3 SUBMISSIONS OF APPLICANT DATED 24 JULY 2014

MS PAUL: Thank you, your honour. Your honour, the (indistinct) submission we rely on submissions in relation to the principle material of section 157 applicant this is being brought under we say is necessary for the purposes of meeting a modern award objective. The main thrust of our submission is that we believe that the issue that (indistinct) our submission of SEW1 is that the full bench at the time of (indistinct) 2010 does not take into consideration the industry standard that was established (indistinct) enterprise awards that operated in the
industry. Your honour, there are more enterprise awards than (indistinct) industry than there are general industry awards in themselves.

PN54

Your honour, we believe that there’s sufficient reason to get over (indistinct) section 157 application to demonstrate that there has been a change. That change of material that these enterprise awards (indistinct) terminate at the end of last year subject to one proviso, that there are applications to vary such enterprise awards.

PN55

THE SENIOR DEPUTY PRESIDENT: I think the position is they were terminated at the end of last year and a very small number were the subject of an application for a modern enterprise award to be made in substitution for the pre-existing award. Off the top of my head I think there were probably three in what would be described as the water industry. I think that’s the situation as I understand it.

PN56

MS PAUL: Yes, your honour. One of them was the South East Water application which was also addressed in submissions SEW1.

PN57

THE SENIOR DEPUTY PRESIDENT: Yes.

PN58

MS PAUL: The purpose of that application, your honour, is a purely for the purposes of inserting, or retaining an annualised salary clause of some sort for the class of employees that we speak in terms of levels 9 and 10. In light of that, Commissioner, what we would like to do is to identify (indistinct) in terms of the attachment 3 which we have amended and I would seek at this point to tender that.

PN59

THE SENIOR DEPUTY PRESIDENT: What I have done is already put it in a substitution for the existing attachment three that was filed with your outline of submission. I’m happy for the transcript to note that it is in substitution for that attachment 3 and, of course, that’s already been marked exhibit SEW1 or would you prefer it to have a separate marking?

PN60

MS PAUL: No, that’s fine your honour.

PN61

THE SENIOR DEPUTY PRESIDENT: All right. Again, I will just confirm what I said. In relation to attachment 3 to the document I have marked SEW1, it should be noted that there’s an amended attachment 3. It’s identified by the additional red amendments in the title of the document and in the column identified as annualised salary. Yes?

PN62

MS PAUL: Your honour, if I could go to that attachment. It appears clear that the (indistinct) water industry award 2001 is accepted by the parties as containing an annualised salary clause and thereby we say the (indistinct) centred around this issue about the industry having salaried arrangements (indistinct) for employees
covered under the (indistinct) enterprise awards and in particular for the levels of employees that we are talking about which is the senior managers. It also appears that (indistinct) 2002 we believe that there is a salary (indistinct) - - -

THE SENIOR DEPUTY PRESIDENT: Hang on a minute. We lost you there for a moment so I think you’re going to have to be careful about staying close to your microphone. I understand that you said that the Rural Water Industry award a predecessor to the modern Water Industry award had a clause in it which allowed for annualised salaries and I see that, it’s clause 11.1.6. It just allowed for employees or parties to agree that employees may be paid annualised salaries. I see that clause.

MS PAUL: Yes, your honour. We say there’s no dispute between APESMA and ourselves in relation to the fact that that’s an annualised salary clause. In relation to the (indistinct) salary employees award 2002 - - -

THE SENIOR DEPUTY PRESIDENT: That’s where I’m losing one of the words. In relation to which award?

MS PAUL: The Australian Rural and Salaried Employees award 2002.

THE SENIOR DEPUTY PRESIDENT: The Australian Inland Salaried Employees award?

MS PAUL: Sorry, Inland.

THE SENIOR DEPUTY PRESIDENT: Yes, all right. In the APESMA document they’ve referred to that as the fourth award.

MS PAUL: Yes. They’ve disagreed that it contains an annualised salary. We don’t debate the issue that there is another clause that identifies annualised salary in that sense. I do say that the award reflects employees are paid in accordance with the salary and salaries are clearly of an annual nature (indistinct) pay type meaning fortnightly et cetera. Our submissions are based on the fact that we say that salary arrangements (indistinct) in relation to this industry.

THE SENIOR DEPUTY PRESIDENT: You’re fading in and out, Ms Paul and I think it’s possibly because you’re moving away from the microphone from time to time. Could you do your best to stay as close to it as possible.

MS PAUL: Yes. I’m sorry your honour. We say that a feature of the industry is a fact that there are salary arrangements (indistinct) specifically states it’s an annualised salary or a total remuneration salary we say is irrelevant. It’s a principle of what we are saying - - -
THE SENIOR DEPUTY PRESIDENT: Well, you would accept would you not that an award that reflects remuneration for employees as an annual salary is not necessarily an award which contains annualised salaries in the sense in which now we are contemplating the insertion of one or other of the proposed clauses.

MS PAUL: Yes, your honour except that we say that for the purposes of getting over the issue of whether or not it’s an industry feature, it is relevant that (indistinct) whether or not employees are paid in accordance with the salary or not. For the purposes of that we say that the clauses in particularly the (indistinct) as we go through the remainder of appendix 3, identify clearly that there are payments in relation made to employees in relation to a salary arrangement. In some instances these awards identify that not only do they get a salary but there is some level of off set or aggregation of any overtime payments for those receiving (indistinct) and in other circumstances they very specifically identify the annualised salary clause that (indistinct) a number of terms and conditions.

To that sense I just want to be clear, we’re not disagreeing with APESMA that some of these are not annualised salaries in a sense, we just want to clarify our position as being in our submission that all we’re talking about is the fact that salaries are a feature in the same way as when the commission looked at clerical awards and (indistinct) in the clerical industry. It’s about the feature of having a salaried arrangement. It doesn’t allow the parties in the clerical industry to (indistinct) payments under the award, the holistic sense that the parties are able to enter into an arrangement to pay salaries.

THE SENIOR DEPUTY PRESIDENT: Yes, I think in these pre-existing awards operating in the industry it is clear that there are a number of rates or minimum rates or wages clauses which, in fact, reflect the payment by reference to an annual salary. I think the extracts probably speak for themselves namely the extracts annexed to the APESMA submission as well as the additional ones that you have provided to us. What I would be interested in is your submission about the extent to which, in those awards which do have an annualised salary clause which are not extensive, whether those annualised salaries may only have been entered into with the agreement of the parties, whether that was a feature of the pre-existing awards.

MS PAUL: Your honour, I believe that there – if we look at solely the issue of those with annualised salaries we would have to consider that there are some of the awards that provide for (indistinct) by way of such arrangements by way of agreements but we would say that if you look at that, if I can give you an example in terms of the (indistinct) asset management services award at clause 4.2, it’s clear that it’s not referred as an annualised salary. It’s (indistinct) that the employer shall be entitled to offset any allowance paid under an employee’s contract of employment against any allowance payable under the award.

I accept your honour that (indistinct) has to be an agreement between the parties but it’s not a necessary requirement if we look at that clause, for example, that the
employer has to reach agreement for the purposes of activating their right to look at an offsetting arrangement which (indistinct) principle of a salary type process.

PN79
THE SENIOR DEPUTY PRESIDENT: Could I put it this way, in any of the pre-existing awards, the predecessor awards to the modern Water Industry award where there was an annualised salary clause or an ability for the parties to enter into an annualised salary clause, did any of them allow that arrangement to be entered into other than with the agreement of the employer and the employee?

PN80
MS PAUL: Commissioner (indistinct) one did. The Sydney Water award 2001 your honour which is one of the (indistinct) which we’ve attached (indistinct) conditions for senior managers to be contained within their individual contracts.

PN81
THE SENIOR DEPUTY PRESIDENT: Just a minute, let me find that. That’s in some of these additional ones you sent yesterday is it?

PN82
MS PAUL: Yes, your honour.

PN83
THE SENIOR DEPUTY PRESIDENT: The Sydney Water Senior Managers award.

PN84
MS PAUL: Yes, your honour.

PN85
THE SENIOR DEPUTY PRESIDENT: What were you saying about that?

PN86
MS PAUL: Clause 6, your honour, which I have extracted I don’t (indistinct) senior management unless they’re paid (indistinct) and then clause 7 identifies that the award classes senior managers for the other conditions that are within the award and (indistinct) conditions will be contained in their individual contracts.

PN87
THE SENIOR DEPUTY PRESIDENT: Yes. It’s a bit cryptic, isn’t it, but I say that you read into that that allowed an employer to, that did not require the employee’s consent to be paid on the basis of an annualised salary. That’s what you say arises out of these brief clauses.

