DECISION

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

4 yearly review of modern awards—*Professional Employees Award 2010*—Substantive claims

(AM2019/5)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER JOHNS

MELBOURNE, 22 APRIL 2020

4 yearly review of modern awards – award stage – group 4 awards – substantive issues – Professional Employees Award 2010

1. Introduction

[1] This decision deals with substantive claims by the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) and Australian Industry Group (Ai Group) to vary the *Professional Employees Award 2010* (the Professionals Award) as part of the 4 yearly review of modern awards (the Review).

[2] APESMA seek to vary clause 13 – Hours of work and Ai Group seek to vary clause 2 - Definitions.

[3] Correspondence and submissions were filed by:

- APESMA on:
  - 15 October 2018;
  - 15 July 2018;
  - 28 August 2018;
  - 2 October 2019;
  - 14 October 2019;
- Ai Group on:
  - 12 October 2018;
  - 30 September 2019;
- ABI on 30 October 2019;
- Jointly; Ai Group and APESMA on 14 May 2019; and
- Jointly; Ai Group and APESMA on 18 December 2019.

[4] The two claims are reflected in the draft variation determination set out at Attachment A to the joint correspondence from Ai Group and APESMA dated 18 December 2019. A copy of the draft variation determination is set out at **Attachment A** to this decision.

[5] The claims were the subject of an oral hearing on 13 December 2019. The transcript of that hearing is available here.

[6] Before turning to the claims, it is necessary to first say something about the Commission's task in the Review before turning to the submissions relating to the proposed variation.

2. The Review

[7] Section 156 of the *Fair Work Act 2009* (Cth) (the Act) deals with the conduct of the Review and s.156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards. In this context 'review' has its ordinary and natural meaning of 'survey, inspect, re-examine or look back upon'.[1] The discretion in s.156(2)(b)(i) to make determinations varying modern awards in a Review, is expressed in general, unqualified, terms.

[8] If a power to decide is conferred by a statute and the context (including the subject-matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion confined only by the subject matter, scope and purposes of the legislation will ordinarily be implied.[2] However, a number of provisions of the Act which are relevant to the Review operate to constrain the breadth of the discretion in s.156(2)(b)(i). In particular, the Review function is in Part 2-3 of the Act and hence involves the performance or exercise of the Commission's 'modern award powers' (see s.134(2)(a)). It follows that the 'modern awards objective' in s.134 applies to the Review.

[9] Section 138 (achieving the modern awards objective) and a range of other provisions of the Act are also relevant to the Review: s.3 (object of the Act); s.55 (interaction with the National Employment Standards (NES)); Part 2-2 (the NES); s.135 (special provisions relating to modern award minimum wages); Division 3 (terms of modern awards) and Division 6 (general provisions relating to modern award powers) of Part 2-3; s.284 (the minimum wages objective); s.577 (performance of functions etc by the Commission); s.578 (matters the Commission must take into account in performing functions etc), and Division 3 of Part 5-1 (conduct of matters before the Commission).

[10] The modern awards objective is in s.134 of the Act:

> SECTION 134 **THE MODERN AWARDS OBJECTIVE**
>
> *What is the modern awards objective?*
>
> 134(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:

[1] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [38].

[2] *O'Sullivan v Farrer* (1989) 168 CLR 210 at p. 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(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

(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.

This is the ***modern awards objective***.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

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).

[11] The modern awards objective is to '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 the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[12] The modern awards objective is very broadly expressed.[3] It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).[4] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[5]

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[3] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35].

[4] (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44].

[5] [2018] FWCFB 3500 at [21]-[24].

[13] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[6] No particular primacy is attached to any of the s.134 considerations[7] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[14] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[8] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[9] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[15] Further, the matters which may be taken into account are not confined to the s.134 considerations. As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*[10] (*Penalty Rates Review*):

> 'What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the" Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).'[11]

[16] Section 138 of the Act emphasises the importance of the modern awards objective:

> **'138 Achieving the modern awards objective**
>
> 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.'

