DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

Annualised Wage Arrangements
(AM2016/13)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
COMMISSIONER SAUNDERS SYDNEY, 20 FEBRUARY 2018

Review of annualised wage arrangement provisions in modern awards.

Introduction and background

[1] Section 156 of the *Fair Work Act 2009* (Cth) (FW Act) requires the Commission to conduct a 4 yearly review of modern awards as soon as practicable after 1 January 2014. Subsection 156(2) deals with what must be done in the Review and provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards.

[2] Section 138 imposes a significant constraint on the conduct of the 4 yearly review as follows:

> **138 Achieving the modern awards objective**
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> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

[3] Section 136 sets out the terms which may or must be included in a modern award. Section 136(1)(a) refers to Subdivision B of Division 3 of Part 2-3 of the FW Act as setting out the terms that may be included in a modern award. Section 139, which falls within Subdivision B, sets out the general categories of terms which may be included, and s 139(1)(f) specifically provides that a modern award may include terms about the following matters:

> (f) annualised wage arrangements that:
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> (i) have regard to the patterns of work in an occupation, industry or enterprise; and
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> (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
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> (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;…

[4] Section 142 additionally allows the inclusion of incidental and machinery terms in modern awards:

> **142 Incidental and machinery terms**
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> *Incidental terms*
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> (1) A modern award may include terms that are:
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> (a) incidental to a term that is permitted or required to be in the modern award; and
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> (b) essential for the purpose of making a particular term operate in a practical way.
>
> *Machinery terms*
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> (2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

[5] The modern awards objective referred to in s 138 is set out in s 134 as follows:

> **134 The modern awards objective**
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> *What is the modern awards objective?*
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> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
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> (a) relative living standards and the needs of the low paid; and
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> (b) the need to encourage collective bargaining; and
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> (c) the need to promote social inclusion through increased workforce participation; and
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> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
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> (da) the need to provide additional remuneration for:
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> (i) employees working overtime; or
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> (ii) employees working unsocial, irregular or unpredictable hours; or
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> (iii) employees working on weekends or public holidays; or
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> (iv) employees working shifts; and

> (e) the principle of equal remuneration for work of equal or comparable value; and
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> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
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> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
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> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
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> This is the ***modern awards objective***.
>
> *When does the modern awards objective apply?*
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> (2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:
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> (a) the FWC's functions or powers under this Part; and
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> (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.
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> Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

[6] The general principles as to the interpretation and application of the above provisions in the conduct of the 4 yearly review have been comprehensively stated in a number of decisions issued in the course of the review, most notably the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision*[1], the *4 Yearly Review of Modern Awards - Annual Leave Decision*[2] and the *4 Yearly Review of Modern Awards - Penalty Rates Decision.*[3] Where an interested party applies for a variation to a modern award as part of the 4 yearly review, the proper approach to the assessment of that application was described by a Full Court of the Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd*[4] as follows:

> "[28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as

[1] [2014] FWCFB 1788; 241 IR 189 at [19]–[24]

[2] [2015] FWCFB 3406; 250 IR 119 at [11]–[38]

[3] [2017] FWCFB 1001; 265 IR 1 at [95]–[141], [162]–[165], [230]–[270]

[4] [2017] FCAFC 123

> necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.
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> [29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net."

[7] In the same decision the Full Court also said: "...the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective."[5]

[8] We will apply the above principles in this decision.

[9] Section 139(1) identifies the subject matter of terms which may be included in modern awards. One of those matters is annualised wage arrangements. In this respect s 139(1) relevantly provides:

> **139 Terms that may be included in modern awards--general**
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> (1) A modern award may include terms about any of the following matters:
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> . . .
>
> (f) annualised wage arrangements that:
>
> (i) have regard to the patterns of work in an occupation, industry or enterprise; and
>
> (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
>
> (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;
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> . . .

[10] In connection with the 4 yearly review of the *Pastoral Award 2010* (*Pastoral Award*), the National Farmers' Federation (NFF) has made an application for the insertion of an annualised wage arrangement[6] provision in that award, which does not currently contain any

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[5] Ibid at [46]

[6] We will generally use the expression "annualised wage arrangement" in this decision, except when summarising the evidence and submissions or referring to existing award provisions where different terminology is used, since that is the expression used in s.139(f) of the FW Act. It is acknowledged that they are more commonly referred to as "annualised salary

such provision. The claimed provision is set out later in this decision. The NFF's claim was initially dealt with by a different Full Bench, specifically constituted to conduct the review into that award, in a decision issued on 24 December 2015 (*Pastoral Award decision*).[7] In that decision the Full Bench (Ross J, President, Kovacic DP and Saunders C) expressed satisfaction that the requirements of s 139(1)(f)(i) and (ii) were met.[8] The Full Bench then discussed in detail the requirement in s 139(1)(f)(iii) for there to be "*appropriate safeguards that ensure that individual employees are not disadvantaged*", and in doing so referred to the way in which the issue of annualised salaries had been dealt with in the course of the award modernisation process conducted under Pt.10A of the *Workplace Relations Act 1996* which established the modern awards currently in operation. The Full Bench said:

> "[129] During the award modernisation process the Australian Industrial Relations Commission (the AIRC) did not generally insert annualised salary provisions into awards unless there was a widespread history of such provisions in the relevant antecedent instruments.[60] In its decision of 19 December 2008 the AIRC Award Modernisation Full Bench rejected the proposition that annualised payment arrangements be adopted as a general standard in modern awards, for the following reasons:
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> > '[69] Although annualised wage and salary provisions are a common feature of workplace agreements they are very rare in the Commission's awards. By far the predominant method of calculating entitlements is weekly, based on ordinary hours, penalties, overtime etc. This is a system with which employees, particularly employees who are safety net dependent, are familiar. No doubt many employees arrange their affairs on that basis. While employers invoked the need for flexibility there is always the potential for employee disadvantage which through fear of reprisal or ignorance employees are unable to correct. There are also some practical problems associated with the concept in industries in which short hour employment is common and in which working hours may vary unpredictably. While flexibility might be important, when safety net entitlements are at issue employers would be required to keep a record of hours in any event to ensure that the annualised pay was sufficient to meet those entitlements. Finally, in some industries employers may be able to implement annualised pay arrangements without breaching the award. We assume that this occurs in many areas of employment already. Annual salaries are of course also a feature of many workplace agreements.
> >
> > [70] As indicated we have decided not to adopt a standard provision for annualised wages and salaries in modern awards. Where such provisions already exist in relevant awards we have maintained them. The matter could be revisited in one of the regular award reviews which have been foreshadowed. We also note that the *Clerks—Private Sector Award 2010* will include an overtime exemption provision which will go part of the way to addressing claims for annualised salaries in that award. We deal with this later. The parties to the *Rail Industry Award 2010* agreed that the award should contain an

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arrangements" (or similar variants) by parties and in modern award clauses and past decisions. No distinction is intended to be made by the use of any particular expression in this respect.

[7] [2015] FWCFB 8810

[8] Ibid at [125]

> annualised wage and salary provision but could not agree on all of the terms. We deal with that matter later also.' ([2009] AIRCFB 945)
>
> [130] Only 19 of the 122 modern awards contain an 'annualised salaries' term (footnote omitted) and in the modern awards which contain such a term it was usually the case that similar provisions were in the relevant pre-modernised instruments. Absent such a historical context the AIRC rejected a number of applications to insert provisions for annualised payment arrangements, for example in the *Real Estate Industry Award 2010* ([2009] AIRCFB 945) and the *General Retail Industry Award 2010* ([2010] FWAFB 1958).
>
> [131] In most instances the annualised payment arrangement term inserted into a modern award reflected the form of such a term in relevant pre-modernised instruments and was included in the modern award by consent, or was unopposed. As a consequence the form and content of such terms was not the subject of much debate during the award modernisation process. There were two exceptions in this regard."

[11] The "two exceptions" the Full Bench referred to were award modernisation decisions concerning the *Rail Industry Award 2010* (*Rail Industry Award*)[9] and the *Clerks-Private Sector Award 2010* (*Clerks Award*).[10] In the former decision, the award modernisation Full Bench said:

> "[256] We have accepted the submissions of the parties that annualised salary arrangements are a common feature in the industry and we note that a clause dealing with this matter was contained in drafts proposed by both RSCC and the rail unions. However, they were not in the same terms.
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> [257] The rail unions submitted that entering into such an arrangement should only be by agreement between the employer and employee concerned. We agree and the clause in the award has been drafted accordingly. Additionally the rail unions sought a provision about assumptions that may have been made about overtime or penalty components to be absorbed into the annualised wage. There is merit in these submissions and our clause reflects them.
>
> [258] We have made a number of other changes to the terms of the clause as contained in the exposure draft. It now provides that a copy of the agreement is to be given to the employee and kept by the employer as a time and wages record. We have also inserted provisions dealing with the manner in which the agreement may be terminated."

[12] The clause determined by the award modernisation Full Bench (which became clause 18 of the Rail Industry Award) was as follows:

> **18 Annualised wage and salary arrangements**
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> 18.1 An employer and an employee may agree to enter into an annualised salary arrangement instead of any or all of the following provisions of this award:

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[9] [2008] AIRCFB 1000

[10] [2009] AIRCFB 922 and [2010] FWAFB 969

Clause 14—Classifications and minimum wage rates;
Clause 15—Allowances and expenses;
Clause 23—Overtime and penalty rates; and
Clause 24.3—annual leave loading.

18.2 Where an annualised salary is paid the employer must specify in writing the annual salary that is payable and what provisions of this award will not apply as a result of the annualised salary arrangement.

18.3 The annual salary must be no less than the amount the employee would have been entitled to receive under the rates and allowances prescribed by this award. The annual salary is paid in full satisfaction of any obligation to otherwise make payments to the employee under this award and may be relied upon to set off any such obligation, whether of a different character or not.

18.4 In addition to the requirements of clause 18.3, any written agreement under this clause must specify each separate component of the annualised wage or salary arrangement and any overtime or penalty assumptions and calculations commuted into the annualised arrangement.

18.5 The employer must give the employee a copy of the agreement and keep the agreement as a time and wages record.

18.6 The agreement may be terminated:

(a) by the employer or the employee giving 12 months' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

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

[13] In the *Pastoral Award decision* the Full Bench made the following observation about the above provision:

"[134] It is to be noted that the clause determined by the AIRC included the following safeguards:

- the annualised salary arrangement is to be by agreement, in writing, between the employer and employee;
- the agreement must specify the annual salary that is payable and the provisions of the award that will not apply as a result of the agreement; and
- the employer must give the employee a copy of the agreement and keep the agreement as a time and wages record."

[14] The first decision involving the *Clerks Award*, issued on 16 November 2009,[11] concerned an application by the ASU to remove a provision which exempted employees from certain provisions of the *Clerks Award* who were paid 15% above the pay rate for Level 5. The award modernisation Full Bench granted the application on the following basis:

> "[25] In all of the circumstances we consider that the exemption provision should be removed but that flexible working arrangements should be available with respect to clerical employment and that these should be subject to appropriate safeguards and processes to ensure that employees clearly understand and agree to any arrangements which may differ from base award entitlements. We propose to delete the exemption provision in cl.17. However, we propose to insert an annualised salaries 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, safeguards against disadvantage and a formal process to establish and maintain the annualised salary arrangement..."

[15] The annualised wage arrangements provision which was made, which became clause 17 of the *Clerks Award*, was as follows:

> **17. Annualised salaries**
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> 17.1 Annual salary instead of award provisions
>
> (a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:
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> (i) clause 16—Minimum weekly wages;
>
> (ii) clause 19 – Allowances;
>
> (iii) clauses 27 and 29 – Overtime and penalty rates; and
>
> (iv) clause 29.3 – Annual leave loading
>
> (b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.
>
> 17.2 Annual salary not to disadvantage employees
>
> (a) 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).
>
> (b) 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.

[11] [2009] AIRCFB 922

> 17.3 Base rate of pay for employees on annual salary arrangements
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> 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 the annual salary equivalent to the relevant rate of pay in clause 16—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

[16] There subsequently followed an application by the ASU to vary clause 17 of the *Clerks Award* to require prior agreement between the employer and the employee for an arrangement under that clause to operate. In a decision issued on 25 February 2010,[12] the award modernisation Full Bench rejected this application:

> "[8] Awards operate in conjunction with contracts of employment. It is generally accepted that clerical employees are commonly remunerated by way of annualised salaries whether the relevant award expressly provides for such arrangements or not. It is also generally accepted that if the salary is expressly paid in compensation of all award entitlements and the amount paid exceeds the amount due under the award then the arrangement is not inconsistent with the award. The intention of the ASU in making its application is that the only arrangements which can legally be entered into are those expressly provided for in the award.
>
> [9] It is apparent that the terms of the relevant awards and NAPSAs were taken into account in formulating the annualised salaries clause in the Commission's decision of 16 November 2009. We believe that the safeguards in the modern award are appropriate in the circumstances of clerical employment. Further, we are concerned that the variation sought by the ASU may reduce existing flexibility and require changes in practices which have operated for many years. The ASU has not made a case for imposing a limitation on existing arrangements."

[17] As was noted by the Full Bench in the *Pastoral Award decision*, a subsequent application to vary the annualised wage arrangements provision in the *Oil Refining and Manufacturing Award 2010* to require agreement was also rejected on the basis that annualised salaries for clerks were widespread in the oil industry and that the clause contained safeguards to ensure an employee is not disadvantaged by being remunerated by way of an annualised salary.[13] The Full Bench also noted that "in both the *Clerks Award* and the *Oil Award* the decisions turned on the circumstances pertaining in those industries".[14] It then referred to further applications by the ASU to remove the annualised salaries provision in the *Clerks Award* as well as the *Contract Call Centres Award 2010* (*Call Centres Award*). Both applications were, in separate decisions,[15] dismissed. In the latter decision Kaufman DP rejected the proposition advanced by the ASU that the annualised salaries provision prevented the award from meeting the modern awards objective having regard to the need to encourage collective bargaining, the need to promote social inclusion through workplace bargaining and

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[12] [2010] FWAFB 969

[13] [2015] FWCFB 8810 at [141]

[14] Ibid at [142]

[15] [2012] FWA 9731 and [2012] FWA 9025 respectively

the need to ensure a simple, easy to understand, stable and sustainable modern award system.[16] Kaufman DP went on to say:

> "[32] As well as submitting that the Award, whilst containing cl 18.5 does not meet the modern awards objective, the ASU submits that there are cogent reasons for its removal and that the provision was not adequately considered by the Australian Industrial Relations Commission 'when compared to the consideration given to the Award Flexibility provision.' The cogent reasons for its removal are said to be 'based on the principles of equity, fairness and changed circumstances', which are that the provision is:
>
> - Inherently inequitable and discriminatory as it applies only to employees in the higher classification levels;
>
> - Inherently unfair as no employee agreement is required;
>
> - No longer necessary for employers now that all modern awards have compulsory award flexibility provisions; and
>
> - More appropriate in Enterprise Agreements where actual pay rates apply and annualised pay arrangements can be agreed, monitored and more reliably reviewed by employees.
>
> [33] In my view, none of these matters is made out, let alone has the ASU demonstrated that there is a cogent reason for the removal of the clause. By its nature it is more appropriately applied to employees in the higher classifications. It is not unfair merely because no employee agreement is required. Most award clauses apply absent employee or employer agreement. The award flexibility clause does not do the same work as that done by cl 18.5. I do not accept that such a clause is more appropriate in an enterprise agreement, and whether or not it is, is probably irrelevant to the review…
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> . . .
>
> [42] On 5 October 2012, I issued a statement seeking further submissions on the interaction between the common law in relation to offsetting payments against award provisions and the annualised salaries clause.
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> [43] At a further hearing on 19 October 2012, the ASU maintained its position that the clause should be deleted, as did the employers that it should be retained.
>
> [44**]** Having heard the parties, I am further confirmed in my view that the clause should not be deleted. Whatever be the position at common law, the current clause provides the parties with certainty as to what may be offset if an annual salary is paid, what procedures must be followed, as well as providing certain safeguards to employees.
>
> [45] In my view the deletion of clause 18 would cause confusion, particularly as to what, if anything, can be offset and as to whether employees could be paid by way of

[16] [2012] FWA 9025 at [21]-[30]

an annual salary at all. Its deletion would also, in my view, disadvantage the employees affected because, as a matter of law, they could be remunerated by way of annualised salaries without any of the protections provided by the clause.