PN88
MS PAUL: Yes. If I may your honour, I would like to make the distinction from (indistinct) any contract of employers, both parties have to agree but reading that aside to an industrial obligation arising from an award and within the context of the industrial obligation arising from the award, we say that particular clause that I’ve referenced in the Sydney Water Senior Management award clearly identifies that an on industrial basis the only (indistinct) for an employer to offer a contract of employment if he employee is not being paid, the employee is being paid below point 6.9. So in that sense there is a contemplation that that industrial (indistinct) can proceed in a course of action that it has previous to do in terms of offering employment conditional on a contract of employment being signed.
In the other clauses that identify – the other clauses, your honour, work on the same, sorry the other provisions your honour work on the same principles as I’ve just identified regarding the fact that it allows for salaried arrangements and allows the employer to consent. For the purposes of a pure annualised salary in that sense then these predecessor enterprise awards where they have such clauses we can see fairly similarly to that of the South East Water award do have a level of agreements that needs to be entered into.

THE SENIOR DEPUTY PRESIDENT: Yes.

MS PAUL: Again your honour, that turns on this concept that a contractual arrangement doesn’t (indistinct) employer to choose to enter into such arrangements. Your honour, I seem to have got to the nub of the issue that we were (indistinct) in our (indistinct) predecessor enterprise awards the real issue (indistinct) is our arrangements in those enterprise awards that either allow for annualised salary or a salary arrangement with some level of offset in overtime and other payments, whether it’s by payment of an annual (indistinct) or whatever the circumstance may be. It does allow flexibility for the parties to enter into an arrangement in terms of salary arrangements. Your honour, if I can refer you to the Yarra Valley Senior Water Officers award.

THE SENIOR DEPUTY PRESIDENT: That was an extract that was in that additional document you sent into us yesterday.

MS PAUL: Yes, your honour.

THE SENIOR DEPUTY PRESIDENT: Yes, Yarra Valley Water Senior Officers award 2006. I have that.

MS PAUL: That similarly contemplates a contract of employment so clause 9.1 (indistinct) in the form of (indistinct) provides then for a total remuneration arrangement that says that Yarra Valley Water Senior Officer (indistinct) and goes to some process in relation to that. It then identifies at clause 9.3.2 that the following clauses would not apply, being the hours of work, the overtime et cetera. We’re saying that two of the awards was (indistinct) senior employees to the type that we are seeking to be, in our application, there is a very clear identification (indistinct) and the ability to enter into arrangements, salary arrangements that provide for offset.

We stress that, your honour, that for the basis of what we say is the test the commission is to look at for the purposes of advancing our 157 application, firstly whether or not there is a necessity to make the amendments to the modern award (indistinct) and we say there is on the basis that the award doesn’t contemplate conditions which are a feature of the industry such as salary arrangements or annualised salary clauses or total remuneration clauses in some form. We say that the predecessor enterprise awards as a predecessor award contemplated such
arrangements to be in place. The fact that they’re not in the modern water award we say was on the basis that the parties hadn’t contemplated it at the time of the award being made.

PN97 The second issue that we’ve got to get over is the issue regarding (indistinct) of the 157 application and as we’ve addressed in our submission, your honour, we believe that this is an issue that could be ventilated as part of the four yearly review but bearing in mind that this award is listed for next year and in light of what South East Water sets in terms of its enterprise award, we say it’s most properly brought in relation to this application. We say it’s most properly brought because we say that the nature (indistinct) 2010 is that these enterprise awards as you have pointed out, your honour, have all expired and it leaves not just South East Water but the other parties in the industry with the same issue of losing that opportunity to enter into these sorts of arrangements.

PN98 Finally, your honour, to address the issue about whether the commission should grant our application we say that the ASU supports the fact that there is this feature of having annualised salary or salary arrangements within the industry. We say that being a union that deals with this industry a fair bit that (indistinct) weight should be put in relation to the fact that there is an acceptance that these clauses are appropriate to put into the water industry award. (indistinct) rely on our outline of submissions in the material intended with respect to that. What I would like (indistinct) no further questions on that issue (indistinct) about what kind of clause should be put into the award.

PN99 THE SENIOR DEPUTY PRESIDENT: Yes.

PN100 MS PAUL: Your honour, the (indistinct) is the issue of the type of clause to be put into the award. We accept the ASU’s submission that there is an alternate proposition that they put forward, that that alternate proposition is that (indistinct) reflects the South East Water enterprise clause but we say that in the modern award, the award clause should be that which has been ventilated appropriately before the full bench. The clause in relation that is proposed by South East Water is that which is contained in the Clerical award. That award can be (indistinct) between the ASU and a number of other parties at the time of modernisation but also later in terms of further review.

PN101 Those applications the ASU had sought to (indistinct) clauses contained in the Clerical award or that type of clause to be removed. We say that the issue about what clause should go in should be a clause that reflects an appropriate clause that meets the needs of the industry at large and (indistinct) of the test set by the commission in relation to what is an appropriate annualised salary arrangement. The clause that we’re proposing as evidenced from the Clerical (indistinct) Award 2010 can also be found in the Contract Call Centres Industry award. I refer your honours to the position being 2009 AIRCFC 922. The history of the Clerical award clause arose on the basis that there were exemption provisions that were included as part of the award. Those exemption provisions occurred at
paragraph 8. The commission says “Our most common (indistinct) are in white collar employment”.

PN102
THE SENIOR DEPUTY PRESIDENT: Sorry, I lost you there for a minute. Are you referring to an extract now from that full bench decision?

PN103
MS PAUL: Yes, I am your honour.

PN104
THE SENIOR DEPUTY PRESIDENT: All right. I can’t immediately locate it. Have you reproduced the extract from this decision in your submissions or anywhere? I’m familiar with the decision but I don’t actually have a copy of it in front of me.

PN105
MS PAUL: I apologise your honour, I should have forwarded that across. I don’t think we’ve actually covered that in the submission per say. If the commission is minded I’m happy to provide the commission with a copy of the case and highlight the sections that I’ve read after this hearing if that assists.

PN106
THE SENIOR DEPUTY PRESIDENT: You just give us the citation again and identify the paragraph you’re reading from and then you can read that and I think that should be adequate for us to proceed but in any event this a full bench decision that concerned the Clerks Private Sector modern award?

PN107
MS PAUL: Yes, it is your honour.

PN108
THE SENIOR DEPUTY PRESIDENT: Yes, all right.

PN109
MS PAUL: The citation was 2009 AIRCFB 922. Paragraph 8 your honour, second sentence, sorry the paragraph says that (indistinct) provisions and clauses expressed in a variety of ways provide that (indistinct) apply to particular classes of employees. They are most commonly instruments covering (indistinct) employment. In some cases they expressed the application of particular clauses of the award and in other cases they’ve specified a particular clause which do apply. The (indistinct) of the Clerks award your honour come about obviously as a result of the exemptions provision. There was an amendment made to the Act and it required the parties to revisit the issue about exceptional clauses. Sorry, amendment made as a result of government.

PN110
The end result, your honour, was that (indistinct) notwithstanding that the commission in this matter (indistinct) needed to be a retention of the (indistinct) arrangements. Clause 25 of that same case your honour, the full bench says “In all of the circumstances we consider that the exemption provisions should be reviewed but that principle working arrangements should be available in respect to clerical employment and these should be subject to appropriate safeguards and processes to ensure that employees clearly understand and agree to any
arrangements in place (indistinct) entitlements. We propose to delete the exemption clause in clause 17 (indistinct) annualised salaries clause (indistinct) in line with the clauses in some other modern awards. It provides for an alternative (indistinct) safe guards against disadvantage and (indistinct) to establish and maintain the annualised salary arrangement”.

It then goes forward to identify the actual annualised salary clause which is the (indistinct) that the (indistinct) included would be the Water Industry award 2010.

THE SENIOR DEPUTY PRESIDENT: I’m sorry, just pause for a moment would you.

MS REPORTER: Her microphone just keeps dropping in and out so it’s not recording some bits.

THE SENIOR DEPUTY PRESIDENT: Yes, we’re still having some difficulty in picking up everything you’re saying, Ms Paul, and I think the fault may be yours. I think stay as close as you can to the microphone and then if, in fact, it’s the equipment or the problem is our end we will let you know. Madam Reporter, are you confident that at least that transcript thus far we will be able to figure out what we’re saying or is intended?

MS REPORTER: I’m sure there are some parts that won’t be picked up because just recently again she dropped out and I couldn’t hear anything.

THE SENIOR DEPUTY PRESIDENT: I think just immediately before I raise this concern you were quoting from that full bench decision and I think you had been reading from a part of it. I noted paragraph 8 you had been reading from. Did you read from any other paragraph of that decision?

MS PAUL: Yes, your honour (indistinct) paragraph 25.

THE SENIOR DEPUTY PRESIDENT: Paragraph 8 and 25 you were reading from?

MS PAUL: Yes, your honour.

THE SENIOR DEPUTY PRESIDENT: I note that in one of those extracts you did refer to the full bench observing that there should be agreement between the parties in relation to that.

MS PAUL: Yes, your honour.

THE SENIOR DEPUTY PRESIDENT: Yes.
MS PAUL: (indistinct)

THE SENIOR DEPUTY PRESIDENT: Yes, proceed.