[17] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant

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[6] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].

[7] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

[8] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106].

[9] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

[10] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161.

[11] Ibid at [48].

having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[12]

[18] In *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors) Decision* (the *Penalty Rates Decision*)[13] the Full Bench summarised the general propositions applying to the Commission's task in the Review, as follows:

> '1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.
>
> 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
>
> 3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
>
> 4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
>
> - the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);
> - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
> - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'[14]

[19] Where an interested party applies for a variation to a modern award as part of the 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 (Anglo American)*: as follows:[15]

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[12] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[13] [2017] FWCFB 1001.

[14] Ibid at [269].

[15] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123.

> '[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 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.
>
> [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.'

[20] 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.'[16]

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

3. The Claims

3.1 Clause 2 – Definitions and interpretation

[22] The Professionals Award covers, among others:

> 'employers throughout Australia principally engaged in the information technology industry, the quality auditing industry or telecommunications services industry and their employees who are covered by the classifications in Schedule B.' (See clause 4.2)

[23] Schedule B sets out the classification definitions, which include an information technology and telecommunications 'stream.' Clause 3.3 contains certain definitions relevant to the information technology and telecommunications stream, in particular:

- Experienced information technology employee; and
- Graduate information technology employee.

[24] Ai Group seeks to vary the Australian Computer Society (ACS) membership grade referred to in the definitions of Experienced information technology employee, Graduate information technology employee and Professional information technology duties in clause 2 – Definitions in clause 3 of the current award, as follows:

> **Experienced information technology employee** means a professional information technology employee with the undermentioned qualifications in any particular employment the adequate discharge of any portion of the duties of which employment requires:

[16] Ibid at [46].

(a) that they have graduated with a university degree, with a science or information technology major (three, four or five year course) and had four years' experience on professional information technology duties since graduating; or

(b) that they, not having so graduated, have sufficient qualifications and experience to be ~~eligible for admission as a member~~ a Certified Professional of the Australian Computer Society plus a further four years' experience on professional information technology duties.

Graduate information technology employee means a person who:

(a) holds a university degree with a science or information technology major (three, four or five year course) accredited by the Australian Computer Society at professional level; or

(b) has sufficient qualifications and experience to be ~~eligible for admission as a member~~ a Certified Professional of the Australian Computer Society.

professional information technology duties means duties carried out by a person in any particular employment the adequate discharge of any portion of which duties requires a person to:

(a) hold a university degree with a science or information technology major (three, four or five year course) accredited by the Australian Computer Society at professional level; or

(b) has sufficient qualifications and experience to be ~~eligible for admission as a member~~ a Certified Professional of the Australian Computer Society.

[25] As to the requirements to be met by the proponent of a substantive claim. Ai Group submits that its claim falls with the category of a 'self-evident' claim that can be determined with little formality, relying on the following observation of the Full Bench in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> 'The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.'[17]

[26] During the course of the hearing on 13 December 2019, we raised an issue in respect of the definitions of Experienced information technology employee, Experienced engineer and

[17] [2014] FWCFB 1788 at [23]

Experienced scientist contained in Clause 3 - Definitions and interpretation of the Award. The issue concerned the potential disconnect between these definitions and other provisions in the Award, in particular Schedule B - Classification Structure and Definitions.

[27] To address this issue the APESMA and Ai Group jointly proposed that clause B.1.7 be amended to include the words 'Experienced engineer, Experienced information technology employee and Experienced scientist'. It was submitted that this would 'add clarity to the interpretation of the Award and clarify the relationship between Clause 3 and Schedule B'.

[28] In addition, it was proposed, for the sake of consistency, to 'tidy up' clause B.1.7 to replace the words 'Professional scientist' with 'Qualified scientist'.

Consideration

[29] We agree with Ai Group's characterisation of the claim as 'self evident', insofar as it does not need to be supported by probative evidence.