[46] For the above reasons the application is dismissed."

[18] The Full Bench in the *Pastoral Award decision* then referred to the unsuccessful appeal from the decision of Kaufman DP, in which the appeal Full Bench had rejected a submission by the ACTU that annualised wage arrangements should only be entered into with the agreement of the employee, saying (footnotes omitted):

"[22] With respect to the ACTU's submissions, we point out that the "Annualised salaries" clause in the Clerks Award is a base award entitlement, and part of the safety net of terms and conditions provided by the Clerks Award. The safety net in the FW Act being the minimum terms and conditions in the National Employment Standards, modern awards and national minimum wage orders.

[23] We also point out the FW Act does not require that the annualised wage arrangements in modern awards provide for the parties' agreement to such arrangements. We do not think there is any warrant for regarding the words "arrangements" or "alternative" in s 139(1)(f) of the FW Act as incorporating the concept of "agreement".

[24] Further, we point out that subsequent to the Full Bench decision that included the "Annualised salaries" clause in the Clerks Award, a Full Bench of FWA specifically dealt with an ASU application to vary that "Annualised salaries" clause so as to require the parties' agreement to an annual salary. The Full Bench of FWA dismissed the ASU application…".

[19] Finally, the Full Bench in the *Pastoral Award decision* referred to the decision in *Re South East Water Corporation*[17] (*SE Water decision*), which concerned an employer application to add an annualised salaries provision to the *Water Industry Award 2010* applicable to the primarily managerial employees in the top two classifications (levels 9 and 10). The ASU's position was that the proposed provision contained inadequate safeguards, and referred to preferable provisions in the *Rail Industry Award*, the *Pharmacy Industry Award 2010*, the *Manufacturing and Associated Industries and Occupations Award 2010*, the *Oil Refining and Manufacturing Award 2010* and the *Broadcasting and Recorded Entertainment Award 2010*. The Full Bench said (footnotes omitted):

"[27] We observe that the clauses in the modern awards referred to by the ASU were inserted by consent of the parties and not the subject of Full Bench scrutiny in any contested hearing. We also observe that to some extent the ASU identifies provisions it submits are superior from a number of awards. It identifies these provisions as containing what it called "inbuilt features" which constitute additional safeguards it submits should be contained in an annualised salaries clause. It summarised those features. They were that the annualised salary must be agreed and in writing, that the parties to it must have genuinely made the agreement without coercion or duress, the

[17] [2014] FWCFB 5195

components of the annualised salary agreement must be listed, there was to be no disadvantage to the employee, a copy of the agreement must be kept as a time and wages record, there must be annual reviews of the agreement, the employee was entitled to involve a relevant union or an employee nominated representative and, finally, the agreement can be terminated by either party with 12 months' notice or at anytime if agreed.

. . .

[30] Subject to the matters we address in paragraph [32], we have not been persuaded that there is anything about the employers and employees at classification Levels 9 and 10 in the Water Award that warrants a departure by this Full Bench from taking a similar approach to that taken in earlier Full Bench decisions dealing with contested cases about the terms of an annualised salaries clause. The observations made by the Full Benches in the November 2009 Clerks Award decision and the February 2010 Clerks Award decision are equally applicable to this matter. No persuasive submission was made for us to rule in a manner inconsistent with those decisions. Similarly, the decision of the Full Bench in March 2013, which endorsed the comments Senior Deputy President Kaufman had made about the need for a clause in terms similar to those SEW here seeks are also applicable to this application.

[31] We have not been persuaded there is anything about the attributes of the water industry or its administrative and professional employees at the higher classification levels in the Water Award which justifies us departing, in any significant way, from making a ruling consistent with each of the Full Bench decisions we have identified above.

[32] We have, however, decided to introduce three additional requirements into the clause that we have decided should be inserted into the Water Award. They will, to some extent, address the need for the “safeguards” the ASU submitted were necessary. The requirements concern additional details which are to be in writing, including the classification level of the employee, the identification of the date on which the annualised salary arrangement commences and that a copy of the arrangement is to be provided to the employee. Nothing that was put to us in the hearing suggests that these requirements will place any unreasonable burden on employers or employees.

[33] We have not made any reference to the role a union may have. If any employee has concerns about the operation of the clause or their annualised salary arrangement they may raise that concern under clause 9 of the Water Award, the dispute resolution clause. That clause makes it clear that an employee is entitled to have a person, organisation or association represent them in any dispute to which the clause applies. Depending on the nature of the complaint an employee may have, they may also have rights which may be pursued under the general protections provisions of the Act.

[34] We have also not found it necessary to place any additional obligations upon an employer in respect to the written wages records it should keep. In this respect, we note that obligations about the details that must be kept are adequately regulated by Part 3-6 of the *Fair Work Regulations 2009.*

[35] We have considered the submissions of APESMA opposing the introduction of any annualised salaries clause into the Water Award. For the reasons we have given we were persuaded such a clause was appropriate for employees at the higher

classification levels in the Water Award. For the same reasons we do not accept the submission that annualised salaries can adequately be introduced under the terms of clause 7, the award flexibility clause.

[36] We are satisfied that the clause we have decided upon is necessary to achieve the modern awards objective. In this respect it is a clause which is consistent with s.134(1)(d) in that it will promote flexible modern work practices and the efficient and productive performance of work. Consistent with s.134(1)(f) it should have a positive impact on the regulatory burden on employers and reduce employment costs associated with payroll. It should provide to both employers and employees, wishing to enter into an annualised salaries arrangement, a simple and easy to understand provision consistent with s134(1)(g).”

[20] The annualised salaries clause placed into the *Water Industry Award 2010* was as follows:

14.2 Annualised salaries

The following provisions are to apply to employees employed in classification Levels 9 and 10 in accordance with Schedule B of this award.

14.2.1 Annual salary instead of award provisions

(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of this award:

(i) clause 14—Minimum wages;

(ii) clause 19—Allowances;

(iii) clauses 25.5 and 26—shiftwork penalty rates and Overtime and;

(iv) clause 27.3—Annual leave loading

(b) Where an annual salary is paid the employer must provide written advice to the employee of the following:

(i) the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary;

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

(iii) the award level classification for the role; and

(iv) the terms of clause 14.2.2 of this award.

14.2.2 Annual salary not to disadvantage employees

(a) 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).

(b) 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.

14.2.3 Base rate of pay for employees on annual salary arrangements

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 the annual salary equivalent to the relevant rate of pay in clause 14—Minimum wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

[21] The Full Bench in the *Pastoral Award decision* made the following three general observations about the above decisions:

> "[154] First, the Commission has adopted a cautious approach to the insertion of annualised wage arrangements in modern awards. In the 21 modern awards[18] that contain such a term it was usually the case that similar provisions formed part of the relevant pre-modernised instruments.
>
> [155] Second, the safeguards that have been incorporated in annualised wage arrangement terms in modern awards have varied depending on the circumstances relating to the particular award.
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> [156] Third, the Review is broader in scope than the Transitional Review and as such is the first real opportunity to fully examine the appropriateness of the safeguards to be incorporated in such terms."

[22] The Full Bench also made the following observations about the *SE Water decision*:

> "[158] The first point is that the SE Water decision is distinguishable from the matter presently before us in the following respects:
>
> - the predecessor awards to the Water Industry Award 2010 contained provisions limiting senior employees entitlements to overtime;
>
> - annualised salaries are a common feature in the water industry;
>
> - the clause in question applies to senior employees who are principally in managerial positions and have traditionally been paid by way of an annual salary; and

[18] As discussed below, there are in fact only 19 modern awards which contain annualised wage arrangements provisions. The 21 awards referred to appear to include 2 enterprise awards.

- the decision was made in the context of the Transitional Review.

[159] The second point is that, contrary to the Full Bench's observation in the SE Water decision, the annualised salaries term in the *Rail Industry Award 2010* was *not* inserted by consent but rather, as we have set out earlier, was the subject of a contested hearing.

[160] The final point we wish to make about the SE Water decision concerns the observation (at [34] of that decision) that it was unnecessary to specify that written records be kept because that issue was adequately regulated by Part 3-6 of the *Fair Work Regulations* 2009. For the reasons which follow there is cause to doubt the correctness of that observation.

[161] Employer obligations in relation to employee records and pay are set out in Division 3 of Part 3-6 of the *Fair Work Regulations* 2009. The requirements in respect of employee records are quite specific. For instance, there is a requirement to keep a copy of an individual flexibility arrangement entered into by an employer and employee (reg. 3.38) and if an employer gives a guarantee of annual earnings under s.330 of the Act, the guarantee is a kind of employee record that the employer must make and keep (reg. 3.39). There is no requirement to make and keep a record of an annualised wage arrangement.

[162] One of the purposes of annualised salaries is to provide income stability in circumstances where the hours worked fluctuates over the course of a year. As Senior Deputy President Polites observed in *Re: Energy Developments Limited – AWU Hydrocarbon Gas and Energy Award*:

> '... the concept of an annualised salary is that on occasions employees will work less than the notional times provided for in the salary and on occasions they will work more.' (PR915956)

[163] To ensure that employees are not disadvantaged by such arrangements the relevant term usually provides that the annual salary must be no less than the amount the employee would have been entitled to receive under the rates and allowances prescribed by the award. The modern award term may also provide for the review of any annual salary to ensure that it is appropriate having regard to the award provisions which are satisfied by its payment. These two elements are features of the NFF's proposed clause.

[164] Inherent in these safeguards is the notion that the annualised wage paid can be compared to what the employee would have been paid had all of the provisions of the modern award applied. In other words, to ensure an employee is not disadvantaged the annualised wage paid must be capable of being compared to what the employee would have received if the annualised wage arrangement was not in place. Such a comparison necessarily requires that records be kept of the allowances, overtime and penalty rates that would have been payable.

[165] The difficulty is that where an employee is paid pursuant to an annualised wage term in a modern award it is unclear whether there is a requirement to keep an employee record in respect of, for example, overtime hours worked.

[166] Regulation 3.34 deals with the requirement to make and keep employee records in respect of overtime by an employee, it provides:

> **3.34 Records—overtime**
>
> For subsection 535(1) of the Act, if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee, a kind of employee record that the employer must make and keep is a record that specifies:
>
> (a) the number of overtime hours worked by the employee during each day; or
>
> (b) when the employee started and ceased working overtime hours.
>
> Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.
> (emphasis added)

[167] Regulation 3.34 only requires an employee record to be made and kept if 'a penalty rate … must be paid for overtime hours actually worked by an employee'. The essence of an annualised wage arrangement is that penalty rates for overtime hours do not need to be paid, because they are comprehended within the annualised wage. It would seem to follow that if an annualised wage arrangement is in place then there is no requirement to make and keep an employee record of the number of overtime hours worked by the employee each day.

[168] A similar issue arises in relation to recording any entitlements to allowances or penalty rates. Regulation 3.33 provides as follows:

> **3.33 Records—pay**
>
> (1) For subsection 535(1) of the Act, a kind of employee record that an employer must make and keep is a record that specifies:
>
> (a) the rate of remuneration paid to the employee; and
>
> (b) the gross and net amounts paid to the employee; and
>
> (c) any deductions made from the gross amount paid to the employee.
>
> (2) If the employee is a casual or irregular part-time employee who is guaranteed a rate of pay set by reference to a period of time worked, the record must set out the hours worked by the employee.
>
> (3) If the employee is entitled to be paid:
>
> (a) an incentive-based payment; or

(b) a bonus; or

(c) a loading; or

(d) a penalty rate; or

(e) another monetary allowance or separately identifiable entitlement;

the record must set out details of the payment, bonus, loading, rate, allowance or entitlement.

Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.
(emphasis added)

[169] As appears to be the case with overtime records, the obligation to make and keep an employee record of allowances or penalty rates only arises if the employee is 'entitled to be paid' such payments."

[23] The Full Bench then stated the following conclusion:

"[170] The matters we have identified highlight the need for careful consideration to be given to the 'appropriate safeguards' to be incorporated in an annualised wage arrangements term to 'ensure that individual employees are not disadvantaged' (as required by s.139(1)(f)(iii)). We propose to give further consideration to this issue. We will issue a Statement in due course setting out some provisional views as to the content of an appropriate annualised wage arrangement term for insertion into the *Pastoral Award 2010*. Interested parties will be given an opportunity to comment and the matter will be the subject of a further hearing."

[24] The foreshadowed statement was issued by Ross J, President on 31 May 2016[19] (*May statement*). After reviewing the relevant statutory provisions and the history of this aspect of the 4 yearly review, the *May statement* identified the following issues as having been raised by the applications to establish or vary annualised wage arrangements in a number of awards as follows (footnotes omitted):

"(i) the inclusion of a provision to allow for the reconciliation of an annualised salary arrangement for managers;

(ii) inclusion of a mechanism to ensure employees are not disadvantaged if the annualised salary arrangement ends (but employment continues) before the completion of a year;

(iii) a proposed variation to expressly include absorption of the annual leave loading in the calculation of annualised salaries;

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(iv) a requirement that the annualised wage arrangement pass "better off overall test" in comparison with an employee with an equivalent work pattern covered by the general provisions of the award;

(v) an additional safeguard to ensure the employees to whom an annualised salary arrangement applies are not required to work unreasonable hours in excess of the employee's agreed ordinary hours of work;

(vi) a right to access and copy employer records of start and finish times of work;

(vii) additional requirements relating to the making of an agreement including that the agreement between the employer and employee be in writing, be signed by both parties and a copy provided to the employee;

(viii) the inclusion of a provision allowing both the employer and employee to terminate the arrangement on notice or by agreement;

(ix) that the arrangement be subject to an annual review."

[25] The statement went on to say (footnotes omitted):

"[8] … As indicated in the *December 2015 decision*, in those awards that contain an annualised salary term, it was usually the case that similar provisions formed part of the relevant pre-reform instruments and, as a consequence, the form and content of such terms was not the subject of much debate during the award modernisation process.

[9] During the Transitional Review in 2012 the ASU made applications to delete annualised salary clauses in two modern awards. Those applications were dismissed on the basis that no cogent reasons had been advanced for the changes sought and that a thorough re-examination of issues covered within the award modernisation process did not fall within the scope of the Transitional Review.

[10] However, the 4 yearly modern awards review is broader in scope than the Transitional Review and provides an opportunity to comprehensively review such terms.

Conclusion and next steps

[11] In light of the above, I am satisfied that a broader review of all annualised salary terms is required.

[12] I note that in the *December 2015 decision* the Full Bench proposed to give further consideration to this issue in relation to the Pastoral Award and stated at [170]:

> 'We will issue a Statement in due course setting out some provisional views as to the content of an appropriate annualised wage arrangement term for insertion into the *Pastoral Award 2010*. Interested parties will be given an opportunity to comment and the matter will be the subject of a further hearing.'

> [13] However, in order to ensure consistent decision making and that all relevant issues in relation to annualised salary arrangements are canvassed, I have determined that the NFF's application to vary the Pastoral Award and the applications set out above (at [5]–[6], see Attachment A) and existing annualised salary terms in modern awards (Attachment B) will be referred to a separately constituted Full Bench (see Attachment C) for review and determination.
>
> [14] It should not be assumed that the referral of these matters to a Full Bench will result in a standard annualised salary term to be included in all awards. The content of particular clauses will be a matter for the Full Bench."

[26] In accordance with the above statement the review of annualised wage arrangement provisions in modern awards was referred to us. That will require us to consider a number of specific applications to either vary existing annualised wage arrangement provisions or to add new annualised wage arrangement provisions, and also to review the existing provisions generally. The specific applications are described below.