MS PAUL: (indistinct) the issue that the commission, that the full court should determine is that in all of the circumstances we consider that the exemption provision should be removed and that flexible working arrangements should be available with respect to (indistinct) and the issue be subject to the appropriate safe guards and processes to ensure that there is fair (indistinct) arrangements which (indistinct) entitlements. We propose to deal with the exemption (indistinct) propose to insert an annualised salaries clause (indistinct)

THE SENIOR DEPUTY PRESIDENT: I’m sorry to do this to you. I’m just wondering if you might swap with say, Mr Rizzo or Mr Fooks and see if we have the same problem as when you’re addressing us from those mics or that position.

MS PAUL: Is that better?

THE SENIOR DEPUTY PRESIDENT: So far it is. Proceed.

MS PAUL: The salient part, your honour, was that in the first half of that paragraph was the fact that the full bench determined that employees need to completely understand and agree to any arrangement. They then go on to propose:

We propose to delete the exemption provisions in clause 17 however we propose to insert an annualised salary clause. The wording of the clause is in line with clauses in some other modern awards. It provides for an alternative way to remunerate employees, safe guards against disadvantage and a formal process to establish and maintain the annualised salary arrangement.

The full bench then proposes the clause which we say is identical in terms to the clause that we are proposing for the water industry modern award. We say the issue about agreement, your honour, was contemplated by the full bench when it came up with the annualised salary clause that was inserted in the clerical award. That’s the full extent of the agreement that the full bench required. We also found that the clause was adequate for the purposes of remunerating employees and safe guarding against disadvantage. We say this is the most appropriate clause to be added if there was to an annualised salary clause added to the water industry award.

If I can then take you to the Contract Call Centre Industry award which we say was entered into by agreement by the parties. An application was brought in 2012 by the ASU to seek to remove such clause. The Contract Call Centre award clause, your honour, had the effect for providing for annual salary arrangements for employees included in higher classifications. Senior Deputy President
Kaufman found against the application to remove the clause because the current clause provides the parties with certainty as to what may be offset with an annual salary paid, what procedures must be followed as well as providing certain safeguards to employees. This is at paragraph 44 of the case.

The reference to that case, your honour, is 2012 FWA 9025. To an extent that case, your honour, the Senior Deputy President found that (indistinct) effectively the position held by the full bench in the case I described earlier. Essentially these were clauses that provided appropriate safe guards for employees and met the requirements of the awards modern objective. We then look at the other awards that have been referred to by the ASU in support of their position regarding (indistinct) primary position or their alternate clause. We say that we agree that in relation to Manufacturing Associated Industry award and the (indistinct) that there are clauses that allow for the primary position put forward by the ASU. We stress that those are clauses that apply to all employees. Those awards don’t have the same depth of coverage of (indistinct) only apply to senior level managers.

If we look at the (indistinct) industry award your honour which is not a reference to the ASU that award (indistinct) but the Clerical component of the annualised salary clause (indistinct) that there is that of the clause that we are proposing. The (indistinct) your honour has a very different clause that we say maintains the characteristics that would be found in the Clerks award clause. It’s an annualised salary (indistinct) and salaries may be inclusive of overtime, penalty rates et cetera. It doesn’t allow for the clause to be terminated by either party with the provision of notice and it does (indistinct) doesn’t seem to have any specific statement that the employee needs to agree to have such a clause put into effect.

In relation to the broadcasting and recorded entertainment clause, your honour, where they say that, we accept that the clause is very much in line with the ASU proposed clause but we say that that clause again does not apply to the type of senior managers that’s being contemplated by the SEW clause. Additionally, the award specifically excludes employees being more than a certain amount so it specifically excludes what we would characterise as senior managers. The clause that we’re proposing to put into the modern water award is only for senior managers. The Contract Call Centre award your honour I have already referred to, deals with the – it’s the same as the Clerical award.

If your honours look at the Legal Services award 2010 you will also find that there’s an annual salary clause that mirrors that of the Clerical award. Similar clauses can be found at clause 14 of the Banking, Finance and Insurance award 2010. In short your honour, it seems established by those awards that (indistinct) that the appropriate award is that of the Clerical award. We accept that there are awards that allow for the ASU primary and alternate clauses but those awards, your honour, have been entered into by consent not by a contested process that allowed the commission and the full bench in particular to (indistinct) appropriate clause of this nature from a (indistinct).
The highest level of contest that’s occurred in relation to the annualised salary clause we would submit would be that in relation to the Clerks award. That clause has been ventilated, that clause has been not just at the time of the creation of the clause but subsequently when the ASU has sought to remove those clauses, they have been found to be appropriate clauses (indistinct) certainly appropriate clauses for senior level managers. The question your honour that you posed in relation to clauses that reach agreements (indistinct) agreement of the employee, we say the full bench has already addressed that. They’ve addressed it in the Clerical award and the clause in the Clerical award. They have found that is a sufficient clause to deal with the issue of agreement. They’ve also found its sufficient clause to deal with the issue of ensuring protections for employees. That is the clause that we seek to put into the Water Industry award.

THE DEPUTY PRESIDENT: Ms Pauls, it seems a little curious that in the 2009 case you discussed and indeed quoted the full bench there said that the employees clearly understand and agree to any arrangements. There then follows, of course, the proposed annualised salaries clause which does not comprehend agreement.

MS PAUL: I agree, your honour.

THE DEPUTY PRESIDENT: What do we draw from that?

MS PAUL: What I draw from that, your honour, is that the full bench determined that that clause was sufficient to satisfy its need that employees clearly understand and agree to any arrangements which may (indistinct) for award entitlements. It doesn’t, the clause was (indistinct) the award didn’t require that there be agreement between the employer and the employee. We say that the full bench contemplated that very issue and determined that the clause that it developed and inserted into the Clerical award was sufficient for (indistinct) to satisfy this issue about agreement and satisfy any issue regarding a clause that provides safe guards against disadvantage.

THE DEPUTY PRESIDENT: It doesn’t expressly say that it departed from the principle that it espouses at paragraph 25 that there be agreement when the clause itself clearly says that there doesn’t require an agreement.

MS PAUL: Yes, your honour. We say that if the full bench contemplated that that was necessary to put into the clause then that would have been in the clause. If they (indistinct) clause to be inserted and contested if other awards then Senior Deputy President, I don’t think there are any full bench matters on this but (indistinct) Senior Deputy President Kaufman has confirmed that position and found that that was all that was necessary. I don’t disagree your honour that the full bench at paragraph 25 does use the words and says that “the flexible working arrangement should be available in respect of clerical employment and that these should be subject to appropriate safe guards and processes to ensure that employees fully understand and agree to any (indistinct) award entitlements”.
There’s no requirement in the Clerical award to have a clause that says that the employer and the employee must agree (indistinct) pay an employee an annual salary in satisfaction of the various award terms. We say that that has been accepted as being sufficient for the purposes of an award by other members of the bench in other cases where the issue has been contested. We say (indistinct) other than the fact that the full bench found that the clause was sufficient and there was no requirement for any additional (indistinct) use the words that the employer and employee must agree.

THE DEPUTY PRESIDENT: I see that, that’s plain but what confuses me a little is that the full bench talks about agreement but then doesn’t adopt that in the clause and gives no explanation as to why not other than what you say is that it was satisfied that the clause met employee’s concerns.

MS PAUL: Yes, your honour and I’m not able to assist in relation to where their honours had intended that statement to go except to say that in future adoptions subsequent to that the bench in those circumstances didn’t see the need to depart from the full bench’s clause.

THE DEPUTY PRESIDENT: All right, thank you.

THE SENIOR DEPUTY PRESIDENT: Ms Paul, the clause that the applicant has in its enterprise award South East Water is a clause that allows for the parties to enter, to agree to enter into annualised salary. I take it because there is no evidence before us, I take it that that has not caused any difficulties for the applicant.

MS PAUL: I think one can safely say that that would have to be the case, your honour, on the basis that it’s the industrial instrument that applies and that would need to be complied with.

THE SENIOR DEPUTY PRESIDENT: Yes, but my point was that we have no evidence before us that the need for there to be agreement before an annualised salary clause applies has caused any difficulty to South East Water or indeed the employees.

MS PAUL: I agree your honour. There is no evidence to show that (indistinct) that require agreement will cause South East Water any concern.

THE SENIOR DEPUTY PRESIDENT: Yes.

MS PAUL: To that end, your honour, just so that (indistinct) we’re not suggesting that the (indistinct) of the agreements as found in some of the predecessor enterprise awards that we talked about, there certainly is clauses of that nature in enterprise awards as well. We’re just saying that for the purposes of
the modern award and modern industry award (indistinct) can be gained from the full bench’s finding in relation to the Clerical award and subsequent findings in contested matters regarding annualised salary (indistinct). If the commission has no further questions (indistinct) saying that we don’t believe the APESMA position has merit. We believe, in fact, that our written submissions have satisfied the requirement regarding section 157, satisfied the (indistinct) sufficient change to require the commission to deal with (indistinct) outside a (indistinct) review.

