ASU submission response to:

Fair Work Act 2009 (Commonwealth)

s.157 – FWC may vary etc Modern award if necessary to achieve Modern Award objection

FWC Matter 2013/26
South East Water Corporation
Water Industry Award 2010
ODN AM2008/92 (MA000113)
Application by South East Water to vary the Water Industry Award 2010 to annualised salary clause

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OUTLINE OF SUBMISSION

1. In accordance with Directions issued on 19th May 2014, by SDP Harrison, this is the ASU's response to the material filed by South East Water (SEW) on the 10th and 12 June 2014.

2. The ASU is not in principle opposed to the insertion of an annualised salary clause in the Water Industry Award 2010. It understands that annualised salary clauses exist in some water awards, as per Attachment 3 of SEW materials, and that these clauses also exist in the Local Government Industry and in some Modern Awards.

3. However the ASU is opposed to the proposed clause by SEW in Attachment 1 of its materials. It is opposed to the proposed clause because it is a weak clause which does not adequately protect employees. There are many stronger and more protective clauses to be found in many Awards, including Modern Awards (discussed below) and in the current South East Water Limited Senior Officers and Managers Award 2003 (SEW Award 2003) at clause 9.4 "Total Remuneration Arrangements".

4. The ASU proposes an alternative clause which is more comprehensive and affords employees more protection than the anemic clause proposed by SEW. It is a clause based on the existing clause 9.4 in the SEW Award 2003 and clause 14.7 of the Local Government Industry Award 2010. (See Attachment 1)

5. While the ASU is opposed to SEW's proposed clause, the ASU supports SEW's application to modernize the South East West Water Ltd Senior Officers and Managers Award 2003 so as to maintain the current annualised salary at clause 9.4. The ASU definitely prefers this current clause to the proposed clause put forward by SEW in its Attachment 1.

Critique of Outline of Submission by SEW

6. The proposed clause by SEW is identical to the one found in Clerks – Private Sector Award 2010 and SEW treats this clause as the norm (see paragraphs 3, 13, 21). Firstly, it must be emphasised that the ASU vigorously opposed this clause
being inserted into the Clerks Award, but it was imposed on the ASU by the FWA at the time. Secondly, the Clerks Award/SEW clause is not the norm. The following Modern Awards; Pharmacy Industry Award 2010, Manufacturing and Associated Industries Occupation Award 2010, Rail Industry Award 2010, Oil Refining and Manufacturing Award 2010, Broadcasters and Recorded Entertainment Award 2010 all have superior annualised salary clauses compared to the Clerks Award/SEW Award clause, with in-built features which better protect employees.

7. Some of the in-built features common to these Award are:
   • The annualised salary agreement must be agreed and in writing
   • "The employer and the individual employee must have genuinely made the agreement without coercion or duress (Manufacturing and Associated Industries and Occupations Award 2010 p.44)
   • The components of the annualised salary agreement must be listed
   • No disadvantage must occur to the employee
   • A copy of the agreement must be kept as a time and wages record
   • There must be annual reviews
   • The employee can have the involvement of the relevant union or an employee nominated representative
   • The agreement can be terminated by either party with 12 months’ notice or it can be terminated at any time if agreed by the parties. Attachment 1 by SEW has little or none of these features

8. SEW says in Paragraph 15 that, 'SE Waters application merely seeks to have the Award reflect the terms applicable to managers in the industry' and at paragraph 41 says, 'Put simply, its application (SEW's application) is solely to retain the annualised salary provisions of the Enterprise Award' (emphasis added). These paragraphs are incorrect because its proposal seeks to water down what employees already enjoy in clause 9.4 of the SEW Limited Senior Officers and Managers Award 2003.

9. A cursory comparison of SEW Attachment 1 and clause 9.4 of SEW Award 2003 (see Attachment 2 to this ASU submission) will show that SEW Attachment 1 does not have many features contained in clause 9.4 including;
   • 9.4.1 (a)
   • 9.4.1 (b)
• 9.4.1 (c)
• 9.4.1 (d) (i)
• 9.4.1 (d) (iii) through to 9.4.1 (d) (viii)

10. It is the default position of the ASU that if the Commission is not persuaded to adopt the ASU's alternative clause found in Attachment 1 of this submission then we would ask that the slightly modified clause 9.4 of the SEW Award 2003 found in Attachment 3 of this submission be the preferred clause of the ASU to be inserted into the Water Industry Award 2010.

The ASU's alternative clause

11. The ASU's Attachment 1 is a slightly modified version of clause 14.7 "Annualised Salaries" found in the Local Government Industry Award 2010. This clause as properly stated in paragraph 19 of the SEW outline of submissions document, was the result of a consent position of the parties. The ASU supports Attachment 1 because it contains many of the features of other Modern Awards mentioned in paragraph 7 (above) and many of the features employees currently enjoy at SEW mentioned in paragraph 9 (above).