Pastoral Award 2010* and *Horticulture Award 2010

National Farmers' Federation claim

[27] The *Pastoral Award* and the *Horticulture Award 2010* (*Horticulture Award*) do not currently contain provisions relating to annualised wage arrangements. The NFF has proposed that the awards be varied to add such provisions. The provision proposed for the *Pastoral Award* is as follows:

> **"18. Annualised salaries**
>
> The following provisions are to apply to employees employed in any of the classifications contained in clauses 27, 33 or 39 of the award.
>
> **18.1 Annual salary instead of award provisions**
>
> **(a)** An employer may reach agreement with an employee to pay the employee an annual salary in satisfaction of any or all of the following provisions of the award:
>
> **(i)** clauses 28, 34 and 40—Minimum weekly wages;
> **(ii)** clauses 17 and 29—Allowances and special allowances;
> **(iii)** clauses 31, 36 and 42—Overtime and penalty rates;
> **(iv)** clause 23.4—Annual leave loading; and
> **(v)** clauses 26, 32, 38 and 43—Payment for public holidays.
>
> **(b)** Where an annual salary is paid, the employer must retain a written copy of the agreement reached with the employee, which includes the annual salary that is payable and the provisions of this award that will be satisfied by payment of the annual salary as well as the date on which the salary arrangement commences.

18.2 Annual salary not to disadvantage employees

(a) 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).

(b) 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.

18.3 Base rate of pay for employees on annual salary arrangements

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 the annual salary equivalent to the relevant minimum wage in clause 28, 34 or 40, whichever is applicable, and excludes any incentive based payments, bonuses, loadings, monetary allowances, overtime and penalties or payment for public holidays.

18.4 The annual salary of the employee will be paid during all periods of paid leave."

[28] The NFF's proposed annualised wage arrangements provision for the *Horticulture Award* is as follows:

"19A. Annualised salaries

The following provisions are to apply to employees employed in any of the classifications contained in clause 13 of the award.

19A.1 Annual salary instead of award provisions

(a) An employer may reach agreement with an employee to pay the employee an annual salary in satisfaction of any or all of the following provisions of the award:

(i) clause 14—Minimum wages;
(ii) clauses 17—Allowances;
(iii) clauses 24—Overtime; and
(iv) clause 25.6—Annual leave loading.
(v) clauses 28—Public holidays.

(b) Where an annual salary is paid, the employer must retain a written copy of the agreement reached with the employee, which includes the annual salary that is payable and the provisions of this award that will be satisfied by payment of the annual salary as well as the date on which the salary arrangement commences.

19A.2 Annual salary not to disadvantage employees

(a) 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).

(b) 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.

19A.3 Base rate of pay for employees on annual salary arrangements

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 the annual salary equivalent to the relevant minimum wage in clause 14, whichever is applicable, and excludes any incentive based payments, bonuses, loadings, monetary allowances, overtime and penalties or payment for public holidays.

19A.4 The annual salary of the employee will be paid during all periods of paid leave."

[29] The NFF identified the purpose of its proposed variations as being to address some of the issues caused by the seasonal variability, peaks and troughs and vulnerability to fluctuating weather in the pastoral and horticultural industries. The variations would also reduce the regulatory burden on employers and reduce costs associated with payroll, and would have a lower administrative burden than individual flexibility arrangements.

Evidence

[30] The NFF relied on two statements of evidence, the makers of which were not required to attend for cross-examination. The first statement was made by Gracia Kusuma, the Industrial Relations Manager with the NSW Farmers Association. In her statement, Ms Kusuma said that one of the most frequent enquiries the Association received from members related to reviewing their proposed employment conditions from a compliance perspective and formalising them as employment contracts or Individual Flexibility Agreements. An estimated 50% of members who sought assistance with drafting or reviewing employment contracts wanted annualised salary arrangements with their employees. Such arrangements were preferred by members in certain circumstances because they provided consistency of pay for employees, incentivised employees to complete assigned tasks within normal hours, and took away the need for "clock watching".

[31] The second statement was made by Charles Armstrong, the Chair of the NFF's Workforce Productivity Committee, the Chair of Farmsafe Australia and the former President of the NSW Farmers' Association. Mr Armstrong has also been the operator of a large farm for 40 years. He said that the agricultural industry was dictated by seasonality, which caused peaks and troughs in workload during the year, with busy times occurring during operations such as sowing, harvesting, shearing, marking, lambing or calving. Farmers and their employees often worked long hours during these periods and took time off when the peak period had passed and there were routine management and maintenance operations to do. It was important to find ways to streamline paperwork and administrative tasks to ease the regulatory burden on farmers. Farmers and their employees were vulnerable to changes in seasonal conditions caused by weather and changes to market forces because of retailer demands. For farmers, such changes limited the ability to control work or plan ahead, and for employees it could cause fluctuations in their take-home pay depending on hours worked. One way of dealing with this was to adopt annualised salary arrangements for employees, so

that farmers and employees could plan around to amount to be paid each week, and to reduce the paperwork burden on farmers. It was common practice in the industry for annualised salaries to be negotiated in employment contracts, but it was not always clear how such contracts interacted with award terms requiring payment for overtime and the like. In Mr Armstrong's opinion, an award provision that allowed annualised salary arrangements to be made was a practical step that could benefit both farmers and their employees by improving certainty and regularity of cash flow. The certainty provided to employees by an annualised salary would also benefit employees when negotiating with a bank or for other commercial arrangements.

[32] No other party adduced evidence in relation to the NFF claims.

Submissions

[33] The NFF submitted that:

- seasonal variability was more prevalent in the agricultural sector than in the mining industry covered by the *Mining Industry Award 2010* which contained an annualised salaries provision as a result of decision of the Australian Industrial Relations Commission (AIRC) in 2009;

- its proposed annualised salaries provision would be consistent with the modern awards objective in s 134(1)(a);

- in respect of s 134(1)(a), the proposed provision would improve the living standards of the low paid, in that a dependable year-round income would give greater financial security and allow effective budgeting; in respect of s 134(1)(b) it was neutral; in respect of s 134(1)(c) and (d) it would promote social inclusion and flexible work practices by accommodating non-standard business hours; it was neutral in respect of s 134(1)(da) and (e); in respect of s 134(1)(f) it reduced the regulatory burden, had a lesser administrative burden than individual flexibility arrangements, and supported greater workplace certainty and flexibility which would give employers greater confidence to employ; in respect of s 134(1)(g) it allowed for greater clarity as to how to calculate an annual salary; and in respect of s 134(1)(h) it would promote employment;

- the proposed provision contained a number of safeguards to ensure that the proposed term would not cause disadvantage to employees, including that the arrangement had to be in writing, employees had to receive at least what they would have received over the year if paid under the award, the annual salary was payable during all periods of paid leave, and did not apply to shearing operations in the pastoral industry.

[34] The AWU did not oppose the introduction of an annualised salary provision in the two awards provided that further safeguards were added. It proposed the following additional requirements as safeguards:

- the employer was to keep records of the performance of work that fell into the category of work that was satisfied by the annual salary;

- the employer was to conduct a review on termination of employment, or if the annualised salary arrangement ended, as well as annually;

- any underpayment to be rectified within a certain time period following a review (including the annual review, review on termination of employment, or review upon ending an annualised salary arrangement); and

- a termination clause allowing the employee to end an annual salary arrangement.

[35] The AWU submitted that similar record keeping requirements were inserted into the *Rail Industry Award 2010* (*Rail Award*) by the Award Modernisation Full Bench. It also proposed inserting the following provision extracted from clause 18.4 of the *Rail Award*:

> "… any written agreement under this clause must specify each separate component of the annualised wage or salary arrangement and any overtime or penalty assumptions and calculations commuted into the annualised arrangement."

[36] At the hearing on 7 December 2016 the NFF submitted in response to the AWU's proposals that the FW Act required that the arrangement for an annualised salary be recorded and that including a term for recording the arrangement in the award was "*arguably duplication*". It further submitted that it thought the more prescriptive the clause was the more likely it would be breached, and that it would be sufficient as long as it was clear what the salary was and what was contemplated within it. It was not strongly opposed to the termination provisions proposed by the AWU taken from the *Rail Award*.

[37] Australian Business Industrial and the New South Wales Business Chamber (ABI & NSWBC) submitted that the safeguards proposed by the NFF in their written submissions were sufficient and that the Commission need not go beyond that. There should be no provision for termination of the agreement within the award and that neither party should have the power to unilaterally terminate the annualised salary arrangement.

Clerks - Private Sector Award 2010, Legal Services Award 2010* and *Contract Call Centres Award 2010

Australian Services Union claim

[38] The ASU seeks the variation of vary three awards: the *Clerks Award*, the *Legal Services Award 2010* (*Legal Services Award*) and the *Call Centres Award*. These awards currently contain annualised salary clauses that are in essentially the same form. We have earlier set out the current provision in the *Clerks Award*. The ASU proposes that they be replaced by annualised salary clauses the same as that in the *Local Government Industry Award 2010* (*Local Government Award*). Clause 14.7 of the *Local Government Award* provides:

> **14.7 Annualised Salaries**
>
> **(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) Minimum Wages – clause 14;

(ii) Allowances – clause 15;

(iii) Higher duties – clause 18;

(iv) Penalty rates – clause 23;

(v) Overtime – clause 24; and

(vi) Annual leave loading – clause 25.4

(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;

(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.

(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.

[39] Clause 14.7 was introduced into the *Local Government Award* by consent in 2013.[20]

Law firms' claim

[40] Russell Kennedy and 20 other law firms (the Law Firms) sought the variation of the annualised salary provision (clause 30) of the *Legal Services Award* to permit allowances payable for shiftwork and work performed on Saturdays, Sundays, public holidays and rostered days off to be included as entitlements which might be satisfied by payment of an annualised salary amount.

Evidence

[41] The ASU provided evidence by way of the witness statement of Terry O'Loughlin, an industrial officer with the ASU. Mr O'Loughlin was not required for cross-examination. Mr O'Loughlin gave evidence in his statement that the ASU had experienced problems where members had been in dispute over the non-payment of overtime where extra hours, early mornings, later evenings or weekends had been worked, the non-payment of shift penalties, the non-payment of annual leave and annual leave loading and the non-payment of annual holidays. Disputes had arisen when letters or contracts of employment had been drafted which referred to an annualised salary as being "*all encompassing*" in regard to penalties and allowances or that the "*salary will cover all overtime entitlements*", and claims made by the ASU for the payment of penalties or allowances to a member were often met with the

[20] [2013] FWC 2936

response that an over-award payment formed the basis of an annualised salary that covered all other penalties and allowances even though they were never detailed in the contract of employment. In a number of instances the member had been unaware of the implications of such an arrangement because under the current award provisions it did not require their consent, nor did it require identification of the award provisions which were to be offset. Employers invariably used the annualised salaries provision in preference to the individual flexibility agreement provision because it was less prescriptive.

[42] The ASU also relied upon a survey which it conducted of its members which generated approximately 280 responses. It relevantly showed that:

- 66% of respondents were female;
- 66% of respondents did not previously know what an annualised salary arrangement was;
- 63% were currently paid an annualised salary, with 17% saying that they did not know and 20% saying they were not; and
- 76% had been paid an annualised salary under a previous employment arrangement.

[43] No other evidence was adduced by any party in relation to these awards.

Submissions

[44] The ASU submitted that the clause in the *Local Government Award* was superior to that in the *Clerks Award* and the two other awards because:

- the clause required agreement between the employee and employer;
- 10 safeguards are listed in clause 14.7(d); and
- the agreement could be terminated with four weeks' notice to the other party.

[45] The *Clerks Award* provision was also said to be inferior to other award provisions concerning annualised salaries which required employee agreement and had appropriate safeguards such as the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Pharmacy Industry Award 2010*. The ASU undertook an analysis of 18 awards that presently contained an annualised salary clause, and submitted they could be categorised into three groups according to the level of employee agreement required and the safeguards contained in the provisions as follows:

(1) No employee agreement and few employee safeguards:

- *Clerks – Private Sector Award 2010*
- *Legal Services Award 2010*
- *Salt Industry Award 2010*
- *Mining Industry Award 2010*
- *Banking, Finance and Insurance Award 2010*
- *Wool, Storage, Sampling and Testing Award 2010*

(2) Employee agreement and inbuilt safeguards:

- *Local Government Industry Award 2010*
- *Rail Industry Award 2010*
- *Restaurant Industry Award 2010*
- *Hospitality Industry (General) Award 2010*
- *Manufacturing and Associated Industries and Occupations Award 2010*
- *Oil Refining and Manufacturing Award 2010 (agreement required for non-clerical employees only)*

(3) No explicit employee agreement, but with safeguards and recording requirement:

- *Pharmacy Industry Award 2010*
- *Broadcasting and Recorded Entertainment Award 2010*
- *Telecommunications Services Award 2010*
- *Water Industry Award 2010*
- *Hydrocarbons Industry (Upstream) Award 2010*
- *Contract Call Centres Award 2010.*

[46] The ASU submitted that this analysis showed that the annualised salaries clause contained in the *Clerks Award* was not the norm, and that it undermined the award flexibility provisions because it did not require agreement between an employee and an employer. In effect, employees were denied the right to utilise the award flexibility provisions by virtue of the annualised salary clause. The addition of a requirement for employee agreement and a right for the employee to terminate the arrangement would deal with this difficulty. Further, the need for adequate safeguards was demonstrated by the recent decision of the Western Australian Industrial Magistrate in *Simone Jade Stewart v Next Residential Pty Ltd*[21] which found in favour of an employee claim to unpaid overtime because her annualised salary arrangement did not specify the provisions. This was a highly unusual case in which an employee had challenged her payment under an annualised salary arrangement. The great majority of employees covered by the *Clerks Award* were female and non-unionised, and thus required the protection of greater safeguards.

[47] The ASU opposed the Law Firms' proposed variation to insert shiftwork allowances into clause 30.1 of the *Legal Services Award*. It submitted that shiftwork allowances were critical to employees' pay, and such a variation would disadvantage employees because an employee could not refuse consent nor terminate the agreement and did not have the protection of safeguards. The ASU disagreed with the Law Firms' submission that the inclusion of shift allowances was an oversight.

[48] The Community Public Sector Union (CPSU) supported the ASU's application with respect to the Call Centre Award, and submitted that an annualised salary provision should continue to apply only to the three highest classifications. The current annualised salary clause did not require employee consent and was contrary to the modern awards objective. It created a disincentive for employers to collectively bargain because an employer could achieve flexibilities in award provisions without negotiation with employees. It also deprived

[21] [2016] WAIRC 00756

employees of certain award entitlements that would otherwise apply, and could make it difficult for an employee to calculate over the course of the year whether they would have received a greater annual salary than they would have received under specific award entitlements payable at the time of the work being performed. The CPSU submitted that under the Call Centre Award an employee was deprived of the choice of whether they would prefer the clarity and transparency of award entitlements or choose an annualised salary in discharge of those provisions.

[49] The Ai Group submitted that the ASU had not established any deficiency in the existing provision in the *Clerks Award*. The annualised salary clause in the *Local Government Award*, which the ASU sought to be replicated in the *Clerks Award*, was not fully considered in the Transitional Review, but was inserted by consent of the parties so that the Commissioner's decision could not be construed as endorsing any specific elements of the clause. Further, its inclusion did not establish that the provision was desirable or necessary to achieve the modern awards objective. Ai Group submitted that the ASU's allegation that employers had exploited the annualised salary provisions to go further than the award flexibility clauses had not been supported by probative evidence. The current provision in the *Clerks Award* had been the subject of consideration on a number of occasions such that it could be said that the provision reflected an approach that had been scrutinised, accepted and endorsed by the Commission. The ASU had failed to establish that its proposed provision was necessary to meet the modern awards objective. There was no probative evidence of annualised salary arrangements undermining individual flexibility agreements, and this same argument had been put by the ASU, and rejected, in the Transitional Review. Nor was there probative evidence as to why a requirement for agreement was necessary to avoid unfairness, and the limited evidence of Mr O'Loughlin described award non-compliance rather than any deficiency in the award clause itself.