PN154

Added to that, the support or the position of the ASU that they don’t see any (indistinct) that there is annualised salary clauses in relation to this industry which we say is what was required for the purposes of the Clerical award in creating annualised salary (indistinct) modern award we say there should be an annualised salary clause for the purposes of this award. The core difference of where we then depart from the ASU is this issue of what type of clause should be proposed. I don’t want to add anything (indistinct) discussed that to some length your honour. The only thing we would like to address as a final point is the issue that the ASU’s preferred model is not just about agreement but also the fact that the parties may terminate such a clause with the provision of four weeks’ notice.

PN155

We say that that’s not an appropriate clause to have in a modern award. We concur and accept that there are some clauses, and Local Government is one, some awards that have such a clause but we need to look at for the purposes of the type of employees that are covered by those clauses and those types of employees are not usually senior managers other than the local government. We also say that those clauses were entered into are clauses which were done by consent from the parties.

PN156

THE DEPUTY PRESIDENT: If we were minded to agree to a termination provision, what would you say would be the period of time?

PN157

MS PAUL: Our position is that any clause should not have a - - -

PN158

THE DEPUTY PRESIDENT: Yes, I know that. That wasn’t my question.

PN159

MS PAUL: To answer that question, if the commission were minded to look at that, we would be saying it should be a substantial period of time and certainly some clauses refer to 12 months. We would say it would have to be much longer than that for the employer and employee to be able to properly utilise that clause.

PN160

THE DEPUTY PRESIDENT: Thank you.

PN161

THE SENIOR DEPUTY PRESIDENT: I’ve been asked to have a short adjournment to fix some continuing problems with us picking up the audio and transcribing it faithfully so we will now adjourn for 10 minutes.
THE SENIOR DEPUTY PRESIDENT: Well that was an unfortunate, unintended break but we’re now altogether again. I trust you can hear me clearly.

MS PAUL: Yes, your honour.

THE SENIOR DEPUTY PRESIDENT: Good. Now, you were nearing the end of your submissions I think Ms Paul.

MS PAUL: Yes, your honour.

THE SENIOR DEPUTY PRESIDENT: What more would you like to say?

MS PAUL: We simply wanted to, without reiterating and taking up any more time, we believe that we’ve met the necessary tests. We believe the appropriate clause is the Clerks award version which we propose. If the commission has no further questions we will – that will end our submissions.

THE SENIOR DEPUTY PRESIDENT: I’ve got a couple of questions about the competing clauses but what’s distracting me for a very short time is an extract from the regulations under the Act that relate to the obligations on employers to keep records and I ask this more as a matter of interest than anything else because it’s a while since I look at these regulations. Do you know, Ms Paul, off the top of your head whether there’s some relief from the regulations that’s given to an employer when they pay an employee an annualised salary? When I say some relief, I mean some relief from recording what would otherwise be the base rate of pay and all of the relevant hours.

MS PAUL: Your honour, this would be off the top of my head. My understanding is that they would not have to demonstrate the break-up of how a payment was to be made if there was an annual salary arrangement. That’s my understanding of how it would work because that would be the provision that overrides – there would be no base rate or overtime to contemplate that. I’m not aware of any, therefore, requirement for them to retain the hours of work someone works other than any internal time records that might be kept. That would be, in my view, an issue that the employer needs to maintain to ensure that it remains compliant to the award but I don’t think for the purpose of payslips et cetera that there would be – I’m doing this off the top of my head, your honour.

THE SENIOR DEPUTY PRESIDENT: That’s all right. It’s something that I was wondering about but we’ve probably got enough on our plate to decide without me going off on that tangent. No-one had prior to me raising it addressed it in submissions so maybe it’s just not relevant. The obligations are what are the obligations are. May I just ask you a couple of questions about the - - -
MS PAUL: Certainly.

THE SENIOR DEPUTY PRESIDENT: The clause that you seek and I acknowledge it is a clause in similar terms, if not the same terms in a number of modern awards but tell me this, the review of the awards annually to ensure compensation is appropriate, what happens if it’s not?

MS PAUL: My understanding of the clause, your honour, means that this doesn’t oust the employee from the award. It would mean that the employer would be in breach if at the time at which the review was undertaken that the employee was receiving less than what they would have been entitled to have been had they been under the award condition. Again, I stress it’s my view your honour that this clause merely allows a mechanism of how you pay it doesn’t enable an employer to avoid the entitlements under the award. It allows the employer to aggregate all of those so that there at the end, if an analysis was done where the employee is actually being paid appropriately so long as they’re receiving at least what they would have received under the award.

THE SENIOR DEPUTY PRESIDENT: So that’s really the obligation in 19.2(a) of your proposed clause, the annual salary must be no less than et cetera.

MS PAUL: Yes.

THE SENIOR DEPUTY PRESIDENT: Yes, I see.

MS PAUL: Yes your honour. The point that if there was a breach of (b) we would be saying that would be a breach of the award clause in the award.

THE SENIOR DEPUTY PRESIDENT: Looking at the ASU preferred clause and I want to ask you some questions that relate to the obligations in paragraph (d) of their preferred clause.

MS PAUL: Yes, your honour.

THE SENIOR DEPUTY PRESIDENT: Really what’s behind all of these is asking you what your view is to the difficulties that you may see in the event we were persuaded to put in a clause and in the event we were persuaded to adopt some or other of the obligations in (d). The obligation to provide the annual salary agreement in writing and be signed, now I know your clause requires the agreement to be in writing so there’s no requirement for it to be signed and I suppose at the same time I ask a question about under (d)(iii) nor is there an obligation to provide a copy of it to the employee. On the face of it they seem not unreasonable conditions. Do you want to say something about that?
MS PAUL: I would agree with your honour. I would say that that would not be deemed to be an onerous obligation on an employer in light of an annualised salary clause.

THE SENIOR DEPUTY PRESIDENT: I probably should have said (b) falls into that category too, the date on which the arrangement commences should be made clear presumably in the written arrangement between the employer and employee. That seems sensible enough. It’s probably inferred from your clause but I can’t at the moment imagine it’s too onerous to put that obligation on you if we were attracted to it in the exercise about discretion.

MS PAUL: No, your honour. We wouldn’t see that as a problem. 1, 2 and 3 wouldn’t be an issue.

THE SENIOR DEPUTY PRESIDENT: Yes. I will ask Mr Rizzo about this later, (ix) about the obligation for the salary for the purposes of the act that it make up pay to be identified. I will ask him about that. I may come back to you or not on it. What about the obligation under (x) that the agreement is to contain the award level classification for the role. It seems to me on the face of it to be quite reasonable for the employee to know that under the award they are a level 9 or a 10.

MS PAUL: In light of the clause that we’re putting in I would say certainly your honour. I won’t put it any more heavily than this, it’s really more that employees moving from a nine to a 10 or different grades within that, but certainly it’s not what I would say should be seem as unreasonably or onerous a requirement. I wouldn’t see that as being an onerous requirement.

THE SENIOR DEPUTY PRESIDENT: Yes. I think you addressed a little while ago the issue about the desirability of there being a termination provision in any annualised arrangement entered into between the parties and in the preferred clause of the ASU there’s four weeks’ notice of termination and I know you say that’s too brief. Your position is if a termination clause was to be put in it should be for a much longer period than four weeks? I think your preferred position is no termination clause.

MS PAUL: Yes, I just want to clarify that. I would certainly suggest, your honour, that if the commission were minded to put, contrary to what we would say would be reasonable, adopt a termination clause that it needs to have and this would be what we would say a highly onerous obligation on an employer because it doesn’t provide any certainty. It’s not just for the employer, it’s for the employee. Four weeks’ notice doesn’t provide either party with any level of certainty, tied to which if there’s an agreement entered into at the outset and that agreement contains a whole range of terms, that agreement retains some contractual benefit as well. The employer bears the disadvantage that if the employee were to actually terminate there may still be a need to continue making
certain payments or certain provisions, and it’s not just necessarily about the pay, that would mean that the employer would not be able to necessarily remove those entitlements quite so easily.

Certainly any arrangement would require an employer to have some (indistinct) around that because it’s not just what the employee receives, it’s the pay rise system, it’s what they’re doing, there’s a whole range of factors associated with it. We say a termination clause flies at the face of what these clauses are intended to do and if they are to be put in, which we strongly disagree with, then there should be a substantial period of time and I can’t recall off the top of my head your honour but I did see one of the clauses and again I do recall seeing a clause with 12 months but I wouldn’t put it any higher than it’s off the top of my head. I would certainly say, your honour, that four weeks would be completely unreasonable and would be highly onerous on the employer in light of we do say it’s highly onerous on the employer to have a termination provision put in.

THE SENIOR DEPUTY PRESIDENT: Yes. All right, anything else?

THE DEPUTY PRESIDENT: Just one question. The classification levels 9 and 10, do they have signed contracts as well ordinary or not?

