DECISION

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

4 yearly review of modern awards - Annualised Wage Arrangements
(AM2016/13)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT SAUNDERS SYDNEY, 27 FEBRUARY 2019

Review of annualised wage arrangement provisions in modern awards.

Introduction

[1] On 20 February 2018 we issued a decision[1] concerning the issue of annualised wage arrangements, one of a number of "common issues" being dealt with as part of the current 4 yearly review required to be conducted pursuant to s 156 of the *Fair Work Act 2009* (Cth)(FW Act).[2] In that decision (2018 decision) we stated eight conclusions concerning what is necessary for annualised wage arrangement provisions in modern awards to form part of the fair and relevant minimum safety net of terms and conditions required by s 134(1) of the FW Act taking into account the matters identified in paragraphs (a)-(h) of that provision. We then set out four variant model annualised wage arrangement provisions which we provisionally considered would give effect to our conclusions, with the first two (Model Clause 1 and Model Clause 2) being suitable for a modern award which covers employees who work reasonably stable hours, and the second two (Model Clause 3 and Model Clause 4) being suitable for modern awards which cover employees who work highly variable hours or significant ordinary hours which attract penalty rates under the award. We also expressed conclusions (some provisional in nature) concerning applications to vary the following modern awards in respect of annualised wage arrangements:

- National Farmers' Federation (NFF): *Pastoral Award 2010 and Horticulture Award 2010*;
- Australian Services Union (ASU): *Clerks - Private Sector Award 2010* (*Clerks Award*), *Legal Services Award 2010* and *Contract Call Centres Award 2010*;
- Russell Kennedy and 20 other law firms (Law Firms): *Legal Services Award 2010*;

[1] [2018] FWCFB 154 (2008 decision)

[2] Section 156 was repealed by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* effective retrospectively from 1 January 2018, but clause 26 of Schedule 1 to the FW Act (which was added by the amending Act) requires the Commission to continue to apply s 156 to the current review as if had not been repealed.

- Australian Industry Group (Ai Group): *Health Professionals and Supported Services Award 2010* (*Health Professionals Award*);

- Chiropractors' Association of Australia (CAA): *Health Professionals Award*;

- United Voice: *Hospitality Industry (General) Award 2010* (*Hospitality Award*) and *Restaurant Industry Award 2010* (*Restaurant Award*);

- Restaurant and Catering Industrial (RCI): *Restaurant Award*;

- Aurizon Holdings Ltd and five other employers (Rail Employers): *Rail Industry Award 2010* (*Rail Award*).

[2] We invited interested parties to file further written submissions in response to the provisional views expressed in the 2018 decision, and also allowed the parties an opportunity to file written submissions in reply. In addition, at the request of a number of parties, we conducted a further hearing on 8 June 2018 in order to receive further oral submissions from interested parties.

Further submissions

Chiropractors' Association of Australia

[3] The CAA advised that it wished to withdraw its application to include an annualised wage arrangement provision in the *Health Professionals Award* because any requirement for annual reconciliation would obviate the benefit of administrative simplicity which employers sought to obtain in an annualised wage arrangement and would be impracticable for micro and small businesses. It submitted that Model Clause 3 and Model Clause 4 would not be suitable for chiropractic employers because their employees work predicable hours outside of the hospital environment. It also submitted that it saw no reason why annualised wage arrangements might not apply to part-time employees.

Health Services' Union (HSU)

[4] The HSU submitted that it was neither appropriate nor necessary to include an annualised wage arrangement in the *Health Professionals Award* because such arrangements had never been a feature of the hospital or health system and the sector was characterised by high proportions of shift work and work attracting penalty rates that was performed during evenings, weekends and public holidays and as overtime. In the alternative, with respect to managerial and supervisory-level employees, the HSU submitted that any annualised wage arrangements provision should be confined to Level 4 health professional employees under the award since only they could properly be described as managerial and supervisory-level employees. The HSU further submitted that if Model Clause 3 or Model Clause 4 were to be added to the *Health Professionals Award*, they should be modified so that:

- the agreement must have been genuinely made without duress;

- the agreement can only be entered into after the individual employee has commenced employment with the employer;

- reconciliations should be conducted quarterly, not every 12 months; and

- only three months' notice should be necessary to terminate an annualised wage arrangement.

[5] The HSU also submitted that annualised wage arrangements have no practical application to part-time employees.

Rail Employers

[6] The Rail Employers submitted that, apart from clause 18.4, the current annualised wage arrangements provision in clause 18 of the *Rail Award* contained appropriate safeguards for employees and promoted flexible modern work practices. There was no evidence of any difficulty with respect to the operation of clause 18, and clause 18.3 dealt with a situation where an employee's pattern of work diverges from the assumptions upon which the employee's annualised wage was calculated. If an employee, it was submitted, considered that the annualised wage is not reflective of the actual hours worked, the employee could seek to have the matter resolved via the award dispute resolution procedure. In respect of Model Clause 3 specifically, the Rail Employers submitted that:

- the "outer limit" provision beyond which penalty rates would be payable was unnecessary, since the current provision is prescriptive in terms of its overtime and penalty assumptions and gives the employee a clear reference point against which they may assess the hours worked, with the "make good" obligation in clause 18.3 and the disputes procedure ensuring that the employees would always be paid for the time actually worked;

- the "outer limit" provision would also be onerous and inflexible;

- the record keeping and reconciliation requirements would give rise to inflexible work practices not in keeping with the modern awards objective;

- of the three mechanisms identified in the 2018 decision as ensuring that the employee would not be underpaid, it was not necessary to include more than one, and clause 18 of the *Rail Award* already required identification of the way in which the annualised wage was calculated (which was one of the three identified mechanisms); and

- in the alternative if it was considered necessary to insert an "outer limits" clause, then there was no need to require the payment of an increment above the base rate or an annual reconciliation.

[7] The Rail Employers submitted that the *Rail Award* should be varied to add its proposed clause 18.4 in line with the conclusion in the 2018 decision that the proposed variation had substantial merit.