[50] Ai Group submitted the variations proposed by the ASU would have a number of adverse consequences on business, productivity, employment costs and the regulatory burden (s 134(1)(f) of the FW Act). Firstly, requiring employee agreement to pay an annualised salary would increase the discussions or negotiations required to ascertain employee agreement which may be a time consuming process. Secondly, a requirement for an employer to set out details of any performance pay and performance measurement indicators was not a matter that could be included in a modern award and was not necessary to ensure a fair and relevant minimum safety net. Thirdly, the proposed requirement for a written agreement to contain details of salary package arrangements and other non-salary benefits would create a requirement to define entitlements that do not arise from the terms of the award and instead may be provided subject to a common law contract of employment or a company policy. No basis for requiring the inclusion of this had been advanced, and the assessment of whether an employee was disadvantaged from the payment of an annual salary related only to the amount an employee would have received under the Award.

[51] The Ai Group also opposed the ASU's proposed variation to the Call Centre Award. It submitted that nothing had been advanced to establish the current annualised salary provisions did not provide fair, responsible and robust conditions and a decent safety net. The current clause provided an alternative remuneration structure for higher level classifications and did not contain the express obligation in relation to no disadvantage as the *Clerks Award* did, and thus was of a different character to the other provisions being considered in the matter. The provision had been negotiated and agreed between the Ai Group and the ASU in relation to a

pre-reform award, and an application to delete the provision had been rejected in the Transitional Review.

[52] ABI & NSWBC opposed the ASU claim, and submitted that the claim, if granted, would essentially have the impact of transforming annualised salary arrangements into what would for most intents and purposes be indistinguishable from an individual flexibility agreement. The ASU submission that the annualised salary clause in the *Clerks Award* was unilaterally determined by employers was incorrect because the clause required express agreement between the employer and the employee in the form of a letter of offer/employment contract which was voluntarily entered into by the parties. ABI & NSWBC submitted that the balance of the ASU claim was unnecessary and inappropriate because the existing annualised salaries clause provides appropriate safeguards consistent with the modern awards objective.

[53] The Chamber of Commerce and Industry of Western Australia (CCIWA) contended the variations proposed by the ASU would make the annualised salary provisions more complex and increase the risk for employers seeking to enter into such arrangements, and that there was no basis for inserting the relevant clauses from the *Local Government Award* into the awards proposed by the ASU in circumstances where the awards did not share a common history and where the nature of local government was different to private sector business.

[54] The Law Firms submitted, in relation to their own claim, that the omission of shift allowances in the list of what might be satisfied by the payment of an annualised salary was an oversight or technical omission from the original provision. They submitted that a law firm would engage clerical employees on shiftwork only in very limited circumstances, such as those who have clerical staff working overnight, and therefore no disadvantage was likely to arise. Further, shiftwork allowances were the only monetary entitlement in the *Legal Services Award* which could not be included in an annualised salary, whereas the *Clerks Award* allowed for this. Employees covered by the *Legal Services Award* could not reasonably be characterised as vulnerable because 70% of those employees were paid at least $12,000 above the minimum award rates and 21% were paid over $20,000 above the minimum award rates.

[55] The Law Firms also opposed the ASU claims for reasons similar to those advanced by the other employer groups.

Health Professionals and Supported Services Award 2010

Ai Group claim

[56] The Ai Group filed a draft determination to vary the *Health Professionals and Supported Services Award 2010* (*Health Professionals Award*) to insert the following provision:

> **16. Annualised salaries**
>
> Clause 16 applies to employees employed in the following classifications in accordance with Schedule B of the award:
>
> - Support Services employee – level 8
> - Support Services employee – level 9

- Health Professional employees – any level

16.1 Annual salary instead of award provisions

(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

(i) clause 14—Minimum weekly wages for Support Services employees;

(ii) clause 15—Minimum weekly wages for Health Professional employees;

(iii) clause 18—Allowances;

(iv) clauses 26, 28.1 and 29—Overtime, penalty rates and shift loading; and

(v) clause 31.2—Annual leave loading.

(b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

16.2 Annual salary must be reviewed

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.

16.3 Base rate of pay for employees on annual salary arrangements

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 the annual salary equivalent to the relevant rate of pay in clause 14 or clause 15 and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

Submissions

[57] Ai Group submitted that the variation was proposed on the following bases:

- it benefited both employers and employees by redistributing wages throughout the year where they might have otherwise fluctuated significantly;
- annualised salary provisions provided greater clarity than the common law of set off;
- many modern awards applying to employees performing work of a similar nature contained similar provisions;
- in light of the above proposition, there was no apparent reason not to include the provisions;
- the grant of the claim would not be inconsistent with previous decisions of the Commission;

- the claim could be distinguished from previous unsuccessful claims for annualised salary provisions; and

- the provision was necessary to achieve a fair and relevant minimum safety net of terms and conditions.

[58] Ai Group submitted that a number of modern awards contained annual salary provisions for employees engaged in supervisory, managerial or other senior roles, and the absence of this flexibility in this award was inappropriate and unduly restrictive. The proposed provision would be limited to employees classified as level 8 or 9 Support Services employees and health professionals. The proposed provision was modelled on clause 17 of the *Clerks Award*. It met the requirements set out in s 139(1)(f)(i) of the FW Act as it took into account the pattern of work undertaken by the employees in the classification to whom the clause would apply, and met s 139(1)(f)(ii) in that it enabled payment of an annualised salary as an alternate to the minimum weekly wage and other monetary entitlements such as allowances, weekend and shift penalties, overtime and annual leave. It also met the requirements of s 139(1)(f)(iii) as the operation of proposed clause 16.2 was self-evidently designed to ensure that an individual employee was not disadvantaged. Clause 16.2 mandated an annual review that would ensure that the provisions of the award were satisfied by the salary.

[59] The Chiropractors' Association Australia (CAA) supported the Ai Group's claim and submissions, but did not agree that the provision should be restricted to specific classifications. It submitted there was no reason why administrators within the allied health industry should be differentiated from administrators in the private sector and be denied the benefit of annualised remuneration. It noted that, prior to the introduction of the *Health Professionals Award*, chiropractors were largely award free and their assistants, covered by various clerical awards, were typically paid annual salaries. It sought the inclusion of an annualised salaries provision in the Transitional Review but was unsuccessful. The chiropractic industry was dominated by small businesses, and the use of annualised salaries was much simpler and less of a regulatory burden on employers.

[60] United Voice opposed the claim, and rejected the proposition that annualised salaries were an appropriate method of remuneration for the health industry. It characterised the industry covered by the *Health Professionals Award* as follows:

- most employees were employed in hospitals which operated 24 hours a day 7 days a week;

- this led to complex rosters with different penalty rates and loadings; and

- most workers would expect to be working at any time of the day or night and overtime hours were common.

[61] The complexity of rostering meant, United Voice submitted, that even with a proper review of provisions, it would be very difficult to assess whether underpayment had occurred. United Voice also submitted that, given the complexity of the annual review, the proposed variation might assist an employer to circumvent award entitlements. No evidence had been provided to demonstrate that the proposed variations were necessary to achieve the modern awards objective. The Ai Group's point that a number of other awards with professional

employees contain annualised salary provisions was irrelevant and the Commission should review the award by reference to the particular terms and operation of that award, rather than make a global assessment based on generally applicable considerations.

[62] The Health Services Union (HSU) likewise opposed the proposed variation, which it submitted was supported by no probative evidence demonstrating that the award did not meet the modern awards objective. It rejected the proposition that many modern awards contained provisions of the type sought by the Ai Group, and submitted that many of the awards referred to did not in fact contain annualised salary provisions and, in any event, work performed under the *Health Professionals Award* was of a different nature to the work performed under the identified awards. There was nothing self-evident in the draft determination that would ensure an employee would not be disadvantaged, and accordingly the proposed provision did not include appropriate safeguards to ensure that individual employees are not disadvantaged as required by the FW Act. Employees in the health workforce regularly worked evenings, weekends and public holidays and the industry was characterised by unsociable hours and irregular work, and there was no protection from disadvantage caused by the loss of entitlement for this type of work.

[63] The ASU also opposed the proposed variation and submissions made by CAA. The ASU submitted the AI Group's proposed clause was weak and minimalist in nature, with few employee safeguards and no agreement required from an employee.

Hospitality Industry (General) Award 2010* and *Restaurant Industry Award 2010

Current provisions

[64] The *Hospitality Industry (General) Award 2010* (*Hospitality Award*) and the *Restaurant Industry Award 2010* (*Restaurant Award*) currently contain provisions allowing for the payment of annualised salaries. Clause 27, *Salary arrangements*, of the *Hospitality Award* provides:

> **27.1 Annualised Salary (Employees other than Managerial Staff (Hotels))**
>
> This clause applies to employees other than those classified as Managerial Staff (Hotels).
>
> **(a)** As an alternative to being paid by the week according to clause 20—Minimum wages, by agreement between the employer and the employee, the employer may pay the employee at a rate equivalent to an annual salary of at least 25% or more above the rate prescribed in clause 20—Minimum wages, times 52 for the work being performed. The employer and the individual employee must genuinely make the agreement without coercion or duress.
>
> **(b)** An agreement provided for in subclause 27.1(a) will:
>
> **(i)** have regard to the pattern of work in the employee's occupation, industry or enterprise but must not disadvantage the employee involved; and

(ii) unless the parties otherwise agree, relieve the employer of the requirements under clauses 32—Penalty rates and 33—Overtime (or other award clauses prescribing monetary entitlements, as specified in the agreement) to pay penalty rates and/or overtime (or other specified award-derived monetary entitlements) that the employer would otherwise be obliged to pay in addition to the weekly award wage for the work performed and the hours worked by the employee, provided that the salary paid over a year will be sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations (and other monetary entitlements specified in the agreement) had been complied with.

(c) Provided further in the event of termination of employment prior to completion of a year the salary paid during such period of employment will be sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.

(d) An employee being paid according to this clause will be entitled to a minimum of eight days off per four week cycle. If such an employee is required to work on a public holiday, they are entitled to paid time off that is of equal length to the time worked on the public holiday or the equal length of time worked to be added to their annual leave entitlement.

(e) Where payment in accordance with this clause is adopted, the employer must keep a daily record of the hours worked by an employee which will show the date and start and finish times of the employee for the day. The record must be countersigned weekly by the employee and must be kept at the place of employment for a period of at least six years.

27.2 Salaries absorption (Managerial Staff (Hotels))

This clause applies to those employees classified as Managerial Staff.

(a) Managerial Staff who are paid a salary of 25% in excess of the minimum annual salary rate of $45,987 per annum as in clause 20.2 (in receipt of a salary of at least $57,484 per annum), will not be entitled to the benefit of the terms and conditions within the following clauses:

- clause 12—Part-time employment;
- clause 21—Allowances;
- clause 29—Ordinary hours of work (Full-time and part-time employees)
- clause 31—Breaks;
- clause 32—Penalty rates;
- clause 33—Overtime;

- clause 34.2—Payment for annual leave;

- clause 37.1(b)(i)—Additional arrangements for full-time employees (on public holidays);

- clause 39—Provision of employee accommodation and meals.

(b) An employee being paid according to clause 27.2(a) will be entitled to a minimum of eight days off per four week cycle.

(c) An employee being paid according to clause 27.2(a) who works on a public holiday will be entitled to paid time off that is of equal length to the time worked on the public holiday. This time is to be taken within 28 days of accruing it.

(d) For the purpose of calculating the weekly equivalent of the annual salary rates prescribed by this clause, the divisor of 52 will be used and the resultant amount will be taken to the nearest 10 cents. All calculations required to be made under this award for the purpose of determining hourly amounts payable to an employee will be calculated on the weekly equivalent of the annual salary.

(e) Managerial Staff will be reimbursed for all monies reasonably expended for and on behalf of the employer subject to hotel policy or approval.

27.3 Payment of salaries

In such circumstances and despite clause 26.2, where an employee is being paid in accordance with clause 27.1 or clause 27.2, the employer may elect to pay the employee monthly.

[65] Clause 28, *Annualised salary arrangements* of the *Restaurant Award* provides:

28. Annualised salary arrangements

28.1 Alternative method of payment—annual salary

(a) As an alternative to being paid by the week, by agreement between the employer and an individual employee, an employee other than a casual, can be paid at a rate equivalent to an annual salary of at least 25% or more above the weekly rate prescribed in clause 20—Minimum wages, multiplied by 52 for the work being performed. In such cases, there is no requirement under clauses 24.2, 33—Overtime, 34.1 and 34.2 to pay overtime and penalty rates in addition to the weekly wage, provided that the salary paid over a year was sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.

(b) Provided further that in the event of termination of employment prior to completion of a year, the salary paid during such period of employment must

be sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.

(c) An employee being paid according to this clause will be entitled to a minimum of eight days off per four week cycle. Further, if an employee covered by this clause is required to work on a public holiday, such employee will be entitled to a day off instead of public holidays or a day added to the annual leave entitlement.

28.2 The employer must keep all records relating to the starting and finishing times of employees to whom this clause applies. This record must be signed weekly by the employee. This is to enable the employer to carry out a reconciliation at the end of each year comparing the employee's ordinary wage under this award and the actual payment. Where such a comparison reveals a shortfall in the employee's wages, then the employee must be paid the difference between the wages earned under the award and the actual amount paid.

United Voice claims

[66] United Voice has proposed that the above provisions be varied to add a number of additional safeguards for employees. In relation to clause 27.1 of the *Hospitality Award*, United Voice first proposed that the existing clause 27.1(c) be deleted and replaced by the following provisions:

(c) Where an employee is paid under an annualised salary arrangement made under this clause, the employer will carry out a review in consultation with the employee after every six months of employment comparing what the employee would have earned had he or she been paid for all the hours worked under clause 20 of this award and also paid all appropriate penalties, loadings and allowances ('Award Payments'), with the actual payments made under the annualised salary arrangements.

(d) The employer must also carry out a review in consultation with the employee where the employment is terminated or the annualised salary ends prior to the completion of the 6 months of employment or if for some reason a review has not taken place.

(e) Where a review reveals a shortfall between the salary paid and the Award Payments, then the employer must pay the shortfall within 14 days.

(f) An employee on an annualised salary arrangement has the right to refuse unreasonable request to work additional hours in accordance with the NES and clause 33.1(b) of this award.

[67] United Voice then proposed that the existing clauses 27.1(d) and (e) be re-designated as clause 27.1(g) and (h), and that the following new provision be added:

(i) An employee on an annualised salary arrangement has the right to inspect and make copies of any record made and maintained by his or her employer pursuant to clause 27.1(h). If the employer possesses copying facilities, the employee should be able to use these facilities free of charge.

[68] In relation to clause 27.2 of the *Hospitality Award*, United Voice proposed that the following provisions be added:

> **(f)** Where an employee is paid under an annualised salary arrangement made under this clause, the employer will carry out a review in consultation with the employee after every six months of employment comparing what the employee would have earned had he or she been paid for all the hours worked under clause 20 of this award and also paid all appropriate penalties, loadings and allowances ("Award Payments"), with the actual payments made under the annualised salary arrangement.
>
> **(g)** The employer must also carry out a review in consultation with the employee where the employment is terminated or the annualised salary ends prior to the completion of the 6 months of employment or if for some reason a review has not taken place.
>
> **(h)** Where a review reveals a shortfall between the salary paid and the Award Payments, then the employer must pay the shortfall within 14 days.
>
> **(i)** An employee on an annualised salary arrangement has the right to refuse unreasonable requests to work additional hours in accordance with the NES and clause 33.1(b) of this award.
>
> **(j)** An employee on an annualised salary arrangement has the right to inspect and make copies of any record made and maintained by his or her employer pursuant to clause 27.1(h). If the employer possesses copying facilities, the employee should be able to use these facilities free of charge.