[30] The proposed amendment is consistent with the following s.134 considerations:

- s.134(1)(f) – the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden - Increased clarity about the information technology professional classifications covered by the Award will reduce cost risks and the regulatory burden for businesses.

- s.134(1)(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 – The current lack of clarity about the information technology professional classifications covered by the Award is not conducive to the maintenance of a simple and easy to understand modern award system. Further, allowing award coverage to change simply because the ACS decides to re-label its membership grades is not consistent with the maintenance of a stable safety net.

[31] The other s.134 considerations not relevant to the claim.

[32] We are satisfied that the proposed amendment has merit and is necessary to achieve the modern awards objective.

[33] We will grant the claim and amend the Professional Employees Award accordingly.

3.2 Clause 18 – Hours of work

[34] Clause 18 of the current award provides as follows:

> **18. Ordinary hours of work and rostering**
>
> **18.1** For the purpose of the NES, ordinary hours of work under this award are 38 per week. An employee who by agreement with their employer is working a regular cycle (including shorter or longer hours) must not have ordinary hours of duty which exceed an average of 38 hours per week over the cycle.
>
> **18.2 Employers will compensate for:**

(a) time worked regularly in excess of ordinary hours of duty;

(b) time worked on call-backs;

(c) time spent standing by in readiness for a call-back;

(d) time spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or

(e) time worked on afternoon, night or weekend shifts.

18.3 Compensation may include:

(a) granting special additional leave;

(b) granting special additional remuneration;

(c) taking this factor into account in the fixation of annual remuneration; or

(d) granting a special allowance or loading.

Provided that, where relevant, such compensation or remuneration will include consideration of the penalty rate or equivalent and the conditions as applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed.

18.4 The compensation and/or remuneration will be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in this clause.

18.5 Transfers

Where an employee is transferred permanently from day work to shiftwork or from shiftwork to day work, such employee should receive at least one month's notice. However, the employer and the employee may agree on a lesser period of notice.

[35] The proposed variation is set out at Attachment A and is the outcome of what are described as 'extensive negotiations between APESMA and Ai Group'. The claim seeks to delete clause 18 and replace it with the following:

18. Ordinary hours of work and rostering

18.1 For the purpose of the NES, ordinary hours of work under this award are 38 per week.

18.2 An employee who by agreement with their employer is working a regular cycle (including shorter or longer hours) must not have ordinary hours of duty which exceed an average of 38 hours per week over a six-month cycle.

18.3 Employees classified at Level 1 and Level 2

(a) For employees classified at Level 1 and Level 2 in Schedule B and Schedule C, employers must compensate for:

(i) time required by the employer to be worked in excess of ordinary hours of duty;

(ii) time required by the employer to be worked on call-backs;

(iii) time required by the employer to be spent standing by in readiness for a call-back;

(iv) time required by the employer to be spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or

(v) time required by the employer to be worked on afternoon, night or weekend shifts or on public holidays.

(b) Compensation may include:

(i) granting time off on the basis of one hour of time off for each additional hour worked beyond the ordinary hours of work; Time off shall be taken at a time agreed upon between the employer and employee within 12 months, or paid out by the employer at the minimum award rate specified in clause 15.

(ii) granting special additional remuneration;

(iii) taking relevant factors in clause 18.3(a) into account in the fixation of an annual salary; or

(iv) granting a special allowance or loading.

(c) An employee shall be advised in writing by the employer of the method of compensation being used in respect of any of the matters specified in clause 18.3(a). If the employer is compensating the employee by a method identified in clause 18.3(b)(ii) or clause 18.3(b)(iv), the employer shall identify the amount of the special additional remuneration, special allowance or loading that is being paid.

(d) In circumstances where an employee is paid compensation in accordance with clause 18.3(a)(v) for work on afternoon, night or weekend shifts or on public holidays in an office or other establishment where the majority of employees are carrying out similar work in the same work environment and are entitled to loadings or penalties for such similar work in the same working environment under a different award, the employee's compensation shall not be less than the compensation paid to the majority of employees.