National Road Transport Association (NRTA)

[8] The NRTA made submissions principally in relation to the *Road Transport and Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010* (which are awards which do not currently contain any annualised wage arrangement provisions). The NRTA submitted that the model clauses proposed in the 2018 decision were too complex and onerous, and were not appropriate for the identified awards.

Community and Public Sector Union (CPSU)

[9] The CPSU submitted that an annualised wage arrangement which could be introduced without employee consent would not be consistent with a fair and relevant safety net regardless of whether the pattern of hours of work was reasonably stable or otherwise. In relation to the model clauses, it submitted that:

- it opposed Model Clause 1 and Model Clause 2 because they lacked any requirement for employee consent;
- it supported the requirements for employee consent in Model Clause 3 and Model Clause 4;
- it supported the requirements for record-keeping and annual reconciliation in the model clause;
- the notice period of 12 months for the termination of annualised wage arrangements in Model Clause 3 and Model Clause 4 was too long; and
- the requirement for a minimum percentage above the minimum weekly wage was an attractive measure of protection, but was concerned that the prescription of any such percentage might become the default amount, discourage wage increases or not properly reflect the variable hours worked.

[10] In respect of the *Contract Call Centres Award* and the *Telecommunications Services Award 2010*, the CPSU submitted that Model Clause 3 or Model Clause 4 should replace the current provision, provided that they remained confined to the top three classifications and the issues it had identified were addressed. The CPSU did not support any of the model clauses being added to any award which did not currently contain an annualised wage arrangement provision nor the extension of any such provision to part-time employees.

Law Firms

[11] The Law Firms did not consider that any of the model clauses proposed in the 2018 decision were appropriate for adoption in the *Legal Services Award*. They submitted that the legal services industry was a highly sophisticated working environment in which staff worked in a highly autonomous manner, and the controls proposed under each model clause would give rise to an unreasonable level of administrative burden. It was submitted that the existing provision in clause 30 should be retained save that clause 30.1(a) should be varied to permit an annualised wage to be paid in satisfaction of shift work allowances as well as the other entitlements currently specified. In relation to part-time employees, the Law Firms submitted that clause 30 currently applied to such employees and should continue to do so. This had utility in particular to full-time employees on an annualised wage who returned to work after parental leave on a part-time basis. Such employees would be paid a percentage of their annualised wage based on the proportion of full-time hours worked.

Australian Services Union

[12] The ASU made submissions in relation to the *Clerks Award*, the *Legal Services Award* and the *Contract Call Centres Award*. It supported the inclusion of Model Clause 3 in these awards to replace the existing annualised wage provisions. The ASU submitted that the capacity for employers to implement annualised wage arrangements without employee consent entrenched discrimination against the female majority covered by these awards, the

criterion of stability of hours as a basis to exclude a requirement for consent had never been raised before, and there was a lack of evidentiary support for the assumption that the hours of employees covered by the three awards were more (or less) stable than for employees under other awards. The ASU pointed to a number of clerical enterprise agreements which provided for wide spans of hours and the capacity to work outside these on shifts or on weekends as evidence that clerical work did not necessarily involve a stable pattern of hours. The ASU submitted, in the alternative, that if its position concerning employee consent was not accepted, Model Clause 1 should be placed in the three clerical awards.

[13] In relation to the *Contract Call Centres Award*, the ASU submitted that if Model Clause 3 was adopted it should like the current provision be restricted in its operation to the highest three classifications. In relation to the *Rail Award*, the ASU submitted that the existing requirement for employee consent should be retained and that clauses X.2 and X.3 of Model Clause 3 should be added to the existing provision.

Australian Council of Trade Unions (ACTU)

[14] The ACTU submitted that high rates of award non-compliance, as demonstrated in reports published by the Fair Work Ombudsman (summarised by the ACTU in a table) which showed that using mean values 28 per cent of audited employers did not pay their employees correctly and 21 per cent did not comply with record-keeping requirements, should lead to the following conclusions:

- there could be little confidence that any new record-keeping requirements would be complied with at anywhere near acceptable levels;

- there could be little confidence that the annualised salaries paid under any of the model terms would meet the requirement that they do not disadvantage employees;

- there would be real enforcement difficulties, given that employees would be unable to take advantage of the presumption in s 557C of the FW Act and, except under Model Clause 3 and Model Clause 4, would have to terminate their employment if they wished to recoup the losses they had suffered over a period of less than 12 months;

- there would be reluctance to allow annualised wage arrangements to proliferate across the award system; and

- there would be reluctance to allow some annualised wage arrangement provisions to be retained in their existing terms.

Australian Manufacturing Workers' Union (AMWU)

[15] The AMWU submitted that annualised wage arrangement provisions should not be added to any modern awards which did not already have them, and supported the removal of the existing annualised wage arrangement provision in the *Manufacturing and Associated Industries and Occupations Award 2010* (*Manufacturing Award*). It submitted that there was already poor compliance with awards and safety net entitlements, and employees often had a poor understanding of their award rights. In relation to the model clauses proposed in the 2018 decision, the AMWU submitted that they were all deficient in certain respects. In particular it submitted that:

- Model Clause 1 and Model Clause 2 did not require the agreement of the employee;

- any model clause should require agreement not just by the individual but by a majority of the workforce where the employer intends on making such agreements with 50 per cent or more of the workforce;

- any model clause should have a requirement that the agreement must have been made genuinely and without coercion and duress, such as in cl 24(1)(g) of the *Manufacturing Award*;

- it should contain safeguards for employees for whom English is a second language, such as in cl 24(1)(g) of the *Manufacturing Award*;

- annualised wage arrangement provisions in award should not have general application;

- employees should be paid their annualised salary while on annual leave and personal leave, and the provision in each model clause which provide for a definition of the base rate of pay for the purpose of NES entitlements should be removed;

- awards with existing clauses should be varied only if the Commission provides increased levels of protection; and

- annualised wage arrangements are not applicable or capable of adaptation to part-time employment.