MS PAUL: Ordinarily yes, your honour. I would assume that at the level that there would be signed contracts of employment. From my understanding there would be signed contracts of employment that they would have.

THE DEPUTY PRESIDENT: Thank you.

THE SENIOR DEPUTY PRESIDENT: All right. Mr Fooks and Mr Rizzo, have you reached any agreement as to who wants to go next?

MR FOOKS: Yes your honour, I will appear - - -

THE SENIOR DEPUTY PRESIDENT: Yes, Mr Fooks. I think you might need to stay a little closer to your mic so we can pick up what you’re saying.

MR FOOKS: Yes, your honour. I have just moved my papers.

THE SENIOR DEPUTY PRESIDENT: That’s better, yes. Right, now I have the document I’ve been trying to find. Yes, proceed.

MR FOOKS: Thank you, your honour. As we started this morning you read out a number of documents that you had received. I will just seek now to tender the two documents that APESMA had provided the commission. There was an outline of submission that was provided on 1 July. I tender that document.
THE SENIOR DEPUTY PRESIDENT: Yes, that will be APESMA 1.

EXHIBIT #APESMA 1 OUTLINE OF SUBMISSION DATED 1 JULY 2014

MR FOOKS: The second document was our, I guess, our response to the applicant’s attachment 3 so was the table of the pre-reform awards and the relevant clauses with the extracts of those clauses also. I seek to tender that document.

THE SENIOR DEPUTY PRESIDENT: Yes, that’s the document that’s described as evaluation of summary of South East Water exhibit titled Water, Sewerage of Drainage attachment 3 and that document together with numerous extracts from copies of predecessor awards will become APESMA 2.

EXHIBIT #APESMA 2 EVALUATION OF SOUTH EAST WATER EXHIBIT

MR FOOKS: Thank you, your honour. I will begin my submissions now then. The Fair Work Commission may make a determination varying the modern award under section 157 of the Fair Work Act and it may only do so outside the system of four yearly reviews if it is satisfied it is necessary to achieve the modern award’s objectives which is stipulated in section 134 of the Act. Looking at the submissions provided by the applicant there is little evidence that the variation is necessary to achieve the modern award’s objective. There were submissions made but no real evidence called to this effect.

There was some brief mention in their documents of three subsections of the modern award’s objective. They referenced subsections 1(d), 1(f) and 1(g) however we submit that there was insignificant, not enough evidence provided as to how those subsections are not currently being met. The original submission stated that there was some view from the employees of the applicant company. Those submissions have now been withdrawn so the commission cannot rely on that evidence. Further, the submissions provided deal only with the situation that is alleged to take place at South East Water. There is no evidence provided as to how the variation sought would affect other employers and their employees that are subject to the Water Industry award.

It’s a large awards that has in a very wide scope as all the modern awards do and there are only, this application deals only with a situation at one of those organisations. We are unaware of what the majority of employees and employers in organisations covered by this will actually think about this approach nor evidence of - - -

THE SENIOR DEPUTY PRESIDENT: You may safely assume they don’t oppose it because notification of this application and each of the conferences and
today’s hearing has been placed on the, has been extended to the subscribers to the modern Water Industry award. We can read something in to that, can’t we?

MR FOOKS: We can read it they’ve made no further application that having made no submissions we can’t state any further than they have made no application to oppose it, yes. I accept that.

THE SENIOR DEPUTY PRESIDENT: Yes.

MR FOOKS: We would like to point the Fair Work Commission to the full bench decision in the penalty rates case that took place as part of the transitional review. That was matter 2013 FWCFB 1635. In that matter the full bench discussed at paragraph 119 the need to advance probative evidence in support of an application to vary a modern award. Further the decision stated:

_{The fact that the transition to modern awards is still occurring (indistinct) against the adoption of broad changes to modern awards as part of the review, such changes are more appropriately dealt with in the four year review after the transition process has completed._}

We submit that for this sort of variation to be made the four year review is the appropriate environment to do so, so that - - -

THE SENIOR DEPUTY PRESIDENT: We’ve ruled against you on that, Mr Fooks, that’s why we’re here today.

MR FOOKS: Yes, thank you.

THE SENIOR DEPUTY PRESIDENT: So probably not going to be your best argument to ask us to revisit that ruling. That is the upshot of us ruling that we would hear first, well, first in time the application to insert an annualised salary clause because it was indicated that if such a clause was to be brought in the Water Industry award there would be no desire to proceed with any hearing to make a modern enterprise award to replace the South East Water award which, of course, would be more significant hearing.

MR FOOKS: That’s correct, yes.

THE SENIOR DEPUTY PRESIDENT: That’s the way we ruled.

MR FOOKS: Okay, thank you. It is more to the point perhaps that we submit the applicant here has not provided that requisite level of probative evidence in this matter to identify how the modern awards objective is not currently being met under the terms of the modern award as it stands now. I would also like to refer
the commission to the decision which was an appealed full bench decision to the
restaurant industry award variation. That’s 2014 FWCFB 1996. There the full
bench stated at paragraph 215 that the initial task of the commission was to
determine whether the award was achieving the modern awards objective. Further
it held that this required a consideration of the evidence adduced in the
proceedings, the making of relevant findings of facts and coming to a conclusion
on that primary question by reference to the considerations in the modern awards
objective.

It claims that changes to the award were a secondary step in the event that it was
found the award was not achieving the modern awards objective. We submit that
there is not enough evidence that has been provided here that says whether or not
the modern awards objective is being met. It may be the case that the applicant
may state that inserting the variation that is sought may also meet the modern
awards objective but you can’t get to that stage (indistinct) found that it’s not
currently, the modern awards objective is not currently being met under the terms.
It has to be found to be necessary to meet the objectives in order to insert the
variation.

I would like to move now to the table that was attachment 3, the summary of the
Water, Sewerage and Drainage Service award, the pre-reform awards we might
term them. This attachment showed, purported to show pre-reform industrial
instruments in the water industry that provide for annualised salary arrangements.
We submit that this table and those awards do not truly reflect awards that have
provisions for annualised salaries similar to what is sought in this application as
the applicant led the commission to believe. We feel that there might be some
sort of misunderstanding or conflation or confusion between certain concepts.
The annualised salaries that are inserted here refer to making an annual salary that
takes into account various other entitlements that would be removed for one
overall salary.

I think your honour referred to this that where there is a clause in an agreement or
in an award, sorry, that refers to an annual salary this is quite different from
what’s termed here an annualised salary. The terms obviously can be somewhat
confusing but they are vastly different. Looking at the number of these awards,
there are only very few of them that did actually have what could properly be
termed an annualised salary. I think that’s quite clearly brought out by the
markings on the table. There are various clauses that deal with certain levels of
staff being exempt from overtime payments or commutations around such
payments, remuneration packaging which is not about an annualised salary, it’s
merely allowing for a salary to be paid in part by other benefits and not just in
monetary (indistinct) are to then bring back the need to actually provide the
allowances and entitlements that occur under an annualised salary.

The documents we provided indicate the true nature of the clauses that have been
identified by the applicant. We submit even here that the applicant’s own clause
in there, and this is quite clear I believe, is not an expansive and permissive as that
clause which is being sough here. That includes, again referring to, we were
talking about such provisions being by agreement between the employee and the employer. At this stage I would ask permission for my colleague Ms Baulch to go through that table in slightly more detail if the commission pleases.

PN221

THE SENIOR DEPUTY PRESIDENT: I don’t want to deprive her of that opportunity but unless AIG disagrees with your comments we would take them as being accurate. I don’t think there’s, well, the point seems to be clear that annualised salary is one thing and there’s no too many clauses one can identify in the underlying awards but there are a number of clauses that provide for an annual salary and it just seems that that comment, the comment entries that you’ve made, I don’t know that there is a great deal of disagreement with you and AIG. I’m inclined to think that unless AIG takes issue with APESMA 2 I don’t know that we would be particularly assisted by going through all of the comments.

PN222

MR Fooks: That approach is fine by – sorry, your honour.

PN223

THE SENIOR DEPUTY PRESIDENT: Let’s do that.

PN224

MR Fooks: That approach is fine by me. You may wish to hear from Ms Paul.

PN225

THE SENIOR DEPUTY PRESIDENT: Yes, Ms Paul?

PN226

MS PAUL: Your honours, I think we have already addressed and discussed that issue in our submissions and we have nothing else to say in terms of that.

PN227

THE SENIOR DEPUTY PRESIDENT: You’ve put in a revised attachment 3 and APESMA have addressed your earlier attachment 3 and the impression I had is that you weren’t too far apart on which awards had which clauses.

PN228

MS PAUL: I agree, your honour.

PN229

THE SENIOR DEPUTY PRESIDENT: Yes, all right.

PN230

MS PAUL: (indistinct) for us was we weren’t talking solely about annualised salary. I think there was a misnomer. It’s a reference back to our submissions, I don’t think we’re actually apart.

PN231

THE SENIOR DEPUTY PRESIDENT: No, no. I don’t know that that would assist us then, Mr Fooks.