(e) The compensation in clause 18.3(b) must be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in this clause.

(f) If an employee is paid an annual salary in accordance with clause 18.3(b)(iii), the employer must each 12 months, or at the end of a cycle of averaging of the 38 hour week, or upon termination of employment, calculate the number of ordinary hours worked by the employee and any additional hours that the employee was required by the employer to work. If the salary that has been paid is less than the amount that the employee would have received if the employee was paid at the relevant minimum award rate in clause 15 for each ordinary hour and each additional hour that the employee was required by the employer to work, the employer shall pay the employee the amount of the shortfall within one month.

(g) The employer must keep a record of the ordinary hours of work and any additional hours that the employee is required by the employer to work. In addition, the employer must keep a record of the arrangements implemented in accordance with clause 18.3(b). The employer must make a copy of these records available for inspection and copying on request by the employee to whom the record relates.

18.4 Employees classified at Level 3, Level 4 and Level 5

(a) For employees classified at Level 3 and Level 4 in Schedule B, and at Level 3, Level 4 and Level 5 in Schedule C, employers must compensate for:

(i) time required by the employer to be worked regularly in excess of ordinary hours of duty;

(ii) time required by the employer to be worked on call-backs;

(iii) time required by the employer to be spent standing by in readiness for a call-back;

(iv) time required by the employer to be spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or

(v) time required by the employer to be worked on afternoon, night or weekend shifts.

(b) Compensation may include:

(i) granting special additional leave;

(ii) granting special additional remuneration;

(iii) taking relevant factors in clause 18.4(a) into account in the fixation of an annual salary;

(iv) granting a special allowance or loading.

18.5 Transfers

(a) Where an employee is transferred permanently from day work to shiftwork or from shiftwork to day work, such employee should receive at least one month's notice, unless the employer and the employee may agree on a lesser period of notice.

(b) Clause 18.5(a) is subject to the requirements of clause 9A -Consultation about changes to rosters or hours of work.

[36] APESMA summarised the main elements of the proposed variation as follows:

(a) To provide in clause 13.2 a definition of an averaging cycle for employees who by agreement with their employees work an average of 38 hours a week. The proposed variation provides for a six-month cycle.

(b) Level 1 – Graduate Professional and Level 2 – Experienced Professional

- To provide for greater protection in the form of an enforceable minimum standard for employees classified in Levels 1 & 2 in the award in respect of compensation for the working of additional/unsociable hours as defined in clause 13.3 as follows:

- 13.3 (a) defines the non-standard working arrangements for which there must be additional compensation.
- 13.3(b) defines the various methods of compensation.
- 13.3(b) (i) provides that where time off is granted it will be on the basis of "hour for hour".
- 13.3 (b) (c) provides for the employee to be advised in writing regarding the method of compensation used and the amounts identified.
- 13.3(d) provides that where shiftwork is worked, or work is carried out on public holidays that the compensation shall not be less than that applicable to the penalties and loadings that are paid to the majority of other employees performing similar work in a similar environment.
- 13.3(f) provides for an Annual Salary clause which stipulates that each 12 months; at the end of a cycle, or upon the termination of employment there must be a reconciliation process to ensure that the annual salary paid for all hours worked is not less than what is prescribed by Clause 14 – Minimum Wages.
- 13.3(g) provides that the employer must keep a record of the ordinary hours of work and additional hours and the arrangements in clause 13.3(b). Further the employee has the right to inspect and copy these records.

(c) Level 3 Professional and Level 4 Professional

- To provide for a separate provision for employees classified in Levels 3 and 4 of the Award. For these employees at the more senior levels in the classification structure the claim in respect of compensation/remuneration for the working of additional/unsociable hours is substantially the existing Award provision.