Pharmacy Guild of Australia (PGA)

[16] The PGA submitted, in respect of the *Pharmacy Industry Award 2010* (*Pharmacy Award*), that the existing annualised wage arrangement provision (cl 27) met the modern awards objective and that there was no evidence that the provision did not ensure that employees were not disadvantaged. In respect of the proposed model clauses, the PGA submitted that they did not meet the modern awards objective because:

- the proposed "outer limit" requirement was not necessary to ensure that employees are not disadvantaged, and would be onerous and remove the flexibility that cl 27 of the *Pharmacy Award* was intended to achieve;

- the proposed record-keeping and reconciliation requirement would give rise to inflexible work practices, would be administratively onerous and remove any benefit to the employer of entering into an annualised wage arrangement, and was also unnecessary given that cl 27.3 of the *Pharmacy Award* requires that an annualised wage not result in an employee being paid less over a year; and

- the reconciliation requirement would require the employer to perform calculations on an ongoing basis throughout the year rather than in line with the annual wage review as was the current common practice.

[17] Having regard to the three reasons stated in paragraph [136] of the 2018 decision as to why the NFF's proposed clause for the *Pastoral Award* and *Horticulture Award* did not satisfy the requirements of s 139(1)(f)(iii) of the FW Act, the NFF submitted that it was not opposed to the following additional safeguards to address the Commission's concerns:

- a requirement that the method by which the annualised wage has been calculated be set out in writing;
- permit termination of the arrangement; and
- a requirement for the arrangement to be reviewed and any underpayment rectified.

[18] In respect of Model Clause 3 and Model Clause 4, the NFF raised the following matters:

- the requirements for record-keeping and annualised reconciliation removes the benefits to the employer of managing cash flow, predictability of labour costs and administrative simplicity;
- there was also special difficulties in record-keeping in the pastoral and horticultural industries, where work could often be unsupervised, employees might determine their own working hours, and the work might be carried out at remote locations;
- it would be less burdensome for employers to record the number of hours each day as opposed to the times worked, which went beyond the current record-keeping obligations in the *Fair Work Regulations 2009* (Cth)(*Fair Work Regulations*);
- the requirement for the employee to sign off on the records each pay period or roster cycle was unduly burdensome and would discourage compliance and the use of annualised arrangements;
- a period of 14 days was too short to rectify underpayments and would have cash flow implications, and a period of 30-90 days would be more appropriate;
- there should be a facilitative provision to permit employee reconciliations to occur at the same time each year for all employees;
- the proposed "outer limit" requirement was not necessary given the other protections in the clause and it was not clear how it would operate where hours of work fluctuated significantly across the year in accordance with seasonal requirements; and
- the fixed percentage amount contemplated by Model Clause 4 might limit the capacity of annualised wages to absorb fluctuations and would limit the level of flexibility required for the different sectors covered in the *Pastoral Award*.

[19] Subject to the modifications it proposed, the NFF submitted that Model Clause 3 should be inserted in the *Pastoral Award* and the *Horticulture Award*. In relation to part-time employees, the NFF submitted that annualised wage arrangements could be entered into on the same basis as for full-time employees, that is, on the basis of an agreed number of hours

of work and with the annualised wage compensating for any overtime, allowances, penalty rates and annual leave loading that the part-time employee would otherwise be entitled to.

Restaurant and Catering Industrial

[20] RCI submitted that it was not necessary to replace the existing provision in the *Restaurant Award* with any of the model clauses in order to achieve the modern awards objective. There were sufficient safeguards already in place to protect employees, and while RCI acknowledged issues of non-compliance in the restaurant industry which it was continuing to address, there was little evidence before the Commission of non-compliance with the current annualised wage arrangements clause. RCI submitted that adoption of any of the model clauses would impose a significant regulatory burden on employers in the sector, who largely consisted of small operators with limited resources. The existing provision applied to all permanent employees, and this further supported the need to maintain the existing provision.

Maritime Union of Australia (MUA)

[21] On 26 March 2018 (the day before it was de-registered as part of the amalgamation process which formed the Construction, Forestry, Mining, Maritime and Energy Union), the MUA filed submissions addressing the annualised wage arrangements provision (cl 13.2) in the *Marine Towing Award 2010*. The MUA accepted in light of the 2018 decision that there were three improvements that could be made to the existing provision:

- the addition of a requirement that the agreement be in writing with the individual employee rather than the majority of employees;
- the addition of a further requirement for the employer to keep pay records; and
- allowing annualised wage agreements to be terminated on one month's written notice.

[22] The MUA submitted that there was not otherwise any difficulty with the existing provision or any evidence of a lack of compliance requiring any further amendment to cl 13.2.

Australian Business Industrial and The NSW Business Chamber Ltd (ABI/NSWBC)

[23] In their submissions ABI/NSWBC took issue with some of the eight conclusions which were reached in that decision. In relation to the third conclusion that, where an annualised wage arrangement was by agreement, it should be terminable by either party, ABI/NSWBC indicated that it was strongly opposed to this because the benefit of the arrangement in terms of certainty of labour costs, flexibility and administrative ease could only be realised in the arrangement was "locked in" and could not be unwound. Termination might also cause difficulty and complexity if the annual wage arrangement was incorporated into the underlying contract of employment. In respect of the fourth conclusion, while ABI/NSWBC accepted that s 139(1)(f)(iii) required the Commission to include appropriate safeguards to ensure that individual employees are not disadvantaged by entering into annualised wage arrangements, the proposed safeguards in the model clauses went beyond what was necessary through the imposition of multiple and overlapping administrative safeguards. ABI/NSWBC did not oppose annual reconciliations and submitted that practical experience suggested that they were more efficient than a calculation every pay cycle for employees engaged in the ordinary way. A reconciliation requirement rendered the other

safeguards proposed by the Commission, including a percentage premium payment and an "outer limit" of hours redundant and overly burdensome.

[24] In respect of a record-keeping requirement that was incidental to an annual reconciliation, it was submitted that such a requirement "*would need to pass through [the] extremely narrow jurisdictional 'window' provided by s 142 in being essential for the purpose of making the reconciliation operate in a practical way*", and that ABI/NSWBC were "*not convinced*" that the form of the requirement in the model clauses did this. However no alternative provision was proposed.