[69] United Voice characterised the objectives of these proposed changes as being to establish:

- clear and comprehensive record-keeping obligations in relation to employee's hours on annualised salary arrangements in the two awards;
- a clear obligation on the part of an employer to conduct a reconciliation or review of the hours worked and what the employee would have been paid under the award every 6 months and, if there is any shortfall, pay the difference; and
- a clear provision within the award that employees on annualised salaries have the right to refuse unreasonable directions to work additional hours and to inspect and copy their records.

Restaurant and Catering Industrial claim

[70] Restaurant and Catering Industrial (RCI) has proposed that clause 28.1(a) be varied to permit the payment of an annual salary under the provision to relieve the employer of the obligation to pay annual leave loading. Under its proposal clause 28.1(a) would read as follows (with the added words in italics):

> "(a) As an alternative to being paid by the week, by agreement between the employer and an individual employee, an employee other than a casual, can be paid at a rate equivalent to an annual salary of at least 25% or more above the weekly rate prescribed in clause 20 – Minimum wages, multiplied by 52 for the work being performed. In such cases, there is no requirement under clauses 24.2, 33- Overtime, 34.1 and 34.2 to pay overtime and penalty rates in addition to the weekly wage, *and clause 35.2(b) to pay any additional leave loading*, provided that the salary paid over a year was sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with."

[71] RCI submitted that this alteration would ensure a predetermined and predictable rate of pay and simplify the accounting process. RCI outlined such a provision would apply to current annualised salary agreements upon mutual agreement between the employer and employee.

Evidence

[72] United Voice was the only party which adduced evidence in relation to the claims. It filed two witness statements. The first statement was treated as confidential to the degree necessary to protect the witness's identity (Witness X). Witness X was cross-examined, but the transcript of his evidence was also the subject of a confidentiality order. We shall refer to his evidence in a way which does not permit him to be identified. His evidence may be summarised as follows:

- he was 22 years old, was a qualified chef, and had worked as an apprentice chef at a number of restaurants;
- in 2013 he commenced work at a restaurant in a regional area, initially as a casual, but was later placed on an annualised salary;
- when he was placed on the annualised salary, he was not told very much about how it would work, what his pay should have been or whether a reconciliation of his hours could take place;
- he was classified as a fourth year apprentice chef under the *Restaurant Award* his minimum weekly rate was $688.28;
- he worked split shifts, usually from 10am or earlier until 2pm and then from 5pm to close, which would usually be from 9pm-10.30pm depending on the day but could be after midnight if there was a function;
- he sometimes had to work through the break, and regularly worked shifts that were 14 hours per day;
- he produced his own work hours records which showed that, over a period consisting of five fortnightly pay periods, he worked a total of 665 hours;
- his payslips recorded him as working 80 hours each fortnight over the same period;

- his fortnightly pay varied over this period, and his annual pay amounted to about $38,000.00;

- his employer did not conduct a reconciliation of his pay and hours;

- he complained about his hours and pay to his employer, but nothing was done about it;

- with the assistance of United Voice he made a complaint to the Fair Work Ombudsman, and this was resolved by his employer putting him back on award wages;

- when he left his employment in 2014, United Voice brought an underpayment claim for $19,115.14 on his behalf in the Federal Circuit Court, which was subsequently settled; and

- he had not worked on an annualised salary since that time.

[73] The second witness was Mr Jun Yuan, who was a qualified chef who had emigrated from China to Australia in 2006. After working at a number of restaurants in clubs and hotels, he was employed at the Brighton Metro Hotel in South Australia in June 2014 as a casual chef. In 2015 he was made full-time, and was paid on an annualised salary. In the financial year 2015-16, he earned $52,399. During this period he worked five days per week, averaging about 44 to 47 hours' work. His pay remained the same each week regardless of how many hours he worked. Eventually in May 2016 United Voice complained on his behalf about his pay and hours, and in response the hotel reduced his working week to 4½ days. Mr Yuan was not required for cross-examination.

[74] United Voice also tendered copies of the following expert reports which had originally been prepared for the part of the 4-yearly review concerned with part-time and casual employment:

- report of Dr Damien Oliver dated 3 September 2015;
- report of Damien Oliver dated 22 February 2016;
- report of Dr Olav Muurlink dated 4 November 2015; and
- report of Dr Olav Muurlink dated 16 August 2016.

[75] United Voice also tendered a copy of a power-point presentation concerning "*The role of job quality in recruitment and retention challenges in the Australian restaurant industry*" presented at the 30th Association of Industrial Relations Academics of Australia and New Zealand AIRAANZ Conference: Building Sustainable Workforce Futures in Sydney on 12 February 2016 by S. Belardi, A. Knox A and C.F.Wright. It is not necessary to summarise the expert/industry evidence except to note that United Voice relied on that evidence to demonstrate the following propositions:

- hospitality workers were generally low paid, highly award-reliant and dependent on penalty rates and overtime to maintain their living standards;

- the industries covered by the *Hospitality Award* and the *Restaurant Award* were characterised by unsociable hours and weekend and public holiday work, with 61% of employees usually working weekends;

- significant numbers of employees worked long hours, which could have dangerous physical and psychological impacts;

- average hours for full-time employees were longer than the all-industries average;

- the hospitality industry was marked by very high employment growth, and there were projections for continued growth in demand for skilled workers in full-time positions such as chefs and manager;

- there were industry concerns about finding sufficient skilled workers to meet demand; and

- skilled workers such as chefs and managers left the industry because of poor job quality due to long hours and poor remuneration.

[76] No other party adduced any evidence in respect of the United Voice and RCI claims.

Submissions - United Voice

[77] United Voice submitted that;

- it was necessary in order for there to be proper compliance with award obligations that employees on annualised salaries have access to proper records of their working hours;

- in the *Hospitality Award* that necessitated a new provision giving employees the right to inspect and copy any records, and in the *Restaurant Award* that required clear record-keeping obligations and an express right for employees to access their records;

- the annualised salary provisions in the *Hospitality Award* did not contain clear procedures for review and reconciliation, and only the *Restaurant Award* provided for a yearly reconciliation of the annualised salary arrangement;

- neither award made express provision for the compensation of an employee should a shortfall occur in payment of wages where an employee is transferred from an annualised salary to weekly wages before the completion of a year;

- both awards needed to make express provision for a reconciliation between wages that would have been paid under the award provisions and the actual amount paid under an annualised salary arrangement when the arrangement ends before a year and the employee remains employed;

- it was also necessary to reduce the period for review of the arrangement from 12 months to 6 months;

- a change in terminology from “reconciliation” to “review” was to express the requirement in plain English;

- the NES provided a right to refuse reasonable additional hours and provided the criteria for judging the reasonableness of an employer’s request for an employee to work additional hours, one of which was the remuneration an employee would receive for working the additional hours;

- under the current salary provisions it would be impossible for any employee to know the reasonableness of a request because they would be unable to judge what remuneration they would receive for working those hours;

- the current salary provisions did not meet the modern awards objective because they are essentially a vehicle for avoiding the minimum safety net in the *Hospitality Award* and the *Restaurant Award*;

- the current provisions allowed employers to avoid paying penalty rates, overtime and other monetary entitlements, and contravened the NES by obscuring an employee’s right to refuse unreasonable hours;

- there was no clear statement within the two awards that an employee on an annualised salary arrangement had the right to refuse unreasonable directions to work additional overtime;

- the annualised salary arrangement provisions in the two awards were terms providing for the averaging of hours under s.62(3)(f) of the FW Act and therefore had to be taken into account when considering whether additional hours were reasonable or unreasonable;

- the awards envisaged that the average hours would, from time to time, exceed 38 hours per week, however they did not provide for any clear statement that the maximum weekly hours of a full-time employee should be generally 38 hours a week;

- an assessment of the reasonableness of additional hours required a clear understanding of the level of remuneration that an employee would receive for working those additional hours, and the arrangements would only be reasonable if the level of remuneration for the year (or a shorter period if the salary arrangement ends before a year) reflected the actual hours the employee worked;

- unless the employee's remuneration was compared with the actual hours worked, it would be impossible to properly assess the reasonableness of any additional hours worked by the employee;

- without a clear provision for review and reconciliation of an annualised salary, there was no guarantee that the salary would be appropriate for the employee’s real pattern of work;

- this flaw is problematic in an award dependent, low paid industry characterised by working weekends, nights and public holidays, and the problems were compounded by the rapid growth of employment in the hospitality industry;

- as the proposed variations were limited in scope they would not affect the flexibility of full-time employment or increase the regulatory burden on employers; and

- section 134(1)(da) was not in effect when the *Hospitality Award* and the *Restaurant Award* were first made, and was highly relevant to the circumstances of the employees under the awards who were covered by annualised salary arrangements, which justified a full review of those provisions.

[78] In relation to the RCI claim, United Voice submitted that including annual leave loading in an annualised salary defeated the purpose of the annual leave loading. The loading was provided to incentivise the taking of annual leave; if this were rolled over into an annual salary it would diminish this incentive. The proposed variation would add an administrative burden on the employer and was not necessary to achieve the modern awards objective.

RCI submissions

[79] In relation to its own proposed provision, RCI submitted that it would ensure a predetermined and predictable rate of pay and simplify the accounting process. The provision would only apply to current annualised salary agreements upon mutual agreement between the employer and employee. It would simplify employee obligations under the award and lessen the regulatory and administrative burden by making one lump sum payment to compensate employees for all award entitlements, including minimum wages, overtime penalty rates and leave loading. RCI referred to s 139(1)(f) of the FW Act and submitted that the café, restaurant and catering industry would benefit from an adoption of such an arrangement due to the labour intensive and seasonal nature of the industry. It would provide for a predetermined and predictable rate of pay, and it would be kept in check by pre-existing provisions that ensure that employers meet their obligations to provide employees with all of their award entitlements.

[80] RCI opposed the United Voice proposal to conduct a reconciliation upon termination of employment prior to the 6 month period or reducing reconciliation reviews from 12 to 6 months. RCI submitted that there were sufficient safeguards in the *Restaurant Award*, in particular clauses 28.1(a) and 28.1(b) which required employees to receive entitlements which they would otherwise be entitled to under the award. It submitted that reconciliation does occur in the industry amongst their members, and although the industry suffered from a lack of resources, undertaking the process once a year was not an issue. RCI did not take issue with giving employees the right to inspect their own employment records, and noted that the *Restaurant Award* already contained a provision of this kind. The proposed provisions concerning refusing to work unreasonable excess hours were unnecessary because this was already provided for in the NES.

AHA submissions

[81] The Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn and Motel Accommodation Association (collectively the AHA) submitted that United Voice did not provide any probative evidence for why current requirements do not

achieve the modern awards objective. Nor was there any evidence to support the necessity for a 6 month reconciliation and how this would operate in circumstances where employers may be subject to high and low seasons across a period of 12 months. Due to seasonal demands a 6 monthly review process could produce misleading results and unduly alarm an employee or employer.

[82] The AHA submitted that United Voice failed to acknowledge the operation of the FW Act and the NES in setting out clear maximum weekly hours for full-time employees. Under the FW Act and the *Hospitality Award* an employee could refuse to work additional hours if they were unreasonable. The AHA submitted that United Voice inferred employees who were on an annualised salary arrangement did not have access to time and wages records despite this being required under the FW Act.

[83] In relation to the evidence of Mr Yuan, the AHA submitted that the evidence had not demonstrated how Mr Yuan's salary was not sufficient in the context of his timesheets. On a prima facie basis, Mr Yuan's salary appeared to be in excess of the minimum amount as permitted in the annualised salary provisions. His evidence did not allege an underpayment under the *Hospitality Award*.

[84] During the AHA's oral submissions, the AHA took on notice questions concerning whether any annualised salary arrangements should be required to be reduced to writing and, if so, whether the arrangement should specify how the agreed salary was constructed having regard to the employee's working pattern and any penalty rates and other additional payments which would apply. In a written submission which it subsequently filed, the AHA submitted that if an annualised salary arrangement in the *Hospitality Award* was required to be in writing and subject to reconciliation every 12 months then a method of calculation was unnecessary. A requirement for the express identification of a calculation or construct might lead to disputes regarding refusals to work in excess of identified particular day or hour thresholds notwithstanding that the salary was otherwise sufficient or commensurate modification was made elsewhere within a particular work pattern.

ABI and NSWBC submissions

[85] ABI and the NSWBC submitted that United Voice's claims were unnecessary and inappropriate in circumstances where the NES and the existing clauses provided appropriate safeguards. Reconciliations occurring every 6 months instead of 12 months would increase the administrative burden on employers.

CCIWA submissions

[86] The CCIWA also submitted that the 6 month review period proposed by United Voice was not long enough to take into account seasonal fluctuations in the industry. Industries relying on tourism, particularly those in tropical areas, were highly cyclical and vary over the course of a year, not 6 months.

[87] In relation to the evidence of Mr Yuan, the CCIWA submitted that his concern was not about the hours he worked, but rather the value of the salary he received for the hours worked. He had not made any allegation of underpayment nor suggested if he was paid the base rate under the award with the relevant penalties and overtime that he would have received more money. There is a probability that Mr Yuan would have earned less money. Mr Yuan's

timesheets indicated that his employer did take into consideration the hours Mr Yuan worked by giving him days off in lieu. The evidence of Mr Yuan and Witness X did not indicate that there is a significant concern amongst employees that salary arrangements are operating to their disadvantage.

[88] While it might be the case, the CCIWA submitted, that employees were leaving the hospitality industry because the hours were too long, there was nothing in the evidence to indicate that salaried arrangements were increasing the number of hours worked within the hospitality industry. The powerpoint presentation indicated that there were multiple factors which might cause people to leave the industry.

Rail Industry Award 2010

Rail employers' claim

[89] We have earlier set out the existing provision in the *Rail Award*. Aurizon Holdings Ltd, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd (Rail Employers) have applied for the following variations to clause 18.1 of the *Rail Award*:

(i) Inserting the following clause above the current clause 18.1:

> **18.1** All references to an 'employee' in this clause 18.3 include reference to a prospective employee, being an individual to whom the employer is offering employment.

(ii) Renumbering the remainder of clause 18 taking into account the insertion of new clause 18.1.

(iii) Deleting the current clause 18.4 and inserting in its place:

> **18.5** In addition to the requirements of clause 18.4, any written agreement under this clause must specify each separate component of the annualised wage or salary arrangement and any overtime or penalty assumptions and calculations commuted into the annualised arrangement, state the date on which the salary arrangement commences and contain the award level classification for the role.

[90] The primary purpose of the above variations was to make the annualised salary provision available to both current employees *and* prospective employees.

Evidence

[91] The Rail Employers adduced evidence from David Johnston, the Principal Advisor, Employee Relations at Aurizon Holdings Ltd. In his witness statement, Mr Johnston said:

- the *Rail Award* was the only instrument applying to about 390 employees of Aurizon;

- about 97% of the Aurizon employees under the *Rail Award* were paid based on an annualised salary arrangement;

- these arrangements were beneficial to employees because they were flexible, provided a guarantee of regular and consistent earnings, enable employees to average their work hours over the course of the year, and incentivised them to complete work within normal hours and not have to "watch the clock";

- such arrangements were also beneficial to employers because they were flexible, provided certainty of regular salary payments and were more simple to administer than the base rate and allowances approach;

- for these reasons it was common for Aurizon to explore the option of an annualised salary with a prospective employee at the time of recruitment, but clause 19 of the *Rail Award* as it currently stood did not allow Aurizon to enter into an annualised salary arrangement with a prospective employee during the recruitment phase;

- this was problematic, as it had led to the practice of prospective employees being given a letter of offer showing their role and pay level in the *Rail Award* and told that after they commenced they could be offered an annualised salary, which created confusion and uncertainty for potential employees; and

- being able to make an offer of employment on the basis of an annualised salary before the commencement of employment, where the offer met the award requirements, would simplify the process and remove confusion.