[37] APESMA submits that the proposed variations would introduce additional hours of work safeguards for employees classified at Level 1 and Level 2 under the Professionals Award, including:

- a requirement that an employee be advised of the method by which the employee will be remunerated for any additional hours or shiftwork that an employer requires the professional employee to work;
- additional record-keeping obligations;
- a periodic reconciliation requirement;
- more detailed time off in lieu provisions; and
- more detailed requirements in respect of certain professional employees who are working shift work and/or public holiday work in an office of other establishment where the majority of employees are carrying out similar work in the same work environment and are entitled to loadings or penalties for such work under a different award.

[38] The background to the proposed variation is set out in APESMA's submissions in reply dated 14 October 2019 (at [11]):

- in response to an issue identified by the Commission during the exposure draft process to provide a definition of an averaging cycle for employees who by agreement with their employees work an average of 38 hours a week; and

- to provide for greater protection in the form of an enforceable minimum standard for employees classified in Levels 1 & 2 in the award in respect of the compensation for the working of additional/unsociable hours.

[39] The first dot point is a reference to the following extract from the *Award Stage – Group 4 Decision*[18] of 21 March 2018:

> 'The Professional Employees Award and Exposure Draft allow an employee, by agreement with their employer, to average their ordinary hours of work over a regular cycle which may include shorter or longer hours.[19] In the exposure draft published on 3 November 2016, the Commission asked parties to confirm the maximum number of weeks in a cycle that the 38 ordinary hours per week may be averaged.
>
> Initially, APESMA[20] and AFEI[21] submitted that any proposal to specify a maximum number of weeks over which 38 hours may be averaged would be a substantive change. ABI[22] and Ai Group[23] opposed the introduction of any maximum number of weeks over which ordinary hours were averaged. APESMA proposed the following clause to address the Commission's concerns:[24]
>
> > 'For the purposes of this sub-clause 13.2, a cycle cannot be longer than 12 months.'
>
> Following the final conference, the interested parties[25] confirmed that they agreed to APESMA's proposal that a cycle cannot be longer than 12 months.[26]
>
> The Commission wrote to interested parties on 8 September 2017 to seek clarification about whether an average cycle was appropriate given the lack of overtime provisions.[27] In response, Ai Group submitted that the Professional Employees Award and its predecessors never contained overtime and TOIL provisions because employees typically receive an annual salary.[28]
>
> We agree with the initial submissions of APESMA and AFEI that the introduction of a maximum number of weeks would constitute a substantive change.
>
> We are also concerned that the proposed averaging of ordinary hours of work over a 12 month period is not a reasonable period of time over which to average ordinary hours, and would raise

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[18] [2018] FWCFB 1548

[19] Clause 18.2 Professional Employees Award; Clause 13.2 Professional Employees Exposure Draft

[20] APESMA submission, 22 December 2016

[21] AFEI submission, 18 January 2017

[22] ABI submission, 18 January 2017

[23] Ai Group submission, 22 February 2017

[24] APESMA submission, 19 July 2017

[25] Ai Group submission, 2 August 2017; ABI submission, 2 August 2017; AFEI submission, 20 July 2017

[26] APESMA submission, 19 July 2017

[27] FWC correspondence, 8 September 2017

[28] Ai Group correspondence, 17 September 2017

> practical issues with the reconciliation of the ordinary hours and any overtime worked including in situations where employment is terminated prior to a 12 month period.
>
> Along with any overtime entitlement that might be introduced, there would need to be consideration of the rate at which overtime hours would be paid, for example, at the ordinary rate of pay or a loaded rate. There would also need to be consideration given to whether time off may be granted instead of payment for overtime.
>
> The averaging of the ordinary hours of work clause has brought to our attention the issues of reconciling the average ordinary hours work over a cycle and the payment of overtime entitlements for hours worked in addition to ordinary hours. We note that under the Professional Employees Award, while there is provision that employees will be compensated for time worked regularly in excess of ordinary hours, there is no method of calculation of these 'additional hours in relation to remuneration, time off in lieu or penalty rates.
>
> This matter will be referred to a separately constituted Full Bench for further consideration and determination.'[29]

[40] Section 7 of the Ai group's submission traverses the history of the award regulation of technology - based professionals such as Professional Engineers, Professional Scientists, Information Technology and Telecommunications Professionals. The relevant history is also canvassed in APESMA's Outline of Submission at paragraphs 57-69.