[25] ABI/NSWBC did not propose the extension of annualised wage arrangement provisions into awards which were not currently the subject of a specific application, and submitted that the Commission should be cautious of implementing award provisions in industries in which no evidence had been heard and no industry-specific considerations had been identified. The application of annualised wage arrangements to part-time employment was supported, and there was no reason why such a system could not equally apply to such employees, including where an employee under an annualised wage arrangement moved from full-time to part-time hours (perhaps after returning from parental leave) and the annual wage could continue to apply on a pro-rata basis.

Australian Hotels Association and others

[26] The Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn and Motel Accommodation Association (Hospitality Associations) accepted the proposition that 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. The Hospitality Associations did not regard Model Clause 2 or Model Clause 4 as being appropriate for the *Hospitality Award*, but submitted that some parts were appropriate. In particular they submitted:

- the minimum threshold should be 25 per cent above in accordance with the current award and past awards which have applied to the hospitality sector;

- the proposed "outer limit" provision was not appropriate because it was too complex, was at odds with the conclusion that an annualised wage arrangement guarantee operated over the course of a year and not during a particular pay period, and did not account for periods when an employee might work significant numbers of hours below the outer limit;

- the reconciliation requirement was excessive and not appropriate because it would obviate many of the benefits of an annualised wage arrangement, would require the employer to run two payroll systems, and because there was no evidence which demonstrated any widespread underpayments throughout the hospitality industry;

- the requirement for employees to counter-sign times and wage records was excessive and did not take into account the prevalence of electronic time recording tools utilised by employers;

- a 12 month termination period was excessive and not appropriate, and an annualised wage arrangement should be terminable by agreement at any time or upon four weeks' notice; and

- they supported the requirements that an annualised wage arrangement be in writing, specify the annualised wage payable and the provisions of the award satisfied by the payment of the annualised wage, and be retained as a time and wages record.

[27] Any annualised wage arrangement provision, the Hospitality Associations submitted, needed to strike a fair balance between providing for appropriate safeguards for employees to ensure they are not worse off and ensuring that such a provision does not unnecessarily or excessively impose an administrative burden or employment costs on employers, and if the provision was too complex or burdensome it would not be used. The current provision in the *Hospitality Award* which applied to non-managerial staff (cl 27.1) required a minimum 25 per cent increment, provided that an annualised wage would satisfy penalty rates and overtime and other specified award monetary entitlements, required daily time and wages records to be met, and required the annualised wage to be sufficient to cover what the employee would otherwise have been entitled to. The Hospitality Associations submitted that if these safeguards were considered inadequate, this could be remedied by requiring the arrangement to be in writing, providing the employee with a right to request a reconciliation every 12 months, requiring an employer to provide a copy of the annualised wage arrangement provision in the award to the employee at the commencement of the arrangement, and allowing the parties to terminate the arrangement on four weeks' notice. The Hospitality Associations made a similar submission in relation to cl 27.2 of the *Hospitality Award*, which applies to managerial staff in hotels. Finally, the Hospitality Associations submitted that annualised wage arrangements may be practical for part-time employees, particularly those classified as managerial staff in hotels.

Australian Industry Group

[28] The Ai Group sought to take issue with a number of the eight conclusions expressed in the 2018 decision which, it submitted, would have a "*very significant adverse impact upon the flexibility contained within the award system, to the detriment of employers and employees*". In this connection it submitted:

- there was no current statutory requirement to keep records of overtime hours worked by an employee covered by an annualised wage arrangement where no penalty or loading was payable for the overtime hours, and the establishment of such a requirement in an award provision would be unworkable, particularly for managerial, professional and other employees who performed work outside the workplace;

- where an annualised wage provision exists in an industry or occupational award, it can safely be assumed that it reflects the patterns of work in the relevant industry or occupation in accordance with s 139(1)(f)(i) of the FW Act, and thus they would not lightly be altered;

- s 139(1)(f)(iii) allows annualised wage provisions that have "*appropriate*" safeguards, and a record-keeping requirement which imposed an unnecessary and unduly onerous burden on employees would be inappropriate and therefore not allowable;

- the word "*ensure*" used in s 139(1)(f)(iii) was used in other contexts in the FW Act where it was impossible to achieve absolute certainty that the requirement is achieved for every employee, and a practical judgment was required to assess what safeguards were appropriate to ensure that employees were not

disadvantaged, including the matters in s 134(1)(f), (g) and (h) and the need to avoid unnecessary technicalities consistent with s 577(a);

- in considering issues of disadvantage, it was centrally important that if the safeguards were too onerous, annualised wage arrangements would not be offered, which would disadvantage employees and might operate as a barrier to businesses retaining existing employment levels and to productivity and competitiveness;

- "*disadvantage*" in s 139(1)(f)(iii) should not be applied in an unduly narrow sense and needed to be considered holistically;

- where employees did not under a particular award have an entitlement to overtime or other penalties or allowances, these were not relevant to any consideration of employee disadvantage;

- nor for the purpose of assessing disadvantage was it relevant to take into account overtime not directed or required to be performed by the employer;

- existing provisions which required a "*review*" of annualised wage arrangements did not require the conduct of a reconciliation and were not intended to operate as a mechanism for an employee to claim back-pay;

- the FW Act contained protections against unreasonable overtime (s 62) and unreasonable requests to work on public holidays (s 114), and they needed to be taken into account in assessing whether safeguards in an annualised wage arrangements provision were appropriate; and

- existing annualised wage provisions should not be altered absent a solid basis (such as evidence that such provisions have in reality resulted in relative disadvantage to employees), and existing flexibilities should not be disturbed contrary to the modern awards objective.

[29] In light of the above propositions, the Ai Group submitted that there was no need for model annualised salary clauses across the award system, and it did not seek that any existing provision be varied to reflect the model clauses proposed in the 2018 decision. It considered that there might be a benefit in the inclusion of annualised wage provisions in a greater number of awards, and the need for such provisions might increase once the outcome of the separate 4 yearly review proceedings concerning the payment of wages was finalised.