PN232

MR Fooks: That’s fine. Thank you for that clarification, your honour. I guess the point I seek to make then is that seeking to rely on such pre-reform awards does nothing to advance the case on behalf of the applicant. Instead it shows that the existing or the pre-reform custom and practice, if you will, was that there was
no reliance on annualised salaries therefore it would be, there is no need to include them in the new award and there’s no need to – this doesn’t demonstrate how the modern awards objective is not being currently met under the terms of the award as it stands.

I would like to also refer then to move on to part of the submissions of the applicant which states amongst other things that enterprise agreements providing for annualised salary arrangements. APESMA has no objection to annualised salary arrangements that are included in an enterprise agreement, similar to what we said before about agreement between employer and employee in individual matters obviously enterprise agreements come about as a result of good faith bargaining between the employer and its employees and the union representatives where that exists. In terms of stating that this has, that having annualised salary in enterprise agreements somehow means that we should then see them again in a modern award, we believe that in fact the correct way to do this is through good faith bargaining provisions in creating an enterprise agreement.

There I would like to refer your honours to section 134(1)(b) of the modern awards objective which states that:

*The commission must ensure modern awards together with the national employment standards provide a fair and relevant minimum safety net of terms and conditions taking into account the need to encourage collective bargaining.*

We submit the (indistinct) unilateral annualised salary agreements to be made by the applicant and other employers will, in fact, discourage collective bargaining. Where an employer may rely on terms of award for an annualised salary arrangement which then allows them not to pay various other terms of the award but in one annual arrangement without the agreement of those employees they will be discouraged from making an enterprise agreement with their employees. Maintaining the status quo of the award will not prevent employers from making use of annualised salary arrangements. They should be able to do so through the provisions in an enterprise agreement. This assists in furthering the terms of the modern awards objectives as stated in subsection (1)(b).

In the alternative, if the commission is of a mind to grant the application we submit that we support the submissions of my friend the ASU regarding the format of that annualised salary provision. We submit there aren’t provisions in any of the pre-reform awards that are in the nature of the provision put in this application. We have obviously heard what Ms Paul has to say about other modern awards but here if the commission is to take into account the existing practice within the industry as being relevant to what should occur in a modern award to make a variation, the provision should be something more akin to the total remuneration arrangement that already exist in South East Water Senior Officers and Managers award. It should only apply by agreement between
employer and employee and in that sense it should be treated, I guess, in a similar way to an IFA, individual flexibility agreement.

Further, APESMA has concerns about the drafting of the proposed annualised salary provision and the potential for a negative impact this would have on employees that are subject to the Water Industry award. The proposed clause may lead to a situation where the employee is not aware of precisely which award classification applies to them and I guess this is something that you just question Ms Paul on in the closing of her submissions. We feel that that situation which might exist under the proposed variation could have a result that where employees are not able to adequately determine if they have been disadvantaged.

I would also like to refer to the modern awards objective subsection 1(f), that’s the likely impact of exercise a modern award powers on business including productivity, employment costs and the regularity burden. This has been mentioned by the applicant in their submissions but I feel that it’s been insufficiently extrapolated upon. Under the terms of having, if we had an annualised salary agreement there would still be a need for the annual review. Employees would still bear the cost of actually ensuring that any annualised salary adequately covers the costs of all of aspects that would then be removed from the arrangement. Upon review they would still need to take the time to see well, has the employee been adequately covered? Is he or she truly at a disadvantage or not?

We feel that that would, that actually making this variation would still result in a higher regulatory burden on business. Having the system as it is now is simple and easy to understand under the terms of subsection 1(g). We feel that system is simple and easy to understand. Everybody knows exactly the amount they get paid plus any extra allowances depending on the work that they do. There’s no need to record every single part of then add it all up together and then 12 months down the track go back and actually find out have we made the right amount, have we made the right call on this one. We feel that the modern award as it stands now does meet the modern awards objective and it is a simple and easy to understand award system. This award is a simple and easy to understand award and it does not create a greater burden on business, on their productivity or employment costs or regulatory burden.

Therefore in conclusion, APESMA submits the application should not be granted. There is insufficient evidence to demonstrate that the modern awards objective is not currently being met, this variation is necessary to meet the objective under section 134. If the commission is of a mind to grant the application it should be done in the terms proposed by the ASU in order to both follow the existing practice of such arrangements in the industry including the applicant’s current practice and most adequately protect against any disadvantage that may befall employees to whom such arrangements may apply. If you have no further questions, those are my submissions.
THE DEPUTY PRESIDENT: Mr Fooks, I would have thought that the preponderance of your members would be those that were more likely to opt for annualised salaries. I just wonder how that sits with your opposition to such proposition being put into the award.

MR FOOKS: Some of our members may come under this and you are correct that the applicant being sought is obviously at the senior levels which does cover many of our, probably a higher proportion of our members than my friend’s at the ASU. We have not heard from them that they want to have a variation included. They are appreciative of knowing how much they should be getting paid and are concerned that although an annualised salary may seem like a higher amount it can lead, even for them under their current circumstances, it can lead to them possibly being disadvantaged and even if not they find it’s very difficult to actually establish if they are being paid an adequate amount to cover all of those extra costs that are included in the day to day business that they undertake.

THE DEPUTY PRESIDENT: Thank you.

THE COMMISSIONER: On that point, Mr Fooks, do you have any evidence of (indistinct) with the annualised salaries under the individual enterprise awards when you say your members have difficulty ascertaining what’s going on?

MR FOOKS: Excuse me just one moment, your honours, I would just like to confer with my colleague. Thank you for allowing me that brief moment. My colleague, Ms Baulch, has advised me that we do run surveys very frequently of our members and a number of those surveys have contained evidence from members that they are concerned that after having been on such an arrangement for 12 months they still demonstrate concern that they have not been able to avail themselves of all the entitlements and that the ultimate annualised salary does not adequately compensate them for the losses that are incurred in removing certain entitlements. If it would assist the commission we should be able to find some copies or some sort of evidence relating to those surveys if you feel that that would assist.

THE SENIOR DEPUTY PRESIDENT: For myself it would assist if you then in turn took those matters to the commission and there was evidence of there being difficulty such as to warrant a complaint about how the clause in the award was working.

MR FOOKS: Yes.

THE SENIOR DEPUTY PRESIDENT: I am not the biggest fan of surveys without knowing what practical utility they really have. I don’t feel that we are going to be aided by having those documents, Mr Fooks.
MR FOOKS: Thank you.

THE COMMISSIONER: I mean for example, Mr Fooks, it may be under those agreements that annualised salaries proceed by agreement so people aren’t happy they can withdraw from them.

MR FOOKS: That is correct and again as we’ve stated if the commission is of a mind to grant the application to make a variation we feel that it’s important that that remains I guess, one it’s by agreement between employer and employee and two, that it is able to be terminated.

THE COMMISSIONER: Mr Fooks, did you want to, only if you want to, expand upon your point that you say that the enterprise flexibility arrangement under the award allows annualised salaries?

MR FOOKS: Sorry, you just dropped out there. The sound was unclear. Can I ask you to repeat that?

THE COMMISSIONER: In your outline of submissions you say that the enterprise flexibility arrangement clause, clause 7 of the award allows for annualised salaries. Is that seriously put? If so, are you aware of any examples of that occurring?

MR FOOKS: That is my interpretation of that clause. Just give me one moment, please. Yes, we believe that the award does allow for annualised salaries. I think it’s been referred to previously as well also under certain common law contracts that that occurs. I’m afraid I’m not at this, I can’t off the top of my head think of exact examples. I don’t want to mislead the commission with some sort of anecdotal evidence.

THE COMMISSIONER: But if the award if you say allows for annualised salaries what’s wrong with the proposition of having a specific clause to state that?

MR FOOKS: It’s under a flexibility clause. We submit that it should be consistent with the terms of what we would see under an IFA and that would be the appropriate way to undertake such an arrangement.

THE COMMISSIONER: Most of the rules under that are probably in the ASU’s application.

MR FOOKS: Yes.
THE COMMISSIONER: Not application sorry, their proposed clauses in terms of agreement in writing and notice period and so forth even though notice period might be arguable.

MR FOOKS: That is correct. I will properly allow Mr Rizzo to explain the full terms of that and why they seek such an arrangement which we would support if, as I’ve stated before, we would support if the commission is of a mind to allow a variation to the modern award.

THE COMMISSIONER: Thank you.

THE SENIOR DEPUTY PRESIDENT: Yes, thank you. Mr Rizzo?

MR RIZZO: Thank you, your honours. I would start of your honour before I get to the main point about distinguishing and clarifying some comments by Ms Paul in relation to what the ASU’s position is in relation to annualised salaries. We have said in our submissions that we recognise that they exist obviously. We recognise that they are in some modern awards. We recognise that they’ve been in some pre-reform awards but what distinguishes us quite clearly from the AIG SEW application and particularly the clause that they propose is that we are vigorously opposed to what we see as weak clauses which do not protect employees’ interests. We make no apology in saying that the clauses proposed by AIG which are essentially the clause in the Clerks award, we think is a weak award, a weak clause.