[41] Ai Group submits that it was 'heavily involved in the development of the Professionals Award in the course of the Part 10A Award Modernisation Process'.

[42] During Stage 2 of the Award Modernisation Process, Ai Group and APESMA submitted a joint draft *Information Technology and Telecommunication Services Industries Professional Employees Award 2010* to the AIRC on 10 December 2008. The joint draft award included an agreed hours of work clause that was very similar to the clauses in the *Information Technology Industry (Professional Employees) Award 2001* and the *Telecommunications Industry (Professional Employees) Award 2002.*

[43] In its Stage 2 Award Modernisation Statement of 23 January 2009,[30] the Full Bench advised that it had decided to defer consideration of an award for information technology and telecommunication professionals until Stage 3: (emphasis added)

> 'We publish an exposure draft of a *Telecommunications Services Industry Award 2010* (Telecommunications Modern Award). The telecommunication services industry covers…
> The draft award covers all current award-covered employees apart from professional employees. The parties to the current award agree that the nature of professional employment in the sector makes it more appropriate that there be a separate award for professional employees. The employers proposed an information technology and telecommunications industry award confined to professional employees engaged in those industries. The Association of Professional Engineers, Scientists and Managers, Australia proposed an occupational award covering information technology and telecommunications professionals.
> We have decided to defer the consideration of awards covering such employees until Stage 3 of the award modernisation process. The nature of awards covering professional employees generally will be considered in Stage 3 and the alternative approaches can be considered in that broader context.

[29] [2018] FWCFB 1548 at [613] – [621]

[30] [2009] AIRCFB 50 at [87] – [89]

[44] During Stage 3 of the Award Modernisation Process, Ai Group and APESMA submitted a joint draft *Professional Engineers and Scientists - Private Sector - Award 2010* on 6 March 2009. Some elements of the hours of work clause in the joint draft were agreed and others were not, as highlighted below:

> **24. Ordinary hours of work and compensation for additional hours**
>
> 24.1 The ordinary hours of duty of an employee must not exceed 38 per week. (APESMA CLAUSE)
>
> 24.1 The ordinary hours of work of an employee should not exceed the ordinary hours of duty in the particular industry or sector of industry in which the employee is employed. (Ai GROUP CLAUSE)
>
> 24.2 Employers will compensate for time worked regularly in excess of ordinary hours of duty either by:
>
> (a) Granting other compensation such as special additional leave; or
>
> (b) Granting special additional remuneration; or
>
> (c) Taking this factor into account in the fixation of annual remuneration; or
>
> **APESMA CLAUSE**:
>
> (d) Payment at the same penalty rate and upon the same conditions as are applicable from time to time to the majority of employees employed in the particular establishment in which the employee is employed.

[45] The hours of work clause in the Exposure Draft of the Professionals Award, that was issued by the AIRC on 22 May 2009, was largely based on the clause in the joint Ai Group/APESMA draft *Information Technology and Telecommunication Services Industries Professional Employees Award 2010* that had been submitted to the AIRC during Stage 2. A notable exception was the underlined wording below that appears to be a modified version of clause 24.2(d) that APESMA was seeking for the proposed *Professional Engineers and Scientists – Private Sector – Award 2010*: (emphasis added)

> **1. Ordinary hours of work and rostering**
>
> **1.1** For the purpose of the NES, ordinary hours of work under this award are 38 per week. An employee who by agreement with their employer is working a regular cycle (including shorter or longer hours) must not have ordinary hours of duty which exceed an average of 38 hours per week over the cycle.
>
> **1.2** Employers will compensate for:
>
> **(a)** time worked regularly in excess of ordinary hours of day;
>
> **(b)** time worked on call backs;
>
> **(c)** time spent standing-by in readiness for a call back;
>
> **(d)** time spend carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or
>
> **(e)** time worked on afternoon, night or weekend shifts; either by
>
> **(i)** granting other compensation such as special additional leave; or
>
> **(ii)** granting special additional remuneration; or

(iii) taking this factor into account in the fixation of annual remuneration; or

(iv) granting a special allowance or loading.