[30] In respect of the proposed model clauses, the Ai Group submitted:

- the inclusion of multiple safeguards in the clauses was unwarranted and not appropriate;

- if, contrary to the Ai Group's submissions, the reconciliation safeguard was introduced, there was no need for the other safeguards;

- in respect of the proposed requirement that the components and overtime and penalty rate assumptions of an annualised wage arrangement be set out in writing, in many circumstances annualised wage arrangements were established having regard to market conditions rather than award-related matters, making compliance with the requirement unworkable;

- subclause X.1(c) in each model clause inappropriately included additional hours that an employee may choose to work rather than just the additional hours the employer requires an employee to work;

- the requirement for a reconciliation upon termination of employment was inappropriate where the termination was at the initiative of the employee, and would remove the benefit to the employer of a wage arrangement which operated over the course of an entire year;

- it was unclear whether the "*annual wage*" contemplated by the model clauses captured all contractual arrangements concerning the payment of an annualised salary, or just those implemented pursuant to the relevant award clauses; and

- there was no reason why annualised salary arrangements were incapable of having practical application to part-time employees, and for example the current provision in the *Clerks Award* (cl 17.2) did so.

[31] In respect of the *Horticulture Award*, the Ai Group opposed the inclusion of Model Clause 3 or Model Clause 4. The Ai Group submitted that the current provisions in the *Clerks Award*, the *Legal Services* Award and the *Contract Call Centres Award* should be maintained. In respect of the *Health Professionals Award*, the Ai Group opposed the inclusion of Model Clause 3 or Model Clause 4.

United Voice

[32] United Voice submitted that, in relation to the *Hospitality Award* and the *Restaurant Award*, annualised wage arrangements were used to minimise the payment of penalty rates and overtime, and could result in an employee working excessive unsocial hours without receiving appropriate compensation. United Voice accepted that the model clauses went some way in minimising abuses of annualised wage arrangements, but made the following specific submissions:

- whether the minimum 25 per cent pay increment required under the *Hospitality Award* and the *Restaurant Award* was fair would depend on the utilisation of the employee within the framework of unsocial work hours that could lead to a variety of remuneration outcomes;

- appropriate reconciliation provisions and an ability for "overs" to be paid made the increment above the base rate less important, and the model clauses contained satisfactory provisions to this effect;

- the "outer limit" requirements in clause X.1(c) of the model clauses was an important protection;

- a minimum 25 per cent threshold increment was of utility to guarantee the employee was not worse off and the employer did not benefit from the deferral of payments awaiting reconciliation;

- clause X.3 of the model clauses should be amended to require annualised wage amounts to be increased in line with adjustments to the minimum wage;

- annual leave loading should not be a matter permitted to be encompassed in annualised wage arrangements;

- in respect of the *Hospitality Award* and the *Restaurant Award*, non-wage related allowances should not be permitted to be encompassed in annualised wage arrangements;

- provision should be made for an employee to be able to inspect and copy the records referred to in clause X.2(c) of the model clauses; and

- the proposed notice period of 12 months was too long, and should be reduced to three months.

[33] United Voice submitted that the Commission should not vary modern awards which do not currently provide for annualised wage arrangements to add any such provision. In respect of part-time employees under the *Hospitality Award* and the *Restaurant Award*, it was submitted that because the part-time employment provisions in those awards had recently been varied to make them more flexible, annualised wage arrangements should not be available for them. Those awards should, it was submitted in conclusion, be varied to provide for Model Clause 4 for non-managerial employees.

Shop Distributive and Allied Employees' Association (SDA)

[34] The SDA submitted that the Commission should not extend annualised wage arrangements into awards that did not currently contain them unless there was a specific application to do so and a thorough explanation of the industry.

Consideration

[35] The above summary of the submissions discloses that interested parties have taken diverse positions about the issues to be resolved, even where the nominal interests of parties are aligned. There is no consensus, even among employer parties on one hand or unions on the other as to the proper approach to be taken. Accordingly it is necessary for us to resolve the outstanding issues identified in the 2018 decision.

Reconciliation versus annual review

[36] In paragraph [121] of the 2018 decision, we concluded that the annual review provisions contained in a number of annualised wage provisions in current modern awards were imprecise as to the obligations which they imposed (if any), and were not such as to ensure that employees are not disadvantaged as required by s 139(1)(f)(iii). We further concluded in paragraph [129] that a reconciliation requirement would be an effective means of ensuring there was no employee disadvantage, notwithstanding that the administrative burden associated with such a requirement would diminish some of the advantages to employers in entering into annualised wage arrangements (see paragraph [119]). No party which made submissions opposing the introduction of a standard reconciliation requirement identified any other means by which disadvantage to the employee could be avoided or explained how a mere "review" could achieve that objective. We note the Ai Group's concession that the current annual review requirement in annualised wage arrangement provisions did not require or involve any notion of the rectification of financial disadvantage suffered by the employee. We reject the Ai Group submission that the requirement in s 139(1)(f)(iii) for "*appropriate safeguards to ensure that individual employees are not disadvantaged*" can in some way be read as meaning less than a requirement that every

employee under an annualised wage arrangement must not suffer the relevant kind of disadvantage, and the Ai Group did not articulate how an alternative interpretation of s 139(1)(f)(iii) was available on the language of the provision. We also reject the Hospitality Associations' submission that it would be sufficient to give employees the right to request reconciliation on an annual basis. Providing an opportunity for an employee to obtain rectification of any disadvantage is not the same thing as ensuring that such disadvantage does not occur. The position in this respect is analogous to that discussed in the Full Bench decision in *Shop, Distributive and Allied Employees Association v Beechworth Bakery Employee Co Pty Ltd*[3] in relation to whether "make good" provisions in enterprise agreements which operated on employee request could satisfy the better off overall test:

> "[43] Such obligation to "make good" any shortfall arises only if an employee makes a request for a review. If no such request is made, whether through ignorance or design, or perhaps because an affected employee simply lacks the time, information or ability to form a view, then no obligation to conduct a review, much less "make good" any shortfall, arises. Any concern that an employee or prospective employee would not be better off overall if the Agreement applied to the employee than if the relevant modern award applied to that employee cannot be met by such an undertaking."