[92] Mr Johnston was cross-examined by the ASU. In cross-examination and re-examination he said:

- he envisaged the annualised salaries provision operating in respect of someone who was not yet an employee but had applied for a position and with whom the organisation would like to enter into a contract of employment;

- the current position was problematic for Aurizon, but also for the employee, because the *Rail Award* applied to persons such as accountants, business analysts, human resources professionals and others who were accustomed to being employed on an annual salary in the private sector, and it was confusing to have to tell them that an annual salary could not be part of their offer of employment;

- he considered that if a prospective employee was presented with an annualised salary arrangement which, as the *Rail Award* clause required, set out a number of assumptions in the construction of the salary, that added to the information that they would get about the company and their conditions of employment;

- the proposed new clause 18.5 gave employees more information about matters such as the date the annualised salary arrangement commenced, which would generally be the date they commenced employment;

- being able to offer an annualised salary to a prospective employee gave the employee some certainty when they were considering whether or not to enter into

an employment arrangement as to what their future remuneration would be, whereas currently they had to trust the employer that an annualised salary would be offered after they commenced employment;

- prospective employees were told what industrial instrument applied to their employment, and if an enterprise agreement applied they were given a copy of it;

- in Aurizon's operations the *Rail Award* generally applied, outside Queensland, to clerical, professional and administrative areas, graduates and some areas of track maintenance;

- Aurizon's enterprise agreement in Queensland provided for salaries but also for overtime and penalties as well;

- in the clerical, administrative and professional areas employees generally had a 38 to 40-hour week, which might involve earlier starts or later finishes depending on workload with adjustments to hours at other times;

- track maintenance had less predictable hours because they were required to travel to sites and work for long periods, and annualised salaries were used to balance out payments from fortnight to fortnight, otherwise employees might get quite a large pay one fortnight and maybe a very small pay the next fortnight; and

- when annualised salaries were entered into, Aurizon looked at how the employee was rostered for the particular work, calculated the penalties and the hours worked and construct the salary from that, and if there was a significant change to the rostering that would affect the penalties and allowances then it would recalculate to ensure that the salary offered was still within the scope of what would be payable under the award.

Submissions

[93] The Rail Employers submitted that its proposed variation was consistent with the Full Bench approach in its decision concerning the *Water Industry Award 2010* (Water Award Case). Clause 18 of the *Rail Award* in its current form already met the modern awards objective and included appropriate safeguards, and the proposed amendments sought only to clarify the operation of clause 18 in furtherance of the modern awards objective. It was submitted that an annual review of an annualised arrangement was not necessary for the *Rail Award*, because the clause ensured that an employee was better off under the salary arrangement than if they received base salaries plus allowances. In the event of a dispute about this, an employee could invoke the award dispute resolution procedure.

[94] It was submitted that the current provision was ambiguous in that it was not clear that an employer could enter into an annualised arrangement with a prospective employee. As a result of this ambiguity, employers offered employment at the base rate and only then could discuss the annualised arrangement after the employment had commenced. The proposed variation to clause 18.4 would add the following additional necessary but reasonable safeguards to what must be included in a written agreement to an annualised salary arrangement:

(a) a statement of the date on which the salary arrangement commences; and

(b) identification of the award level classification for the role.

[95] The Rail Employers submitted that the *Rail Award* did not need a provision for reconciliation, as the employee had an on-going guarantee that they would earn more with an annualised salary. The clause currently required the employer to inform the employee how the salary was calculated and the assumptions relied on in the calculation of the salary, and an employee could pursue a relevant avenue of recourse if the circumstances upon which the salary was calculated had changed. An annual reconciliation requirement would place an administrative burden on employers to keep comprehensive records of hours worked by each employee. It was submitted that there was no current requirement to keep a record of hours for employees paid on an annualised arrangement as this was not a safety net issue.

[96] The Rail, Tram and Bus Union (RTBU) did not agree that there was ambiguity in the current wording of clause 18. It submitted that an "*employee*" is defined in the *Rail Award* as a "*national system employee within the meaning of the (FW) Act*", and the definition of "national system employee" in s 13 of the FW Act precluded prospective employees. This was not an error in the drafting; it had been the intention of the Commission to limit the operation of the clause to current employees. The proposed variation could disadvantage prospective employees as they might not be aware of alternative options such as penalty rates and overtime under an enterprise agreement or state award, and it might prejudice employees who did not wish to enter into an annualised arrangement from gaining employment. They also submitted that it might create a two-tiered system with employees working side-by-side with different pay and conditions contrary to the intention of the national framework. The RTBU did not oppose the proposed new clause 18.5.

[97] The ASU took the same position as the RTBU.

Submissions on other awards

[98] In relation to the *Marine Towage Award 2010*, the Maritime Union of Australia (MUA) submitted that the Full Bench should determine that the annualised salaries provision in clause 13.2 was consistent with the modern awards objective and no alteration was required. Under that clause the use of an annual salary by an employer was optional and required the agreement of the majority of employees of the employer, and the clause contained appropriate safeguards to protect employees.

[99] The Australian Mines and Metals Association (AMMA) submitted that it had an interest in the annualised salary provisions of the following awards:

- *Hydrocarbons Industry (Upstream) Award 2010;*
- *Marine Towage Award 2010;*
- *Mining Industry Award 2010;*
- *Oil Refining and Manufacturing Award 2010;* and
- *Salt Industry Award 2010.*

[100] AMMA contended that no variation should be made to the existing provisions in those awards. Because no application had been made to vary those provisions, the Commission should conclude there was no basis to vary them, there were no pressing or evident concerns

with their operation, and that there was no basis for a standard annualised salary term to be included in all awards. AMMA also submitted that enterprise agreements containing annualised salary provisions applied to all or the vast majority of workplaces covered by the above awards and those salaries exceeded the minimum terms provided for by the awards.

Consideration

General conclusions

[101] On the basis of the (limited) evidence and submissions before us, it is clear that annualised wage arrangements potentially offer benefits for both employers and their employees. For employers, it allows the remuneration of the employee to be set at a fixed amount for each pay period notwithstanding that the employee works varying hours. This may confer business advantages in terms of managing cash flow and creating predictability in labour costs. Additionally, the payment of an annualised wage will be administratively simpler for employers in that it will not require a separate calculation of wages owing to be made in each pay period, and (as discussed further below) may potentially mean that the employer is not required to keep precise records of hours worked by employees, subject to the specific requirements of any applicable award provision concerning annualised salaries. It may also have the advantage of removing any incentive upon employees to "drag out" the performance of their work and thereby earn overtime. For the employee, there are benefits also: the employee will receive a fixed and certain remuneration amount each pay period regardless of the number of hours worked, which will carry with it the advantages of income security and predictability of earnings for the purpose of budgeting and obtaining finance. For these reasons it may therefore be said, as a general proposition, that an annualised wage arrangements provision in a modern award is capable of forming part of a fair and relevant minimum safety net of terms and conditions for the purpose of s 134(1). Certainly the fact that s 139(1)(f) permits the inclusion in a modern award of a term about annualised wage arrangements which satisfies the three identified conditions indicates that it was contemplated by the legislature that provisions of that nature were capable of achieving the modern awards objective.

[102] Of course it is not necessary to have an annualised wage provision in a modern award in order for an employer to be able to pay an employee to whom the award applies an annualised salary that compensates for or "buys out" various identified award entitlements. The principles by which this might be done were stated in the Federal Court Full Court decision in *Poletti v Ecob*[22] and subsequently affirmed in the Full Court decisions in *Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia*[23] and *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate*.[24] In short, under a contract of employment the employer and employee may agree that the salary payable under the contract has the purpose of satisfying the obligation to pay identified award entitlements (such as, for example, base wages, overtime rates, shifts and weekend penalty rates, allowances and annual leave loading). The payment of salary pursuant to such a contract of employment may be relied upon by the employer as satisfying in part or whole any claim by the employee for under-payment of the identified award entitlements. However this means of paying an annualised wage to an employee to whom a modern award applies is not entirely

[22] [1989] FCA 492; 31 IR 321

[23] [2001] FCA 1785; 111 IR 227

[24] [2015] FCAFC 99; 240 FCR 578

free from legal difficulty. If there is a lack of a "close correlation between the nature of the contractual obligation and the nature of the award obligations", then payment of the salary may not satisfy the relevant award entitlements.[25] Further, the fact that an annual salary provided for in a contract of employment may, over the course of a year, equal or exceed identified award entitlements such as to discharge payment of them may, arguably, not amount to compliance with an award requirement that pay entitlements are required to be made to the employee within a specified pay period. Issues such as these may make the payment of a salary pursuant to an annualised wages provision in a modern award a more desirable and legally certain option.

[103] We have earlier set out the terms of s 139(1)(f), which sets out three requirements which must be satisfied in order for it to be permissible to include a term concerned with "*annualised wage arrangements*" in a modern award. The first requirement in s 139(1)(f)(i) requires the arrangements to "*have regard to*" the patterns of work in an occupation, industry or enterprise. A statutory requirement to have regard to something means it must be taken into account and given fundamental weight.[26] The expression "*patterns of work*" is used in other provisions of the FW Act, including in relation to the working of additional reasonable hours of work in s 62(3)(g) and in a note relating to employee requests for change to working arrangements in s 65(1). In context it is to be understood as referring to the configuration of the working hours of employees covered by the relevant award, which may include on what days hours are worked, at what time during the day hours are worked, and any variability in the number and arrangement of working hours from week to week. The requirement, we consider, is concerned with ensuring recognition of the need for the design of a term for the payment of annualised salaries to take into account matters such as whether employees under the award work a stable or variable number of hours per week, whether employees' work rosters are fixed or changeable over the course of the year, and whether employees tend to work at unsociable times that would attract the payment of penalty rates under the award or simply perform day work on a Monday-Friday basis. As we discuss later, once fundamental differences in the patterns of work of employees covered by different awards are properly taken into account, it becomes necessary that there be significant differences in the construct of annualised salaries provisions in different awards.

[104] The requirement in s 139(1)(f)(ii) that a term about annualised wage arrangements provide an "*alternative*" to the "*separate payment of wages and other monetary entitlements*" means that it must provide for a different payment method which is an available substitute for that of separately calculating and paying employees the various monetary entitlements for which the award provides. Section 139(1)(f)(ii) does not condition the circumstances in which the alternative may be accessed, so that provisions which may be availed of at the election of the employer or only by agreement with the employee would both be permissible.

[105] The requirement in s 139(1)(f)(iii) is that an annualised wage arrangements term include "*appropriate safeguards to ensure that individual employees are not disadvantaged*". To "*ensure*" there is no disadvantage is, on the ordinary meaning of the language used, to make certain that it does not happen, so the safeguards required must be sufficient to allow that state of certainty to be achieved. Assessing whether disadvantage exists is inherently a

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[25] *Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia* [2001] FCA 1785; (2001) 111 IR 227 at [52]

[26] *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 per Mason J

comparative exercise, but the provision does not expressly state what the comparator is. However, the immediate context makes it clear enough that the comparison is between the benefits to the employee under the alternative afforded by an annualised wage arrangement compared to the normal "*separate payment of wages and other monetary entitlements*" under the relevant award. Because the subject matter is remuneration, it is necessarily implicit that the question of whether there is disadvantage involves a mathematical comparison between remuneration under the annualised wage arrangement and the remuneration which would otherwise be payable under the award's provisions. That the subject matter is *annualised* wage arrangements suggests that the issue of disadvantage may be assessed over the course of a year (and not necessarily within the pay periods prescribed in the award). Therefore, in summary, a permissible annualised wages term must guarantee that, over the course of a year, an employee does not receive any less remuneration under the arrangement than would otherwise be payable under the provisions of the award.

[106] The 19 modern awards which currently contain annualised salaries provisions are as follows:[27]

Banking, Finance and Insurance Award 2010
Broadcasting and Recorded Entertainment Award 2010
Clerks - Private Sector Award 2010
Contract Call Centres Award 2010
Hospitality Industry (General) Award 2010
Hydrocarbons Industry (Upstream) Award 2010
Legal Services Award 2010
Local Government Industry Award 2010
Manufacturing and Associated Industries and Occupations Award 2010
Marine Towage Award 2010
Mining Industry Award 2010
Oil Refining and Manufacturing Award 2010
Pharmacy Industry Award 2010
Rail Industry Award 2010
Restaurant Industry Award 2010
Salt Industry Award 2010
Telecommunications Services Award 2010
Water Industry Award 2010
Wool Storage, Sampling and Testing Award 2010

[107] It may initially be observed that the modern awards which contain annualised salaries provisions only constitute a small proportion of all modern awards, and are themselves diverse in terms of their coverage. For example, they include one but not other manufacturing awards, some but not other primary industry awards, and a select group of service sector awards. The proposition that annualised salaries provisions are necessary to achieve the modern awards objective in this group of awards but no others is somewhat counter-intuitive. No common feature of these 19 awards compared to the other 103 modern awards is apparent that provides the rationale for why only they contain such provisions, and as explained in paragraphs [129]-[130] of the *Pastoral Award* decision the current position pertains because

[27] See Attachment A

of the approach taken in the award modernisation that annualised salaries provision would be placed in modern awards where they existed in relevant pre-modern awards but not otherwise.

[108] Additionally (and as observed in the *Pastoral Award decision* and the *May statement*), there is little commonality in the annualised wages provisions appearing in the above awards. Having regard to the list of issues identified in the *May statement*, it is useful at the outset to identify certain fundamental features, and differences, in those provisions. First, eight of the awards require employee agreement for the introduction of annualised wage arrangements (in one case by majority vote, and in the others by individual agreement), while the remainder provide that an employer may introduce such arrangements by right. Associated with the question of employee agreement is whether the arrangement is terminable at the initiative of the employee. Of the eight awards where the arrangement must be entered into with employee agreement, five make provision for employee termination of the arrangement. None of the remainder of the 19 awards provide for termination of the arrangement.

[109] Second, while all of the provisions in some form require the annualised wage arrangement not to disadvantage the employee compared to the award, some but not other awards provide for a review at least annually to ensure that applicable award provisions continue to be satisfied by the wage. Ten of the awards contain a requirement of this nature. In addition, one award (the *Restaurant Award*) requires a "*reconciliation*" to be carried out at the end of each year whereby a comparison is made between the annualised wage and what the employee would earn if the provisions of the award otherwise applied, with there being an obligation on the employer to pay any identified shortfall.

[110] Third, the large majority of the awards require the arrangement to be reduced to writing and provided to the employee, but four of them contain no such requirement. Eight of the awards go beyond the requirement for the arrangement to be in writing, and further require that the calculation of the various award entitlements used to make up the total wage be also identified.

[111] Fourth, six of the awards limit the application of the annualised wage provisions to persons employed in specified higher-level classifications.

[112] Fifth, all of the awards except three allow for the annual leave loading to be absorbed into the annualised wage amount (that is, the requirement to pay the leave loading may be satisfied by the payment of the salary).

[113] Sixth, five of the awards contain a specific requirement for the employer to keep records of the hours worked by the employee, notwithstanding the payment of an annualised wage.

[114] Seventh, three awards require that the annualised wage be a minimum percentage above the minimum ordinary-time wage rate specified in the award for the relevant classification. They are the *Marine Towage Award*, which provides for a minimum additional 40%, and the *Hospitality Award* and the *Restaurant Award*, where the percentage is 25%.

[115] Finally two awards provide for a restriction on the working of overtime under annualised wage arrangements.

[116] Again we observe that none of these important differences in the construct of the various existing annualised salaries provisions appears to be readily justifiable by reference to the characteristics of the employees covered by the awards. By way of example, it is not easy to identify why the provision in the *Restaurant Award* requires a minimum 25% pay increment and the conduct of a full reconciliation each year, but that in the *Hospitality Award* does not contain the latter requirement, since both awards cover workforces with broadly similar characteristics, notably a frequent requirement to work unsociable hours and a high degree of variability in the number of hours to be worked from week to week.

[117] We do not consider that any current annualised wage arrangements provision fails to comply with the requirements in s 139(1)(f)(i) and (ii), and no party contended otherwise. We are satisfied that the current provisions are constructed having regard to the patterns of work in the occupation or industry to which the relevant modern award applies, and they all provide for an alternative to the separate payment of wages and monetary entitlements. The real issue is whether the third requirement in s 139(1)(f)(iii) is satisfied, having regard to the way in which we have construed that provision.