12. The modifications are underlined with the provisions to the Award in 14.7 (a) changed to be consistent with SEW's proposed clause and roman (xi) has been added which reflects 9.4.1 (d) (vii) of the SEW Enterprise Award 2003. 'The involvement of the relevant union or an employee nominated representative'. This type of clause can also be found in the Pharmacy Industry Award 2010 at clause 27.4. 'The employee may be represented in the discussions in relation to the making of an Agreement under this clause by either their union or nominated representative.'

Conclusion

13. In summary, the ASU does not support the SEW proposed annualised clause contained in Attachment 1 of its submission because it is weak and actually significantly waters down the protections the relevant employees currently enjoy in clause 9.4 of the Enterprise Award. The ASU submits that its alternative proposal is
more consistent with the current clause in the Enterprise Award and with many Modern Awards cited above that have annualised salary clauses.

14. It should be noted that annualised salary clauses are not common features of Modern Awards. Only about 15 of the 122 Awards have them. This reticence of the FWC Full Bench to include such clauses is acknowledged by the employer submissions at paragraph 12. Therefore if we are to place such a clause in the Water Industry Award 2010, let's make it a worthy one. One which protects the rights of employees rather one that diminishes them. The ASU submits that the ASU proposed clause in Attachment 1 of these submissions performs that function and should be adopted by the Commission. However if the Commission is not persuaded to this effect, then the ASU prefers the slightly amended clause 9.4 of the SEW Award 2003 found in Attachment 3 of these submissions.
14.6 National training wage

See Schedule E

14.7 Annualised Salaries

The following provisions are to apply to employees employed in classifications Level 9 and 10 in accordance with Schedule B of the award.

[14.7 inserted by PR536549 ppc 13May13]

(a) Annual salary instead of award provisions

Notwithstanding any other provision of this award, an employer and an employee may agree that the employer may pay the employee an annual salary in satisfaction of any or all of the following provisions of the award:

(i) clause 14 – Minimum weekly wages

(ii) clause 20 – Allowances

(iii) clause 26.5 and 27 – overtime and penalty rates; and

(iv) clause 28.3 – Annual leave loading

(b) Annual salary not to disadvantage employees

(i) The annual salary must be no less than the amount the employee would have received under this Award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

(ii) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

(c) For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of annual salary equivalent to the relevant rate of pay in clause 14 and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

(d) An annual salary agreement must:

(i) be in writing and signed by both parties;

(ii) state the date on which the arrangement commences;

(iii) be provided to the employee;

(iv) contain a provision that the employee will receive no less under the arrangement than the employee would have been entitled to if all award obligations had been met, taking account of the value of the provision of matters not comprehended by the award such as private use of an employer provided motor vehicle;

(v) be subject to an annual review;
Local Government Industry Award 2010

(vi) contain details of any salary package arrangements, including the annual salary that is payable;

(vii) contain details of any other non-salary benefits provided to the employee such as an employer provided motor vehicle;

(viii) contain details of any performance pay arrangements and performance measurement indicators;

(ix) contain the salary for the purposes of accident make up pay; and

(x) contain the award level classification for the role.

(xi) the involvement of the relevant union or an employee nominated representative.

(e) An annual salary agreement may be terminated:

(i) by the employer or the employee giving four weeks’ notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(ii) at any time, by written agreement between the employer and the employee.

(f) On termination of an annual salary agreement, the employee will revert to the Award entitlements unless a new annual salary agreement is reached.”

15 Allowances

[Varied by PR998146, PR500775, PR503674, PR509264, PR523094, PR536549, PR536897, PR547349]

1.2 Meal allowance in relation to overtime

[15.1 varied by PR998146, PR509264, PR523094, PR536897 ppc 01Jul13]

(a) Employees who work more than two hours’ overtime in a minimum of 10 hours on duty will be paid a meal allowance of $14.08.

(b) Where the employer requires the employee to continue working for a further four hours of continuous overtime work, the employee will be paid an additional meal allowance of $14.08.

(c) A meal allowance is not payable:

(i) where the employee has been notified at least 24 hours in advance of the requirement to work overtime; or

(ii) where the employee is only required to work less than the time prescribed; or

(iii) where a meal is provided by the employer.

1.3 Vehicle allowance

(a) Where an employer requires an employee to use their own vehicle in or in connection with the performance of their duties, such employee will be paid an allowance for each kilometre of authorised travel as follows:
AP835789 - South East Water Limited Senior Officers and Managers Award 2003

This Fair Work Australia consolidated award incorporates all amendments up to and including 5 December 2005 (variation PR966029).

Clauses affected by the most recent amendment(s) are:

11. Wages/salaries

About this Award:
This award supersedes the South East Water Limited Senior Officers and Managers Award 1995 [AW796670].

Printed by authority of the Commonwealth Government Printer.

Disclaimer:
Please note that this consolidated award is prepared by the staff of Fair Work Australia and is believed to be accurate but no warranty of accuracy or reliability is given and no liability is accepted for errors or omissions or loss or damage suffered as a result of a person acting in reliance thereon.