[37] We also reject the PGA's submission that a reconciliation requirement was not necessary because the current annualised wage arrangement provision in the *Pharmacy Award* (similar to all modern awards containing an annualised wage arrangement provision, as discussed in paragraphs [122]-[123] of the 2018 decision) required in clause 27.3 that the employee not receive less under the annualised wage than under the modern award provisions. Clause 27.3 of the *Pharmacy Award* currently provides:

> "**27.3** An annualised salary must not result in an employee being paid less over a year (or, if the employment is terminated before a year is completed, over the period of that employment) than would have been the case if an annualised salary had not been agreed."

[38] The PGA did not explain in its submissions how clause 27.3 could be complied with without the calculation annually of a comparison between the remuneration an employee has received under the annualised wage arrangement and the remuneration the employee would have received under the normally-applicable provisions of the *Pharmacy Award* and without the employee then being paid any shortfall. Clause 27.3, like the equivalent provisions in other modern awards, prescribes the same outcome as the reconciliation provision in the proposed model clauses in the 2018 decision, but does not prescribe the means for achieving the outcome. In the absence of any alternative means of achieving the outcome being identified, a reconciliation provision does no more than make explicit what clause 27.3 in substance already requires for compliance.

[39] Accordingly we confirm our provisional conclusion in the 2018 decision that a reconciliation requirement must be a fundamental requirement of any annualised wage arrangement provision. While, as earlier stated, the requirement to conduct such a reconciliation may be more administratively burdensome than under existing provisions which do not contain such a requirement, it is nonetheless the case as ABI/NSWBC submitted that is remains less onerous than calculating wages weekly, fortnightly or monthly in accordance with the normal requirements.

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[40] We reject the submission of the HSU that reconciliations should be required on a quarterly basis. As explained in paragraph [105] of the 2018 decision, the implicit requirement in s 139(1)(f)(iii) is that employee be assessed over the course of a year.

[41] We also reject the submission of the Ai Group that there be no reconciliation requirement applicable upon a termination of employment at the initiative of the employee. That an employee chooses to resign his or her employment should not deprive the employee of the right not to be financially disadvantaged by entering into an annualised wage arrangement.

Record-keeping requirement

[42] As earlier set out, a number of employer submissions opposed the introduction of a requirement to keep a record of the hours worked by employees on annualised wage arrangements. However, none of these submissions explained how a reconciliation exercise, or the existing requirements that employees not receive less pay under an annualised wage arrangement than under the normal modern award provisions, could operate without a record of the hours worked by the employee. Nor was it contended, contrary to the conclusion stated in paragraphs [123] and [124] of the 2018 decision, that the *Fair Work Regulations* already prescribed a requirement to keep records of hours worked. Accordingly we maintain our conclusion that a record-keeping requirement is a necessary incident of the requirement to conduct an annual reconciliation.

[43] We note the NFF's submission that because employees under the *Pastoral Award* and the *Horticultural Award* often work unsupervised and in remote locations, there were special difficulties in keeping records of hours worked. However we do not understand why it would be less burdensome for employers to record only the numbers of hours worked and not starting and finishing times, since the employer would need to know the latter in order to be able to record the former. The NFF submission in this respect is therefore not accepted. However, we do accept the proposition that, for remote workers, there may be difficulty in having employees sign records of hours each pay period or roster cycle. Therefore for the *Pastoral Award* and the *Horticultural Award* we will modify the model provision to simply require a written acknowledgment of the record by the employee each pay cycle or roster period, which may be done remotely by electronic means.

Termination of annualised wage arrangements

[44] The submissions concerning the termination of annualised wage arrangements entered into by agreement were wildly divergent, particularly on the employer side. As set out above, some employers wanted annualised wage arrangements to be terminable on much shorter periods of notice, while others wanted them not to be terminable at all. On the union side, there was general support for shorter notice periods for termination. We are not persuaded that we should depart from the provisional view expressed in the 2018 decision and encapsulated in the proposed model clauses that annualised wage arrangements, where entered into by agreement, should be terminable at any time by agreement or on 12 months' notice. We consider that because entry into an annualised wage arrangement constitutes a major change in remuneration arrangements, there should be a substantial degree of stability in the maintenance of those arrangements. The capacity for a party unilaterally to opt out of an annualised wage arrangement at short notice would tend to de-stabilise such arrangements, and the lack of certainty this would engender would tend to make entry into such arrangements unattractive. From the perspective of employees' interests, if the protective mechanisms contained in the model clauses proposed in the 2018 decision are adopted, employees will not suffer any financial disadvantage during a lengthy notice period. We reject

however the submission advanced by ABI/NSWBC that annualised wage arrangements entered into by agreement should not be terminable at all. It offends basic principle that an agreement is incapable of termination by a party and, for the reasons explained in the 2018 decision, it is necessary to protect the legitimate interests of both employers and employees to allow a capacity for termination.

Specification of method of calculation of the annualised wage

[45] We are not persuaded to depart from the provisional view stated in the 2018 decision that the calculation method of any annualised wage should be specified in writing. This will serve to ensure that the quantum of the annualised wage to be introduced is the subject of some degree of mathematical analysis vis-à-vis the award entitlements it is intended to supplant, which will assist in ensuring that annualised wage arrangements which are likely to lead to the employee being financially disadvantaged will not be introduced. It will also make transparent to the employee the extent of any overtime, weekend and other hours that attract penalty rates under the relevant modern award that may on average have to be worked without additional remuneration under the annualised wage arrangement.