We vigorously oppose the commission placing that clause in that award. Similarly with the Contract Call Centre award, again we think it’s not an adequate clause. What is an adequate clause? An adequate clause is one that for example is in the current South East Water enterprise award which we are party to with APESMA which we have negotiated, which we have supported and which the ASU has put as an alternative proposal before the bench. Another acceptable clause as far as we’re concerned, your honour, is the clause in the Local Government award. Yes, it was by consent by the parties. It was not an arbitrated outcome but nevertheless it is the sort of clause that we would find acceptable and we have put forward to the bench for your consideration.

Let me just say this from a historical point of view which is also relevant to this day is that local government water industries have been intrinsically linked so I think as the bench would appreciate, right around the country the water authorities have largely evolved from the local government authorities and have been intrinsically involved with the local government authorities and, in fact, many parts of the country are still run by local government. When the employers and the companies and the councils in the local government award can come to a consent position with the ASU and APESMA for such an annualised salary clause, your honour, I think the bench should take note of that because the local
government industry is very much related to the water industry and it is a consent clause between us and the relevant employers within that industry.

PN268

Our position, your honour, is clear. We do not oppose annualised salary clause per se but we oppose what we would refer to in our submission as weak or anaemic or watered down clauses. What we suppose we find most, what we oppose most in the application before you is that the applicant waters down what we already have in the South East Water enterprise award. Your honour will recall on our very first hearing on this matter the ASU said to you that we would not oppose the application by the company to renew or modernise their enterprise award. That was our position if that was what they wanted in order to preserve their annualised salary clause. The company obviously did not come to that view which I find somewhat surprising given that they’ve had this clause in their award for a very long time and which we have heard, I think, from Ms Paul today which has not given them any great concern by having such a clause in their award.

PN269

What does the clause in the South East Water enterprise award say? It says things like it has to by agreement, it has to be in writing, it has to detail the various elements of the agreement between the employer and the employee, it has to be accepted. All those sorts of things that you would expect in a contract or an agreement between mature parties at the negotiating table. As the bench has noted the applicant’s proposal which is essentially the Clerks award proposal does not contain that sense of agreement, does not need for it to be in writing, does not have a commencement date, does not have a whole bunch of factors which is either current in the South East Water enterprise award which we’ve slightly amended in our submission or is more explicit in the Local Government award which we have also very slightly amended.

PN270

We say to the bench we submit to the bench that annualised salary clauses are not really as the AIG would have us believe, are not really commonplace. In fact, only 15 of the 122 awards have such a clause and I think it has already been agreed by the parties previous to my addressing the bench all the pre-reform awards, some of them have clear annualised salary clauses but some of them have intonations or derivations of such and are not that clear. When your submission says that somehow annualised salary clauses are the norm or the Clerks award clause is the norm, we reject that your honour. We say that they’re not the norm. We say that they are somewhat unusual in the modern awards but we do not oppose them as such if they are of a quality that protects the interests of the employees and makes clear to the employees what they’re signing on to.

PN271

We have noted and I know Ms Paul has gone to some of the awards that we refer to in paragraph 6 of our submissions but we note that the commission has obviously in the case of the Pharmacy award, the Manufacturing award, the Rail Industry award, the Oil Refining award, the Broadcasters award has approved clauses which we say are much more comprehensive and are much more protective of the employees who enter into such arrangements. In paragraph 7 of our submissions your honour, we list some of the obvious advantages those clauses have. They’re agreed, they’re in writing, the pact has had to be a genuine
one without duress, there’s no disadvantage to the employees, there’s annual reviews. Some of the clauses even have that a relevant union or an employee nominated representative can partake and participate in the striking of the bargain.

PN272
They’re the sorts of things that we support and they’re the sort of things that are obviously missing from the clause that the AIG SEW would like for the bench to place in the Water award. In essence your honour, we say that the clauses that we are submitting to you are much clearer, are much more comprehensive and are much more consistent with what’s already in place at South East Water through their enterprise award and most importantly from our point of view they’re also protective of the employees that elect to be party to this agreement. Also, if people aren’t happy with them they have an option of withdrawing from that proposal just like, for example, people can withdraw from the IFA. Just on that point, your honour, I notice that some of the bench has made observations about termination of these agreements. As the bench knows for a number of years under the IFA principles all you had to do was give four weeks’ notice.

PN273
I do, of course, also note that the bench recently, about a year ago I think, increased that notification period from four weeks to 13 weeks but nevertheless, 13 weeks to my mind is still a reasonable period for being able to terminate an agreement or an annualised salary as (indistinct) to the position of AIG SEW where I think they’re talking at least 12 months and I think I heard Ms Paul say that 12 months would even be insufficient and probably would want more than 12 months, perhaps two years. We think that’s unacceptable. Obviously if mature people and we’re talking about mature people who are in senior roles, if they’re not happy with their arrangement surely they should have the right to be able to terminate that arrangement.

PN274
We propose four weeks. The bench has ruled, for example in relation to IFAs that it should be 13 weeks. Our preference is for four weeks. The ASU ourselves would not be opposed to 13 weeks which is the IFA dictate but certainly we would be vigorously opposed to have it open ended or to have some ridiculous 12 month or 24 month period in order to try and remove oneself from something that supposedly was to the advantage of both parties. I can’t see there be advantage to the parties if one of the parties can’t even remove themselves from it if they see that it disadvantages them. I don’t want to labour the points, I think I’ve made the points I need to make. The points are extended in the submission. You have the alternative proposals which we say are more comprehensive, more relevant, more consistent with what’s happening at South East Water now and we would submit to the bench to take up attachment 4 or what’s been termed as the ASU preferred clause and if the commission was not of a mind to do that, then we would ask that the commission adopts what’s now attachment 5 or the alternative clause which essentially is a re-write, a slight modification of what’s already in the enterprise award and what our members, members of APESMA, employees in general know and are comfortable with. Short of any questions of your honour, I’m happy to cease at this point.
THE SENIOR DEPUTY PRESIDENT: There was a question that I foreshadowed earlier and you may be able to help me on it. In your preferred clause, clause (d)(ix) the arrangement is to contain the salary for the purposes of accident make up pay.

MR RIZZO: Yes.

THE SENIOR DEPUTY PRESIDENT: I haven’t got the Water award here, I had it a moment ago, to look at the accident make up pay clause but I’m just trying to understand why that would be necessary for an annualised salary clause to have that subclause in it.

MR RIZZO: Your honour, as I understand that it would be to distinguish it from having things included such as performance pay or bonus pay or things of that nature. You would actually indicate the base rate pay on which the make-up pay would supplement it. That’s my understanding, the need for that particular clause so it does not incorporate things like bonuses and performance pays and the like which are not normally part of the employee salary.

THE SENIOR DEPUTY PRESIDENT: I haven’t had to turn my mind to any of the considerations in relation to this before.

MR RIZZO: If it helps in (viii) above that it says “contain details of any performance pay arrangements and performance measurement indicators”.

THE SENIOR DEPUTY PRESIDENT: Yes, I saw that.

MR RIZZO: I think earlier it talks about motor vehicle, for example, as part of the package. What I’m putting to your honour and I think I’m right is that (ix) wants to make it clear what (indistinct) make up pay so it doesn’t include those more discretionary parts of the salary.

THE SENIOR DEPUTY PRESIDENT: Yes. In more than one place in clause D, D(4) is an example, maybe D(6) is an example, D(7), there’s a need to identify components of one’s overall salary package that are not regulated by the award and I’m just struggling a little as to why it is appropriate for them to go into an annualised salary clause. It just seems to me that what is important about an annualised salary clause is that the amount that is to be paid is not less than the employee would have been paid had all of the award provisions applied to them. If that’s really what we’re talking about why would you also calculate in the annualised salary non-award provisions? I have to say I would have thought that’s to the employee’s disadvantage, actually.

MR RIZZO: I beg to respectfully differ, your honour. When you get into this area as your honour knows you’ve got things like TFRs, TECs, individual
contracts and IFAs and annual salaries that have all sorts of shapes and sizes and
different approaches. What we find as union officials is that these can be
extremely confusing. These can be confusing for accident pay purposes, it can be
confusing for super purposes, it can be confusing for all sorts of purposes when
people are faced with individual contracts which have TECs, TFRs, et cetera. To
my mind I respectfully submit your honour that the more you can break down the
package and make it clear what is pertinent, how it applies, then the employer and
the employee both are clear about the components of the package. This area ca be
very confusing when you start to talk about the global test.

PN285
As you know the bench has dealt with this a million times about what the, if the
person is globally better off or not globally better off and all that sort of stuff so
it’s very difficult to determine if someone’s been disadvantaged if one is not
familiar with and clear about what the various components of the package is.

PN286
THE SENIOR DEPUTY PRESIDENT: I think I have omitted to mark your
submissions, Mr Rizzo which I should do.