[118] The diversity in the existing provisions means that the way in which they seek to satisfy the s 139(1)(f)(iii) requirement differs in method and the degree of stringency involved. All have various shortcomings. The requirement in the *Restaurant Award* for the employer to keep records of employee working hours (signed by the employee each week), and then to conduct an annual reconciliation comparing the employee's "*ordinary wage under this award*" or "*wages earned under the award*" to what the employee was actually paid and to make good any shortfall, would appear to constitute an absolute guarantee that the employee would not suffer any financial disadvantage (assuming that the expressions quoted from the provision are to be read as meaning the remuneration the employee would have earned under the award had the employee not entered into an arrangement pursuant to the provision). However there are two inter-related practical difficulties that we see with this annual reconciliation requirement.

[119] First, if strictly complied with, it would obviate many of the benefits of an annualised wages arrangement which we have earlier identified. There would be little if any benefit in administrative simplicity: the employer would still have to keep records of all hours worked, and while it would not be necessary to calculate wages owing in each pay period, the employer would face the much larger task annually of calculating wages owed under the award for the last 12 months. Additionally, while the employer would, during the year, have the benefit in terms of financial certainty of only having to pay a fixed amount to the employee each week, the provision creates the possibility of having to make good a potentially large monetary shortfall at the end of the year which would not be quantifiable until the annual reconciliation exercise was carried out, and thus not able to be budgeted for. This could cause considerable business difficulties in an industry which is made up predominantly of small businesses, is characterised by relatively low profit margins, a relatively high rate of business failure, intense competition and an oversupply of businesses, and is highly sensitive to changes in consumer demand.[28]

[120] Second, the complexities in the operation of the provision we have described causes us grave doubt as to whether the reconciliation requirement would actually be the subject of

[28] *Re Restaurant and Catering Association (Vic)* [2014] FWCFB 1996, 243 IR 132 at [95]

widespread compliance. The restaurant industry generally is marked by significant compliance problems,[29] and we consider that there is somewhat of an air of unreality about the proposition that small business restaurateurs employing persons on annualised wage arrangements would have the capacity readily to undertake the comparative calculation required by the reconciliation exercise. The two witnesses called by United Voice illustrate this point: both witnesses said they were paid annualised salaries at least for certain periods, but in neither case does it appear that any reconciliation was ever done (although we note in the case of witness X that he did not remain on the wage arrangement for a full year).

[121] As we have earlier noted, some awards simply contain a requirement for an "*annual review*". In such cases the content of the actual obligation imposed upon the employer tends to be imprecise. For example, clause 14.7(d)(v) of the *Local Government Award*, which we have earlier set out, simply requires that an annual salary agreement "*be subject to an annual review*" without specifying what such a review actually entails. Clause 17.2(b) of the *Clerks Award*, which we have again earlier set out, provides greater detail about the required review, but is still imprecise: it merely identifies the purpose of the review as being "*to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary*". The use of the word "*appropriate*" suggests that a broad judgment is required rather than the comparative mathematical exercise required by the reconciliation provision in the *Restaurant Award*. In neither case could it be said that the review is something which, at least by itself, ensures that the employee is not disadvantaged and thus satisfies the s 139(1)(f)(iii) requirement.

[122] The annualised wage arrangement provisions in the *Clerks Award* and the *Local Government Award* contain a further safeguard, namely a requirement that the annual salary be no less than the amount the employee would have received if paid in accordance with the award. In clause 17.2(a) of the *Clerks Award*, this safeguard is expressed as follows:

> (a) 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).

[123] As earlier observed, all the existing annualised wages provisions contain a safeguard of the same or a similar nature. On its face, a provision such as that in clause 17.2(a) of the *Clerks Award* establishes a legal obligation to ensure that an employee on an annualised salary is not financially disadvantaged that meets the requirement in s 139(1)(f)(iii). However again there are practical problems in the way such an obligation would operate in reality. The major problem, as touched upon in the *Pastoral Award decision*, concerns the issue of keeping records of hours worked. Particularly where the annualised wage arrangement applies to an employee who works significantly variable hours, there will be no practical capacity for the employer to comply with the obligation - or for the employee to seek to enforce it - unless there is a record of hours worked which allows the remuneration payable under the award to be calculated. Unlike the reconciliation provision in the *Restaurant Award*, the *Clerks Award* provision contains no requirement to keep any record of hours worked. As we have earlier set out, in the *SE Water decision* the Full Bench considered that it was not necessary, in relation to the relevantly similar provision in the Water Industry Award, to include any obligations to keep written wage records because the obligations in that respect were "adequately regulated

[29] Ibid at [117]

by Part 3-6 of the Fair Work Regulations 2009". [30] We have also earlier set out the doubt expressed about that conclusion by the Full Bench in the *Pastoral Award decision*.[31] It is necessary for the purpose of this decision that we reach a definitive conclusion about this issue. We consider, in relation to an annualised wages arrangement that is intended to satisfy award entitlements to overtime and penalty rates, the conclusion expressed in the *SE Water decision* is, with respect, incorrect.

[124] This is for two reasons. First, as pointed out by the Full Bench in the *Pastoral Award* decision, reg 3.34 of the Fair Work Regulations (FW Regulations), which prescribes the records required to be kept in relation to overtime, only applies "*if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee*". The effect of an annualised wages arrangement which is intended to encompass overtime is to displace the award obligation to pay penalty rates for that overtime within the relevant pay period. A provision of the nature of clause 17.2(a) of the *Clerks Award* is not an obligation itself to pay overtime rates, but on its face simply an obligation to ensure that the annual salary is no less than would have been payable under the award. Accordingly we consider that reg 3.34 would not apply to an annualised wages arrangement which encompasses overtime. Second, in respect of ordinary hours worked which under the award would attract a penalty rate or loading (for example, weekend work or shift work), reg 3.33(3) provides that "*if an employee is entitled to be paid", relevantly, a loading or a penalty rate, the employer must keep a record that "sets out details of the payment, ... loading, rate ... or entitlement*". Even if the word "*details*" encompasses a record of when ordinary hours were worked, the obligation will not apply in respect of an employee on an annualised wage arrangement because the arrangement will displace the entitlement to the loading or penalty rate.[32]

[125] The consequence of this conclusion is that, in order for a provision of the nature of clause 17.2(a) to operate as a practically effective safeguard, there needs to be (as in the *Restaurant Award*) a requirement to keep the necessary records of hours worked.

[126] An additional difficulty is that provisions of this nature remain imprecise about what steps an employer is actually required to take to discharge the general obligation that the salary must be not less than the remuneration that would otherwise be payable under the award over the course of the year. There is no specific requirement, as in the *Restaurant Award*, to conduct a reconciliation exercise, nor to pay within any given time or at all any monetary shortfall which might by some means be identified.

[127] Most of the awards containing an annualised wage arrangements provision, as earlier identified, require the arrangement to be in writing, but some also require the written arrangement to identify the way the salary was calculated including any overtime or penalty assumptions upon which the calculation is based. Clause 18.4 of the *Rail Award* is an example of this. Generally speaking, we consider a provision of this nature is an effective "upfront" mechanism to ensure that an annualised wage is demonstrably equal to or more than the remuneration otherwise payable under the award. However a question remains as to what happens when the employee's pattern of work begins to diverge from the assumptions in the

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[30] [2014] FWCFB 5195 at [34]

[31] [2015] FWCFB 8810 at [160]-[169]

[32] There is a separate requirement in reg 3.33(2) to keep a record of hours worked by an employee, but only if they are a "*casual or irregular part-time employee*".

calculation, so that for example more overtime is worked than is assumed in the calculation. The evidence of Mr Johnston concerning Aurizon was that, for employees in rail maintenance who had highly variable hours, it would recalculate the salary when there was a significant change in rostering that affected penalties and allowances to ensure that that it remained compliant. However clause 18.4 does not actually require this to occur.

[128] Finally there are the three awards which have as a condition that the salary to be paid be a minimum percentage amount above the relevant base award weekly wage rate. As a general proposition, a requirement of this nature may be an effective way of ensuring that an employee is not disadvantaged by entering into an annualised wage arrangement. However no reasonable percentage threshold can guarantee that the employee will never be worse off regardless of the hours worked; some limitation on the number of hours of work which attract overtime or other penalty rates is necessary. In none of the three awards does any such limitation apply. It is not sufficient to rely on the NES maximum weekly hours provision in s 62. In the case of the *Hospitality Award* and the *Restaurant Award*, where a significant amount of ordinary working hours is likely to be performed at unsociable hours which attract evening or weekend penalty rates, it may only take a relatively small number of weekly overtime hours for remuneration payable under the award to exceed the base weekly wage and a 25% increment. Section 62 does not necessarily produce the result that the additional hours would be unreasonable such that the employee could refuse to work them, given the multi-factor test for reasonable/unreasonable hours in s 62(3). Nor were we taken to any material which demonstrates any particular mathematical justification for the 25% figure used in these two awards.

[129] Having regard to these matters we have reached the following conclusions concerning what is necessary for an annualised wages arrangement provision to form part of the fair and relevant minimum safety of terms and conditions required by s 134(1) taking into account the matters identified in paragraphs (a)-(h) of the subsection:

(1) The first concerns the circumstances in which individual agreement should be a requirement for entering into an annualised wage arrangement, as distinct from the employer having the right to introduce it. Where the employee works a reasonably stable pattern of hours such that the fixed amount of annualised salary would not vary significantly from the amount that would otherwise be payable to the employee under the relevant modern award in any given pay period, we do not consider, having regard to the requirement in s 138 that modern award provisions achieve the modern awards objective of a fair and relevant safety net, that the introduction of an annualised wage should require employee agreement since any potential prejudice to the employee by the introduction of such a system is likely to be slight. Subject to further submissions about this issue (as discussed later in this decision), we think that, as an example, employees under the *Clerks Award* are likely to fall in this category. However, where the working hours of the employee are highly variable (whether from one week to the next or over the course of a year because of seasonal factors), and/or the employee works to a significant degree hours which under the relevant modern award would be subject to overtime, weekend, evening or other penalty rates, we consider fairness requires that annualised wage arrangements should only be able to be applied by agreement. This is because the employee in that circumstance should be able to decide whether, in their own interests, they would prefer to have the stability of an

annualised wage or to receive the full amount of their pay entitlements under the relevant modern award for hours worked at the time of the pay period in which those hours are worked. Subject to further submission, employees under the Horticultural Award, the *Hospitality Award* and the *Restaurant Award* are likely to fall in this category.

(2) The arrangement (whether introduced by agreement or by employer right) should be in writing. Because an annualised wage arrangement is likely to effect such a fundamental change to the employee's pay entitlements in any given pay period, any agreement to such an arrangement should be clearly evidenced to put beyond doubt that the agreement exists. A copy of the agreement should be kept by the employer as part of the pay records, and a further copy should be provided to the employee.

(3) Where the annualised wage arrangement is by agreement, it should be terminable by the employer or employee at annual intervals upon notice. Where an employee is working highly variable hours and/or hours that would otherwise be subject to penalty rates, there is a reasonable likelihood that the employee may form the view that the annualised wage arrangement no longer suits their interests, and if so they should be afforded a reasonable opportunity to return to the other award provisions. The employer too may become dissatisfied with the arrangement (for example, because the number of hours worked by the employee no longer justifies the salary being paid), and should therefore have an equivalent opportunity to return to the other award provisions.

(4) In no circumstances should an annualised wage arrangement clause in a modern award permit or facilitate an employee receiving less pay over the course of a year than they would have received had the terms of the modern award been applied in the ordinary way, and it is essential that the clause contain a mechanism or combination of mechanisms to ensure that this does not happen. We consider that there are three types of mechanism which would likely be effective in this respect:

(A) A requirement for a minimum increment above the base rate of pay prescribed in the annualised wages clause itself.

(B) A requirement that the arrangement identify the way the annualised wage is calculated.

(C) A requirement that the employer undertake an annual reconciliation or review exercise.

(5) In respect of the mechanism (A) above, any such provision in an award should be justifiable by reference to reasonable assumptions about the number of hours which are being paid for, and impose outer limits on the number of overtime hours or other penalty-rate hours which are to be taken as paid for by the increment.

(6) In relation to mechanism (B), the calculation method for the annualised wage must expose any assumptions made about the number of overtime and penalty-rate hours that are to be worked on average. Additionally, the arrangement should contain an outer limitation on the number of such hours in a pay period or across a roster cycle that are paid for by the annualised wage, with any excess hours to be paid for in accordance with the normally applicable overtime or other penalty rate provisions. This outer limitation is not intended to reflect the average number of overtime and penalty rate hours upon which the annualised wage is calculated but rather a higher number of such hours representing the maximum that an employee can reasonably be asked to work in a given pay period without being entitled to an amount in excess of the annualised wage.

(7) In relation to mechanism (C), the annual reconciliation exercise should involve a comparison between the amount paid by way of the annualised wage and the amount that would have been payable had the award provisions been applied in the ordinary way, with a requirement to pay to the employee any shortfall between the former and latter amounts within a specified period. Because of the apparent lack of a requirement in the FW Regulations to keep records of overtime and other penalty-rate hours where an annualised wage arrangement displaces the award requirements for payment for such hours, it is necessary that in establishing a reconciliation mechanism the award clause contain a requirement for such records to be kept. It is only by this means that the reconciliation requirement could practically operate. The inclusion of such a provision in a modern award is authorised by s 142 of the FW Act: it is incidental to an annualised wage arrangement provision made pursuant to s 139(1)(f), and is essential to make such a provision operate in a practical way.

(8) Although it was not the subject of debate in the hearing before us, we have proceeded on the basis that annualised wages provisions only have application in relation to full-time employees. The proposition that a casual employee could be paid pursuant to an annualised wage arrangement is oxymoronic, and no workable proposition has been advanced that such arrangements could apply to part-time employees engaged to work fixed numbers of hours per week. However we will provide parties with an opportunity to advance any proposal they wish to make as to how an annualised wage provision might practically apply to part-time employment.

[130] We *provisionally* consider that there are a number of model clauses which could give effect to the above conclusions. In relation to a modern award which covers employees who work reasonably stable hours, the following clause (Model Clause 1) would be appropriate:

X. Annualised wage arrangements

X.1 *Annualised wage instead of award provisions*

(a) An employer may pay a full-time employee an annualised wage in satisfaction, subject to clause X.1(c), of any or all of the following provisions of the award:

(i) clause X – Minimum weekly wages;

(ii) clause X – Allowances;

(iii) clause X – Overtime penalty rates

(iv) clause X – Weekend and other penalty rates; and

(iv) clause X – Annual leave loading

(b) Where an annualised wage is paid the employer must advise the employee in writing, and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause X.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

X.2 *Annualised wage not to disadvantage employees*

(a) The annualised wage 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 wage is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.

(c) The employer must keep a record of the starting and finishing times, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause X.2(b). This record must be signed by the employee each pay period or roster cycle.

X.3 *Base rate of pay for employees on annual salary arrangements*

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 the annual salary equivalent to the relevant rate of pay in clause X—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

[131] A second variant (Model Clause 2) appropriate for a modern award covering employees who work reasonably stable hours is the following:

X. Annualised wage arrangements

X.1 *Annualised wage instead of award provisions*

(a) An employer may pay a full-time employee an annualised wage of an amount that is at least X% more than the minimum weekly wage prescribed in clause X multiplied by 52 for the work being performed in satisfaction, subject to clause X.1(b), of any or all of the following provisions of the award:

(i) clause X– Minimum weekly wages;

(ii) clause X – Allowances;

(iii) clause X – Overtime penalty rates

(iv) clause X – Weekend and other penalty rates; and

(iv) clause X – Annual leave loading

(b) The employee must not be required by the employer in any pay period or roster cycle to work in excess of:

(i) an average of X ordinary hours which would attract a penalty rate under the provisions of this award per week; or

(ii) an average of X overtime hours per week

without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified in clause X.1(b), such hours will not

be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

(d) Where an annualised wage is paid the employer must advise the employee in writing, and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage; and

(iii) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle under clause X.1(b) without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

X.2 *Annualised wage not to disadvantage employees*

(a) The annualised wage 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 wage is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.