The proposed requirement for an outer limit on hours

[46] We are also not persuaded to depart from the view we expressed in the 2018 decision that annualised wage arrangements should specify an outer limit on the number of hours that would attract penalty rates under the relevant modern award that may be worked pursuant to the arrangement. An annualised arrangement pursuant to which an employee may be required to work an unlimited number of such hours per pay or roster cycle without additional remuneration is likely to lead to financial disadvantage to the employee and be oppressive. We emphasise, as we did in paragraph [129(6)] of the 2018 decision, that an outer limit of such hours is not intended to be the same as the average number of such hours upon which the calculation of the annualised wage is based. For example, where an annualised wage arrangement is intended to satisfy the entitlement to the payment of overtime penalty rates, the quantum of the annualised wage may be calculated on the basis of an average of five overtime hours per week, but the specified outer limit of overtime hours may be ten per week, thus allowing for reasonable fluctuations in the amount of overtime per week that may be covered by the payment of the annualised wage. Alternatively, an annualised wage arrangement may be calculated on the basis that an eight hour shift will be worked, on average, every weekend, but the outer limit may be twelve hours.

Requirement for employee consent

[47] The ASU's submission concerning a universal requirement for employee consent is largely repetitious of the case which it advanced at the hearing of this matter and which was rejected in the 2018 decision. We do not consider that any new matters were raised in this connection which would justify reconsideration of the conclusion stated in the 2018 decision. The AMWU's submission that a requirement for a majority of the workforce to agree to annualised wage arrangements be added to a requirement for individual agreement is also rejected. We do not consider that the views of persons in the workforce who may or may not be subject to annualised wage arrangements themselves are relevant as to whether any particular individual employee should enter into an annualised wage arrangement. We further consider that in the one award in which there is a requirement for majority agreement, namely the *Marine Towage Award*, this should be replaced by a requirement for individual agreement.

Requirement for a minimum pay increment

[48] In the 2018 decision, we identified that a requirement for a minimum percentage pay increment above the award base rate of pay might be one way of protecting employees from financial disadvantage under an annualised wage arrangement. Such a requirement is currently found in the annualised wage provisions in the *Restaurant Award* (25 per cent), the *Hospitality Award* for non-managerial staff (25 per cent) and the *Marine Towage Award* (40 per cent). Model Clause 2 and Model Clause 4 were constructed on the basis that there would be a requirement for such a minimum percentage pay increment. However no party expressed support for the extension of such a requirement to any other award and no party engaged with the question of what the quantum of such a pay increment might be. In those circumstances, we will not impose such a requirement in any award where it does not currently apply, and accordingly Model Clause 2 and Model Clause 4 will not be adopted for use beyond the *Restaurant Award*, the *Hospitality Award* and the *Marine Towage Award*.

Extension of standard annualised wage provisions to other awards

[49] No party supported the adoption of any of the model clauses proposed in the 2018 decision as standard provisions to be added to modern awards generally. Accordingly we do not propose to vary any modern award which does not currently contain an annualised wage arrangement to include any of the model clauses except those awards which were the subject of specific consideration in the 2018 decision, namely the *Pastoral Award*, the *Horticultural Award* and the *Health Professionals Award*. However, it will remain open for interested parties to apply for a specific modern award to be varied to include Model Clause 1 or Model Clause 3, as appropriate.

Applicability to part-time employment

[50] There were differing submissions received concerning the applicability of annualised wage arrangements to part-time employment. While some parties supported such arrangements being made applicable or made available to part-time employees, we do not consider that any workable, specific proposal to that end has been advanced. It is not possible to formulate any standard provision which might apply to part-time employees because of the wide divergence in part-time employment provisions as between different modern awards. The course we propose to take is to adopt standard annualised wage provisions for full-time employees, and then interested parties may if they wish make an application with respect to a specific modern award to vary the provision to extend its operation to part-time employees.

Other matters

[51] A range of other matters were raised in the submissions made by interested parties as summarised above. We have considered them but we are not persuaded to further depart from the provisional views we expressed in the 2018 decision.

Standard annualised wage arrangement clauses

[52] For the reasons stated above, we will not proceed with standard clauses in the form of the proposed Model Clause 2 and Model Clause 4. The specific provisions which will apply to the three awards which currently contain requirements for a minimum percentage increment to be added to the base award rate in any annualised wage arrangement (that is, the *Restaurant Award*, the *Hospitality Award* (with respect to employees other than managerial staff) and the *Marine Towage Award* are discussed later in this decision.

[53] We have determined that Model Clause 1, as set out in paragraph [130] of the 2018 decision, will, subject to some specified modifications for specific awards, become the standard annualised wage arrangements provision for those awards which currently contain an annualised wage arrangements provision and under which employees generally work relatively stable hours of work. We will proceed on the *prima facie* basis that this category of awards (Category 1) consists of those which currently do not require the agreement of the employee to enter into an annualised wage arrangement, namely:

- Banking, Finance and Insurance Award 2010
- Clerks - Private Sector Award 2010
- Contract Call Centres Award 2010
- Hydrocarbons Industry (Upstream) Award 2010
- Legal Services Award 2010
- Mining Industry Award 2010
- Oil Refining and Manufacturing Award 2010 (clerical employees only)
- Salt Industry Award 2010
- Telecommunications Services Award 2010
- Water Industry Award 2010
- Wool Storage, Sampling and Testing Award 2010

[54] Model Clause 1 sets out in paragraph (a) of subclause X.1 five classes of award entitlement for which an annualised wage may be paid in satisfaction thereof: minimum weekly wages, allowances, overtime penalty rates, weekend and other penalty rates, and annual leave loading. Where a modern award in Category 1 currently allows a wider range of award entitlements to be encompassed in an annualised wage arrangement, those award entitlements may be added to subclause X.1. In the case of the *Legal Services Award*, having regard to the conclusions stated in paragraph [140] of the 2018 decision, shift allowances will be added to the classes of award entitlements in subclause X.1.

[55] In addition, to the extent that any existing annualised wage arrangement provision is limited in its application to specified classifications of employees, such a limitation will be retained and Model Clause 1 will be modified as necessary.