PN287
MR RIZZO: Yes, your honour.

PN288
THE SENIOR DEPUTY PRESIDENT: I will mark them ASU 1.

EXHIBIT #ASU 1 SUBMISSIONS OF ASU

PN289
THE SENIOR DEPUTY PRESIDENT: Thank you.

PN290
MR RIZZO: Your honour, do we need to mark the proposed clauses, alternative
clauses et cetera?

PN291
THE SENIOR DEPUTY PRESIDENT: I was thinking about that. I suppose
what I was going to do is just rely on the competing clauses that we put in our
email to the parties of 25 July. I know we only put two clauses in there attributed
to what you’re seeking, the preferred and the alternative and it seems to me that
one or the other did pick up all of the components that you say should be in an
annualised salary clause. Of course, the AIG one was the amended application so
I’m not entirely sure whose exhibit that would be because we generated it. If you
want to adopt it as yours as an exhibit that shows the competing provisions, I’m
happy to mark it as such.

PN292
MR RIZZO: I don’t want to (indistinct) AIG one with the ASU tag, your honour.

PN293
THE SENIOR DEPUTY PRESIDENT: I understand that. Let me just assure you
that any reasons for decision would identify that document going out and they’re
the ones, and might even, may or may not have it as a annexure to a decision that
when we were talking, assuming our clause was to go in the considerations to
what it’s components should be seems to be the parameters of what we should be looking at in these competing clauses. I think it will be something like that will be how we will tackle it.

MR RIZZO: I think we are all clear on those anyway.

THE SENIOR DEPUTY PRESIDENT: Yes, all right. We would be happy to sit on to finish. We assume, Ms Paul, how long do you think you might need in reply?

MS PAUL: Possibly only 10 minutes your honour.

THE SENIOR DEPUTY PRESIDENT: We don’t require a break. Does anyone at the bar table require a break? No. Go on, Ms Paul.

MS PAUL: Thank you, your honour. (indistinct) what we’re written. I just wanted to clarify a couple of issues, one being that raised by the ASU regarding the clauses in the modern awards that currently contain annualised salaries and how they look. The version that is the preferred option which has both components, one being agreements to entering into an agreement plus the ability to terminate an annualised salary clause is in awards that generally deal with non senior managers, if I can classify them that way and not for the kind of restricted class of employees that we are proposing for the water award which we say creates a very different characteristic. Also, those clauses that the ASU and APESMA are preferring with both of those characteristics of agreement and termination we would say are clauses that were entered into by consent and clearly they (indistinct) characteristic of being individual flexibility arrangements in some sense as opposed to a general annualised salary clause that provides certainty for both the employer and the employee and from our perspective mainly the employer.

The issue though, and that we say the bench should be looking at, the full bench determinations on contested matters about what an annualised salary clause looks like and certainly the view from the bench in terms of contested clauses in which the ASU has contested and the Legal Services award and as it comes to mind the Banking and Finance award, the ASU’s various applications to seek to remove the annualised salary clause from the Clerks award and in the Contract Call Centre award are all indicative of the full bench’s view about what is an appropriate annualised salary clause. That’s all I intend to say on that issue and rest on that.

The second issue, your honour, is there seems to be some questions and some submissions made regarding a termination clause. As we’ve said we see that more as characteristic of an individual flexibility arrangement but for the purpose of an annualised salary clause there’s some practical and we’ve already addressed your question in relation to it and I think the bench is clear about what our position, that we don’t see that as something that is proper in an annualised salary
clause but I just want to add one extra feature your honour in terms of the practicality of termination clause. These are senior managers. We’re not talking that they’re likely to be getting a couple of dollars or even a couple of hundred dollars above the award wages. These would be employees that are getting substantially above the award wages and conditions. Because we’re restricting it to levels 9 and 10 there will be an impasse on an employee who decides that they don’t want to – if a termination clause were in there and they sought to terminate then there would be an impasse because the employee would lose a sizable amount of funds potentially in that they would revert strictly back to the award because that’s the outcome that’s going to occur from this as opposed to a protection for the employee who may decide they like a certain overtime clause but overall a higher salary range or a higher annualised salary provides for those benefits.

PN301

I’m not putting that as evidenced that everyone gets paid more, substantially more but I’m saying we’re talking about a very discrete class of employees that we are seeking to be covered by this clause. Unlike the other awards which have termination clauses those clauses apply generically across all classes. We’re only looking at senior managers. I’m specifically referring the commission to the clauses that the ASU has raised in those various awards. They’re not restricted for the purposes of what we’re looking at and as such I saw that any termination provision will effectively create an impasse on both employer and employee. If the commission has no further questions, we will rest with respect to that.

PN302

THE COMMISSIONER: Ms Paul, I assume under the current award if people take their annual leave or superannuation it’s all calculated on the base rate. Does any of that change with an annualised salary?

PN303

MS PAUL: Depending on how that annualised salary is drafted, your honour, I would suggest that that wouldn’t change. Again sorry, let me rephrase that. My belief is that that wouldn’t change on the basis of an annualised salary arrangement.

PN304

THE COMMISSIONER: Thank you. Mr Fooks made some moment of the applicant not addressing the modern awards objective. I don’t see anything in the SEW written submissions that attempt to do so and I know in the AIG submissions you simply just state some of the objectives but there doesn’t seem to be any evidence as to how the objective is actually met. Would you agree with that or am I missing something?

PN305

MS PAUL: Your honour, I think it’s on the fact that we say that the objectives are met on the – sorry, we’ve outlined the objectives that we need to meet. We accept that there’s a higher hurdle. The two elements that - - -

PN306

THE COMMISSIONER: No, not the modern, I’m not talking about the modern enterprise award which you say there’s a higher hurdle. I’m talking about - - -
MS PAUL: The modern award objective, yes, your honour. In terms of 157 application - - -

THE COMMISSIONER: Where is that in the written submissions of the SEW if it is in there? I can’t see it.

MS PAUL: I can refer you to SEW 3. We’ve identified that the annualised salary arrangements at the second last paragraph, annualised salary arrangements being - - -

THE COMMISSIONER: Sorry, I just want to get SEW 3. I’m looking at SEW 1. Yes, thank you. Yes.

MS PAUL: We address what we say is the application brought under 157, for the purpose of providing flexible work practices, the need to (indistinct) easy understandable statement of issues.

THE COMMISSIONER: Yes, I know what the objectives are but how do you address them?

MS PAUL: We address them on the basis, your honour, that we say that this application is based on seeking coverage for annualised salaries for managerial employees. The nature of the award doesn’t provide for annualised salaries for managerial employees and traditionally for those employees that have been paid salaries. Also in relation to SEW 1 that there has been a change since when the award was made and that being the enterprise awards being terminated which give rise to the need for a clause of this sort, a necessity for a clause of this sort to be added into the modern industry award. The circumstances of attachment 3 are clear that there appear to be a large number of enterprise awards versus industry awards that lend itself to the argument that more employees are employed under enterprise awards and these employees and employers will now, by the loss of their enterprise awards fall under a more modern award and a modern award that doesn’t contain an annualised salary will simply not meet the objectives or the objective.

THE COMMISSIONER: Have you got any empirical evidence of the impact on productivity, employment costs and regulatory burden?

MS PAUL: No, your honour.

THE COMMISSIONER: You put your meeting that objective but I don’t know you do that. You may do, you probably do but I don’t know. We just take it as granted, do we?
MS PAUL: I think it’s more on the basis your honour that the facts speak for themselves in relation to enterprise awards that will no longer be valid and employees under those enterprise awards fall under a modern award. If those enterprise awards contain these provisions then those employees (indistinct) to access that annualised salary provision which they now can under a modern award. The case authorities particularly in looking at the Clerical award and in looking at the Banking and Finance award and the Legal award all seem to indicate that annualised salaries, particularly the characteristic of having full benches determine the annualised salary clause, go towards answering that question as to it being a modern and achieving the modern award objective.

THE COMMISSIONER: Thank you.

THE SENIOR DEPUTY PRESIDENT: Yes, thank you. We have no further questions of the parties and we propose to reserve our decision and now adjourn.

<ADJOURNED INDEFINITELY [1.17PM]
EXHIBIT #SEW1 APPLICANT'S OUTLINE OF SUBMISSIONS
DATED 10 JUNE 2014 ................................................................. PN46

EXHIBIT #SEW2 SUBMISSIONS OF APPLICANT DATED 1 JULY
2014 ..................................................................................... PN50

EXHIBIT #SEW3 SUBMISSIONS OF APPLICANT DATED 24 JULY
2014 ........................................................................................ PN52

EXHIBIT #APESMA 1 OUTLINE OF SUBMISSION DATED 1 JULY
2014 ..................................................................................... PN199

EXHIBIT #APESMA 2 EVALUATION OF SOUTH EAST WATER
EXHIBIT .................................................................................. PN201

EXHIBIT #ASU 1 SUBMISSIONS OF ASU .................................. PN288