APESMA submission response to:

Fair Work Act 2009 (Commonwealth)
s.157 – FWC may vary etc Modern award if necessary to achieve Modern Award objective

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

Submitter: Sharelle Herrington, Director Victoria
Organisation: Professionals Australia (formerly APESMA)
Address: 163 Eastern Road
South Melbourne, Victoria 3205
Phone: 03 9695 8971
Fax: 03 9695 8904
Email: Sherrington@professionalsaustralia.org.au
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Outline of Submission

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

2. To vary a Modern Industry Award, the Fair Work Commission must be satisfied that the variation meets the Modern Awards objective (Section 134(1)-(2) Fair Work Act 2009 (the Act)).

3. South East Water does not address how the application to vary the Modern Water Award 2010 meets the Modern Awards Objective.

4. South East Water submits that Section 139(1)(f) of the Act together with historic award arrangements is sufficient to meet the Modern Awards Objective and enable the Fair Work Commission to vary the Water Industry Award 2010 in accordance with its application.

5. APESMA submits that clause 7 Award flexibility of the Water Industry Award 2010 provides the flexibility sought by SEW to provide annualised salaries for its senior management.

6. SEW appear concerned that the constraint in clause 7 which requires them to reach agreement with their employee is in some way an impediment to their ability to provide an annualised salary arrangement. In our submission the need to reach agreement is an essential safeguard to ensure that the employee is not disadvantaged.

7. The evidence submitted by SEW goes to the historic context of the Enterprise Award provision and to the views of 2 senior managers.

8. No evidence is submitted by SEW as to the requirements within the industry which would require such a variation.

9. No evidence is submitted by SEW as to the necessity for such a variation given the capacity for the matter to be dealt with adequately within the Enterprise Bargaining framework.

10. APESMA submits that the capacity to deal with annualised salaries as part of the bargaining framework clearly falls within section 134(1)(b) and as such operates against the exercise of the Fair Work Commissions discretion to vary the Modern Water Award 2010.

11. APESMA submits that if the Fair Work Commission is minded to consider this variation then it is more appropriate to deal with the application as part of the 4 yearly Modern Awards review. This would allow the requirements of the Industry to be considered as part of the application.

12. In the event that the Fair Work Commission exercises its powers to vary the Modern Water Award 2010 then APESMA respectfully adopts and supports the submissions of the Australian Services Union in relation to this matter.