(c) The employer must keep a record of the starting and finishing times, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause X.2(b). This record must be signed by the employee weekly.

X.3 *Base rate of pay for employees on annual salary arrangements*

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 the annual salary equivalent to the relevant rate of pay in clause X—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

[132] In modern awards which cover employees who may work highly variable hours or significant ordinary hours which attract penalty rates under the award, we *provisionally* consider there are two appropriate variants. The first is as follows (Model Clause 3):

X. Annualised wage arrangements

X.1 *Annualised wage instead of award provisions*

(a) An employer and a full-time employee may enter into a written agreement for the employee to be paid an annualised wage in satisfaction, subject to clause X.1(c), of any or all of the following provisions of the award:

(i) clause X – Minimum weekly wages;

(ii) clause X – Allowances;

(iii) clause X – Overtime penalty rates

(iv) clause X – Weekend and other penalty rates; and

(iv) clause X – Annual leave loading

(b) Where a written agreement for an annualised wage agreement is entered into, the agreement must specify:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified in the agreement pursuant to clause X.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

(d) The employer must give the employee a copy of the agreement and keep the agreement as a time and wages record.

(e) The agreement may be terminated:

(i) by the employer or the employee giving 12 months' 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 individual employee.

X.2 *Annualised wage not to disadvantage employees*

(a) The annualised wage 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 wage is paid (or if the employment ceases or the agreement terminates earlier, over such lesser period as has been worked).

(b) The employer must each 12 months from the commencement of the annualised wage arrangement or, within any 12 month period upon the termination of employment of the employee or termination of the agreement, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.

(c) The employer must keep a record of the starting and finishing times, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement agreement for the purpose of undertaking the comparison required by clause X.2(b). This record must be signed by the employee each pay period or roster cycle.

X.3 Base rate of pay for employees on annual salary arrangements

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 the annual salary equivalent to the relevant rate of pay in clause X—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

[133] The second variant (Model Clause 4) is:

X. Annualised wage arrangements

X.1 *Annualised wage instead of award provisions*

(a) An employer and a full-time employee may enter into a written agreement for the employee to be paid an annualised wage of an amount that is at least X% more than the minimum weekly wage prescribed in clause X multiplied by 52 for the work being performed in satisfaction, subject to clause X.1(b), of any or all of the following provisions of the award:

(i) clause X – Minimum weekly wages;

(ii) clause X – Allowances;

(iii) clause X – Overtime penalty rates

(iv) clause X – Weekend and other penalty rates; and

(iv) clause X – Annual leave loading

(b) The employee must not be required by the employer in any pay period or roster cycle to work in excess of:

(i) an average of X ordinary hours which would attract a penalty rate under this provisions of this award per week; or

(ii) an average of X overtime hours per week

without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified in clause X.1(b), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

(d) Where a written agreement for an annualised wage agreement is entered into, the agreement must specify:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle under clause X.1(b) without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

(e) The employer must give the employee a copy of the agreement and keep the agreement as a time and wages record.

(f) The agreement may be terminated:

(i) by the employer or the employee giving 12 months' 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 individual employee.

X.2 Annualised wage not to disadvantage employees

(a) The annualised wage 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 wage is paid (or if the employment ceases or the agreement terminates earlier over such lesser period as has been worked).

(b) The employer must each 12 months from the commencement of the annualised wage arrangement or, within any 12 month period upon the termination of employment of the employee or termination of the agreement, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.

(c) The employer must keep a record of the starting and finishing times, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement agreement for the purpose of undertaking the comparison required by clause X.2(b). This record must be signed by the employee each pay period or roster cycle.

X.3 *Base rate of pay for employees on annual salary arrangements*

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 the annual salary equivalent to the relevant rate of pay in clause X - Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

[134] We invite interested parties to make further submissions concerning whether:

(1) the terms of the above provisions are appropriate to be adopted as model annualised wage arrangement provisions;

(2) any existing annualised wage arrangement provision in a modern award should be varied to reflect any of the proposed model terms (subject to the conclusions stated later in this decision concerning the specific claims advanced in these proceedings);

(3) any modern award which does not currently contain an annualised wage arrangement should be varied to include one of the proposed model clauses; and

(4) annualised wage provisions are capable of having any practical application to part-time employees (including any proposals to that end).

[135] A timetable for the lodgment of such submissions appears at the end of this decision.

Pastoral Award 2010 and Horticulture Award 2010

[136] While we consider that the NFF has advanced a meritorious case as to why these awards should be varied to include an annualised wage arrangement provision, we are not satisfied having regard to our general conclusions that the provision proposed for each award by the NFF satisfies the condition in s 139(1)(f)(iii), for three reasons:

(1) It does not contain any provision to ensure that the amount of the annualised wage is transparently constructed in a way which demonstrates that, over the course of the year, the employee will not be worse off as compared to the award having regard to the hours which it is anticipated that the employee will work.

(2) It does not provide any safeguard for the employee if the assumed working hours upon which the annualised wage is based are significantly exceeded.

(3) The annual review contemplated by clause 18.2(b) of the proposed clause for the *Pastoral Award* does not make it clear what the obligations of the employer are, particularly if the review exposes that the employee has been paid less under the annualised wage arrangement than he or she would have been under the award provisions. It also does not provide for any review to be conducted upon the termination of employment.

[137] We also note that, while the NFF's proposed provision requires agreement between the employer and the employee, it provides no capacity for either party to terminate the agreement if it proves to be unsatisfactory or unviable. We further note that there appears to be a contradiction between the proposed clauses 18.3 and 18.4 as to the payment entitlement of the employee whilst taking leave entitlements.

[138] The additional safeguards proposed by the AWU are, we consider, appropriate and necessary, and are broadly consistent with the proposed model clauses for modern awards covering employees who work variable and/or unsociable hours. We consider that either of the proposed Model Clause 3 or Model Clause 4 may be appropriate for the *Pastoral Award* and *Horticulture Award*. We proposed to invite further submissions from the NFF, the AWU and any other interested party concerning this provisional conclusion in accordance with the timetable at the end of this decision.

Clerks - Private Sector Award 2010, Legal Services Award 2010 and Contract Call Centres Award 2010

[139] We are not satisfied that these awards should be varied to remove the current annualised wage arrangement provisions and replace them with the provision contained in the *Local Government Award*. The critical difference between the existing provisions and that in the *Local Government Award* is that the former allows the employer to introduce annualised wage arrangements by right whereas the latter requires the agreement of the employee. Because these awards cover work which is likely to involve reasonably stable hours from one pay period to the next, we do not consider for the reasons explained in our general conclusion that it is necessary to require employees' agreement in order to properly protect employees'

interests. However, having regard to the general conclusion we have earlier stated, we consider that the current provisions in these awards may be deficient for the same reasons as we have identified in relation to the NFF's proposed provision for the *Pastoral Award* and *Horticulture Award*. We invite interested parties to make submissions as to whether these awards should be varied to include the proposed Model Clause 1 or Model Clause 2 in accordance with the timetable at the end of this decision.

[140] In relation to the Law Firms' claim to vary the current provision in the *Legal Services Award*, we note that the current provision already allows an annualised wage to be paid in satisfaction of weekend and public holiday penalty rates. The primary additional element which the Law Firms wish to include is shift allowances. The current annualised wages provision in the *Clerks Award* appears to allow shift allowances to be included in an annualised wage arrangement (clause 17.1(a)(iii) includes a cross-reference to clause 28, which deals with shiftwork, but is misdescribed as dealing with "*Overtime and penalty rates*"). The work under the *Legal Services Award* we consider to be highly comparable to that performed under the *Clerks Award*, so *prima facie* there is no reason for it to have a provision different to that in the *Clerks Award*. The position of the ASU we understood to be that it opposed the Law Firms' claim without the annualised wage arrangement clause containing adequate safeguards. We have invited the parties to consider whether the *Legal Services Award* provision should be varied in line with Model Clause 1 or Model Clause 2, which contain additional safeguards against employee disadvantage. We will defer stating a final conclusion concerning the Law Firms' claim until we have received the parties' further submissions as to this.

Health Professionals and Supported Services Award 2010

[141] We are not satisfied that the *Health Professionals Award* should be varied to include the annualised wage arrangement provision proposed by the Ai Group. Having regard to our earlier general conclusions, we do not consider that the proposed provision complies with the requirement in s 139(1)(f)(iii) or meets the modern awards objective for the following reasons:

(1) The employees to be covered by the proposed provision work, as submitted by United Voice, complex rosters covering unsociable hours. As a result, shift loadings and penalty rate payments constitute a significant element of their overall remuneration. Because the interests of the employee would be so critically affected by the introduction of an annualised wage arrangement, we consider that fairness would require the agreement of the employee.

(2) The provision does not require the annualised wage to be transparently constructed on the basis of the award entitlements to shift allowances and penalty rates and reasonable assumptions about the number and pattern of working hours. Nor does it provide for any safeguards if working hours diverge significantly from any such assumptions.

(3) The annual review mechanism is inadequate for reasons already stated.

[142] However we see no reason in principle why managerial or supervisory-level employees should not have access to an annualised salaries provision in appropriate form. We invite the Ai Group, United Voice and other interested parties to lodge submissions in

accordance the timetable at the end of this submission as to whether, in relation to the classes of employees encompassed by the Ai Group's claim, Model Clause 3 or Model Clause 4 should be introduced into the *Health Professionals Award*.

Hospitality Industry (General) Award 2010 and Restaurant Industry Award 2010

[143] We are satisfied, based on the evidence and submissions of United Voice, that the s139(1)(f)(iii) safeguards in the current annualised wage arrangement provisions in these awards are inadequate. We also provisionally conclude that these inadequacies may best be addressed by the adoption of the most appropriate of the model clauses which we have earlier set out. Some of the modifications proposed by United Voice are incorporated into these model provisions; other modifications proposed we consider to be inappropriate or unnecessary. In particular, we consider that a requirement that a review or reconciliation be conducted six-monthly rather than annually would not properly take into account seasonal factors in hospitality work which operate over the course of a full year. In relation to employees other than managerial staff in hotels under the *Hospitality Award*, we invite submissions as to whether Model Clause 4 should be adopted, and in relation to managerial staff in hotels we invite submissions as to whether Model Clause 2 should be adopted. In relation to the *Restaurant Award*, we invite submission as to whether Model Clause 4 should be adopted.

[144] We consider, *prima facie*, that RCI's claim that the current provision in the *Restaurant Award* be varied to allow annual leave loading to be included as an entitlement that might be satisfied by the payment of an annualised wage has substantial merit. A number of annualised wage arrangement provisions in other awards include annual leave loading, and we see no reason in principle why an employee should not be able to agree to an annualised wage arrangement that incorporates annual leave loading provided that there are sufficient safeguards in place to prevent employee disadvantage. We will reach a final conclusion about this claim once we have received further submissions concerning whether any of the proposed model provisions should be adopted in the *Restaurant Award*.

Rail Industry Award 2010

[145] We entertain considerable doubt as to whether we have power to vary clause 18.1 of the *Rail Award* in the manner proposed by the Rail Employers. Under s 132, modern awards may set minimum terms and conditions for national system employees in particular industries or occupations. Section 133 provides that in Pt 3-2, *Modern Awards*, "*employee*" means a national system employee. Thus the reference to "*individual employees*" in s 139(1)(f)(iii) must be read as referring to individual national system employees. Under s 143(2), the coverage terms of modern awards must be expressed to cover, relevantly, specified employers and employees of employers covered by the modern award, and again this must be read as referring to national system employees. Under s 47(1), a modern award only applies to, relevantly, an employee if the modern award covers the employee. Under s 12, the expression "*national system employee*" has the meaning given in s 13 and the extended meaning in ss 30C and 30M in relation to referring States. The s 13 definition of the expression is "*an individual so far as he or she is employed, or usually employed, as described in the definition of* ***national system employer*** *in section 14, by a national system employer, except on a vocational placement*". A prospective employee - that is, a person not yet in an employment relationship with the relevant national system employer - would not appear to be encompassed by this definition. Sections 30C and 30M do not extend the definition to

prospective employees (but rather are concerned with persons employed by a wider class of employers in referring States). Accordingly we cannot be satisfied that we have the power to apply clause 18.1 to prospective employees.

[146] In any event, we are also not satisfied that the variation proposed is necessary in practical terms. An employer and a prospective employee can identify the terms of an annualised wage arrangement they are prepared to agree to, and then enter into the agreement immediately upon the commencement of the employment. We see no reason why this would cause confusion and uncertainty, in circumstances where the precise terms of the putative agreement can be shown to the prospective employee in advance of his or her start date. Further, it would be open to a prospective employer and a prospective employee before the commencement of the employment to enter into a contract of employment providing for an annualised wage which takes effect when the employment commences. Accordingly we will not vary clause 18.1 as sought by the Rail Employers.

[147] The proposed variation to clause 18.4 has substantial merit, and reflects concepts which have been incorporated into our proposed model clauses. We do not propose at this stage to form a final conclusion about this proposed variation at this stage, but rather invite the Rail Employers and the ASU to make submissions as to whether clause 18 should be varied to reflect, in whole or in part, Model Clause 3.

Next steps

[148] We make the following directions:

(1) All further submissions invited in this decision shall be in writing and lodged within 28 days of this decision.

(2) Any submissions in reply shall be in writing and lodged within a further 14 days.

(3) Any party which seeks the opportunity to make further oral submissions at a hearing before this Full Bench shall request this in writing within 7 days of the lodgment of reply submissions in accordance with direction (2).

VICE PRESIDENT

Appearances:

M Robson for United Voice.

K Barlow for Community and Public Sector Union.

B Ferguson, R Bhatt, and *S Barton* for Australian Industry Group.

S Mostafavi for Australian Business Industry and New South Wales Business Chamber.

A Khouri for Aurizon and others.

N Keats for the Maritime Union of Australia.

J Nucifora and *M Rizzo* for the Australian Services Union.

R Liebhaber and *L Svendsen* for Health Services Union.

J Sweetman and *P Ryan* for the Australian Hotels Association, the Accommodation Association of Australia, The Motor Inn and the Motel Accommodation Association.

S Barklamb for the Australian Mines and Metals Association.

K Sweatman for Russell Kennedy and others.

K Pearsall and *S McKinnon* for the National Farmers' Federation.

M Wells for Restaurant and Catering Australia.

P Moss for the Chamber of Commerce and Industry of Western Australia.

R Walsh for the Australian Workers' Union.

Hearing details:
2016.
Sydney:
24 November, 6 and 7 December.

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ATTACHMENT A — Existing annualised salary clauses in modern awards

Number	Award	Clause
1.	*Banking, Finance and Insurance Award 2010*	14
2.	*Broadcasting and Recorded Entertainment Award 2010*	44
3.	*Clerks-Private Sector Award 2010*	17
4.	*Contract Call Centres Award 2010*	18
5.	*Hospitality Industry (General) Award 2010*	27
6.	*Hydrocarbons Industry (Upstream) Award 2010*	20
7.	*Legal Services Award 2010*	30
8.	*Local Government Industry Award 2010*	14
9.	*Manufacturing and Associated Industries and Occupations Award 2010*	24
10.	*Marine Towage Award 2010*	13
11.	*Mining Industry Award 2010*	17
12.	*Oil Refining and Manufacturing Award 2010*	20
13.	*Pharmacy Industry Award 2010*	27
14.	*Rail Industry Award 2010*	18
15.	*Restaurant Industry Award 2010*	28
16.	*Salt Industry Award 2010*	18
17.	*Telecommunications Services Award 2010*	15
18.	*Water Industry Award 2010*	14
19.	*Wool Storage, Sampling and Testing Award 2010*	19