[56] Model Clause 3, as set out in paragraph [132] of the 2018 decision, will become the standard annualised wage arrangements provision for those awards which currently contain an annualised wage arrangements provision and under which employees work highly variable hours or significant ordinary hours which attract penalty rates under the award, as well as for the *Pastoral Award* and the *Horticultural Award*. This will again be subject to specified modifications for specific awards. The awards in this category (Category 2) will, again on a *prima facie* basis, include the following awards (in addition to the *Pastoral Award* and the *Horticultural Award*):

- Broadcasting and Recorded Entertainment Award 2010
- Local Government Industry Award 2010
- Manufacturing and Associated Industries and Occupations Award 2010
- Oil Refining and Manufacturing Award 2010 (non-clerical employees)
- Pharmacy Industry Award 2010
- Rail Industry Award 2010

[57] Model Clause 3 will be the subject of the same modifications for individual awards in Category 2 as for those in Category 1 (see paragraphs [54] and [55] above). In addition, in respect of the *Pastoral Award* and the *Horticultural Award*, clause X.2(c) of Model Clause 3 will be modified to read:

"(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, or acknowledged as correct in writing (including by electronic means), each pay period or roster cycle."

[58] With respect to the awards currently listed on a *prima facie* basis in Category 1 and Category 2, we will provide interested parties with an opportunity to advance a case that any particular award should be placed in the opposite category. We emphasise however that the category in which an award has been placed will only be altered on the basis of a substantive case, supported by evidence, that the pattern of working hours of employees generally under the relevant award merits it being placed in the opposite category. Further, this opportunity will not apply in respect of the *Clerks Award*, the *Legal Services Award* or the *Contract Call Centres Award* which, based on our conclusions in paragraph [139] must fall within Category 1. In addition, based on our conclusions in paragraphs [136] to [138] of the 2018 decision, the *Pastoral Award* and the *Horticultural Award* will definitely remain in Category 2.

[59] With respect to the *Health Professionals Award*, we are prepared to vary that award to include an annualised wage arrangements provision that is applicable to managerial or supervisory employees only and is otherwise in the form of Model Clause 3. We will invite further submissions from interested parties as to whether we should proceed to take this course or otherwise, having regard to the conclusions stated in paragraph [141] of the 2018 decision, we should simply dismiss the Ai Group's application for an annualised wage arrangements provision to be added to this award.

[60] In relation to the *Restaurant Award*, the *Hospitality Award* and the *Marine Towage Award*, we consider that the following course should be taken:

(1) Model Clause 2 will apply to the *Hospitality Award* in respect of employees classified as managerial staff.

(2) Model Clause 4 (as set out in paragraph [133] of the 2018 decision) will apply to the *Restaurant Award*, the *Marine Towage Award* and the *Hospitality Award* in respect of non-managerial staff.

[61] Subclause X.1(a) of the respective model clauses will however be modified to contain the full range of award entitlements which may currently be encompassed in an annualised wage arrangement.

[62] Subject to the proper consideration of any further evidence and submissions concerning the categorisation of awards as discussed in paragraphs [53] and [56], the existing annualised wage arrangements in the 19 modern awards which currently contain them will be replaced by the specified model clauses in the manner discussed above, and in addition the specified model clause will be added to the *Pastoral Award* and the *Horticultural Award* and, subject to further submissions as discussed, the *Health Professionals Award*. For the reasons given in this decision and the 2018 decision, we consider that this course is necessary to ensure that annualised wage provisions comply with the conditions specified in s 139(1)(f). We also consider that the inclusion of annualised wage arrangements clauses in these forms is necessary to meet the modern awards objective in s 134(1). In reaching this conclusion, we have taken into account the matters specified in s 134(1)(a)-(h) in the following way (using the lettering for each paragraph in the subsection):

(a) To the extent that annualised wage arrangements may apply to the low paid, it is necessary for certainty that they cannot be worse off under an annualised wage arrangement than under the normally-applicable provisions of the modern award. This is a consideration which weighs significantly in favour of the adoption of the new standard provisions.

(b) This is a neutral consideration.

(c) We do not consider that the form of annualised wage arrangements provisions in a limited number of awards could have a discernible effect upon workforce participation, so this is a neutral consideration.

(d) We do not consider that annualised wage arrangement provisions affect work practices or the productive performance of work, so this is a neutral consideration.

(da) To the extent that current annualised wage provisions do not ensure that annualised wage arrangements which provide for an annualised wage to be paid in lieu of penalty rates for overtime, weekend work, work at unsocial hours or work on public holidays, or in lieu of shift allowances, do not disadvantage employees compared to remuneration payable under the relevant modern award, they may have the effect of allowing employees not to be provided the additional remuneration referred to in s 134(da). This will be rectified under the new standard provisions and accordingly this consideration weighs in favour of the adoption of the new provisions.

(e) This is a neutral consideration.

(f) The new provisions are likely to increase the regulatory burden insofar as they require the keeping of pay records and the conduct of an annual reconciliation exercise, and this may have some consequential effect on employment costs. However this is a necessary result of compliance with the requirements of s 139(1)(f)(iii). We do not consider that there will be any effect upon productivity and accordingly that is a neutral consideration.

(g) We consider that the new standard provisions will make clearer the precise obligations which employers are required to discharge in relation to annualised wage arrangements, and in that sense will be easier and simpler to understand. Otherwise we consider this to be a neutral obligation.

(h) We do not consider that any discernible macro-economic consequences will flow from the adoption of the new standard provisions.

[63] There may be a need for a transitional provision to apply to existing annualised wage arrangements upon the identified modern awards being varied to include the new standard provisions. We will invite further submissions in relation to this.

Next step

[64] Interested parties shall, within 28 days of the date of this decision, file:

(1) any evidence and submissions concerning whether any of the modern awards listed in paragraph [53] of this decision, other than the *Clerks Award*, the *Legal Services Award* or the *Contract Call Centres Award*, should be moved to Category 2, or whether any of the modern awards listed in paragraph [56] of this decision, not

including the *Pastoral Award* and the *Horticultural Award*, should be moved to Category 1;

(2) any submissions concerning whether the *Health Professionals Award* should be varied to include Model Clause 3 or whether the application of the Ai Group in respect of this award should be dismissed; and

(3) any submissions concerning the need for transitional provisions consequent upon the adoption of the standard annualised wage arrangement provisions.

VICE PRESIDENT

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