Copies of official decisions, awards and orders of Fair Work Australia and the Australian Industrial Relations Commission (prior to 1 July 2009) can be accessed at no cost through Fair Work Australia’s website (www.fwa.gov.au) or purchased from any office of Fair Work Australia.
PART 4 - EMPLOYER AND EMPLOYEES DUTIES, EMPLOYMENT RELATIONSHIP AND RELATED ARRANGEMENTS

9. CONTRACT OF EMPLOYMENT

9.1 A Senior officer may be employed on a full-time, part-time or casual basis in accordance with clause 11.2 - Types of employment, of the South East Water Limited Officers Award 2003.

9.2 A full-time Senior officer may also be engaged on a temporary, fixed term, project or seasonal basis.

9.3 Termination of employment

9.3.1 The period of notice of termination shall be a minimum of four weeks by either the Senior officer/Manager or SEWL.

9.3.2 Except where inconsistent with clause 9.3.1, termination of employment shall be as prescribed by clause 11.4 - Termination of employment, of the South East Water Limited Officers Award 2003.

9.4 Total Remuneration arrangements

9.4.1 South East Water Limited and a Senior Officer may enter into a salary agreement which:

9.4.1(a) Must be in writing and signed by both parties; and

9.4.1(b) Either recorded in the time and wage records kept by the employer in accordance with Part 9A, Division I of the Workplace Relations Regulations; or

9.4.1(c) A notation placed in the record as to where a copy of the agreement may be inspected;

9.4.1(d) And which provides for:

9.4.1(d)(i) An overall requirement that employee will receive no less under the arrangement than the employee would have been entitled to if all award obligations had been met, taking account of the value of the provision of matters not comprehended by the award such as private use of an employer provided motor vehicle;

9.4.1(d)(ii) An annual review of the agreement;

9.4.1(d)(iii) Access to the AIRC for dispute resolution in accordance with the award dispute resolution procedure;
9.4.1 (d)(iv) Details of any salary package arrangements;
9.4.1 (d)(v) Details of any other non-salary benefits provided to the employee;
9.4.1 (d)(vi) Details of any performance pay arrangements and performance measurement indicators;
9.4.1 (d)(vii) The involvement of the relevant union or an employee nominated representative;
9.4.1 (d)(viii) The salary for the purposes of accident make up pay;

9.4.2 The agreement under 9.4.1 may, subject to 9.4.1(d)(i) also specify that the following award clauses may not apply:

9.4.2(a) From this award:
   clause 11.5 Higher duties

9.4.2(b) From the South East Water Limited Officers Award 2003:
   clause 15 Expenses and allowances
   clause 18.3 Availability allowance
   clause 19.3, 19.4, 19.5, 19.6, 19.7, 19.8, 19.9, 19.10 Overtime
   clause 20.3.5 Meal Allowances

9.4.1 Notwithstanding this provision a total employment package arrangement entered into under clause 4.3 of the South East Water Limited Senior Officers and Managers Award 1995 shall continue to apply until the 20 July 2004 unless before that date:

9.4.3(a) the total package arrangement however described expires;
9.4.3(b) by agreement the arrangement is terminated;
9.4.3(c) either party seeks to review the arrangement having regard to the provisions of this clause.
Annualised Salaries

The following provisions are to apply to employees employed in classifications level 9 and 10 in accordance with Schedule B of the award

Annual Salary instead of award provisions

Notwithstanding any other provisions of this award, an employer and an employee may agree that the employer may pay the employee an annual salary in satisfaction of any or all of the following provisions of the award:

(i) Clause 14 – Minimum weekly wages;
(ii) Clause 20 – Allowances
(iii) Clauses 26.5 and 27 – Overtime and penalty rates; and
(iv) Clause 28.3 – Annual leave loading

9.4.1 An employer and an employee classified as a Level 9 or 10 may enter into a salary agreement which:

9.4.1(a) Must be in writing and signed by both parties: and

9.4.1(b) Either recorded in the time and wage records kept by the employer in accordance with the Fair Work Act (2009); or

9.4.1(c) A notation placed in the record as to where a copy of the agreement may be inspected;

9.4.1(d) And which provides for:

9.4.1(d) (i) An overall requirement that the employee will receive no less under the arrangement than the employee would have been entitled to if all award obligations had been met, taking account of the value of the provision of matters not comprehended by the award such as private use of an employer provided motor vehicle;

9.4.1(d) (ii) An annual review of the agreement;

9.4.1(d) (iii) Access to the FWC for dispute resolution in accordance with the award dispute resolution procedure;

9.4.1(d) (iv) Details of any salary package arrangements;

9.4.1(d) (v) Details of any other non-salary benefits provided to the employee;

9.4.1(d) (vi) Details of any performance pay arrangements and performance measurement indicators;

9.4.1(d) (vii) The involvement of the relevant union or an employee nominated representative;

9.4.1(d) (viii) The salary for the purposes of accident make up pay;