Provided that, where relevant, such compensation or remuneration will include consideration of the penalty rate or equivalent and the conditions as applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed.

1.3 The compensation and/or remuneration will be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in this clause.

1.4 Transfers

Where an employee is transferred permanently from day work to shiftwork or from shiftwork to day work, such employee should receive at least one month's notice. However, the employer and the employee may agree on a lesser period of notice.

[46] At paragraphs 378 – 388 of Ai Group's submissions of 12 June 2009, the following points were made:

Clause 18 – Hours of work

378. Ai Group strongly opposes the hours of work clause in the exposure draft. This clause is far more prescriptive than the provisions of the existing major awards applicable to engineers, scientists, IT and telecommunications professionals.

379. As set out above, the major federal awards covering these types of professionals are essentially consent awards between Ai Group and APESMA and the longstanding consent position (which revolves around a flexible, non-prescriptive approach) should not be disturbed in the name of award modernisation.

380. The provision which Ai Group is most concerned about is the following paragraph of sub-clause 18.2:

"Provided that, where relevant, such compensation or remuneration will include consideration of the penalty rate or equivalent and the conditions as applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed.

381. This provision is totally inappropriate for an award covering professional employees. It is very common for professional employees to work in establishments where non-professional employees receive penalty rates. Such rates should have no bearing on the rates paid to professional employees.

382. The rates of pay applicable to professional employees (both award rates and over-award rates) take into account the nature of professional employment. Professional employees are very rarely paid penalty rates.

383. In setting remuneration for professional employees, employers take into account:

- Award minimum salaries;
- The specific duties and responsibilities of the role;
- The qualifications required of the employee; and

- Market conditions.

384. The responsibilities, duties, technical expertise and qualifications required of professional employees are different to the responsibilities, duties, expertise and qualifications of non-professional employees. These differences are reflected in the remuneration arrangements for these positions, including any additional or irregular hours worked.

385. Professional employees are typically paid an annual salary which compensates the employee for discharging the responsibilities and duties associated with the job. In discharging these duties professional employees are sometimes required to work irregular or additional hours beyond their ordinary hours.

386. In addition to the professional employees who are required by their employer to work reasonable additional hours, there are a very large number of professional employees who choose to work additional hours because of such factors as:

- Their motivation and work ethic;
- The satisfaction which they derive from their job;
- The enjoyment and recognition that they receive from their job;
- Their desire for career progression; and
- Their desire to perform at a high level and achieve work goals.

387. Far from being modern, the above paragraph of sub-clause 18.2 belongs in an era long gone. The provision is totally inconsistent with the nature of professional employment and the needs of contemporary workplaces.

388. If the inappropriate paragraph is removed, the rest of sub-clause 18.2 is largely similar to the hours of work clause in the Information Technology Industry (Professional Employees) Award and the Telecommunications Industry (Professional Employees) Award. These consent clauses have worked well in practice and have not operated unfairly for employees or employers.

[47] In its decision of 4 September 2009, the AIRC acknowledged Ai Group's concerns regarding clause 18.2 in the Exposure Draft, but highlighted that the provision was not prescriptive:

> 'An important change sought by AiGroup related to the way in which employers would consider a total remuneration package for employees having regard to patterns of work. We have retained the provision contained in the exposure draft. In our view this is not prescriptive but nonetheless alerts employers to the need to take into consideration the demands placed upon professional employees when fixing remuneration.' [31]

[48] Ai Group submits that the intent of the AIRC was to ensure that a significant degree of flexibility was retained, reflective of the pre-modern awards that had been applicable to the sector.

[31] [2009] AIRC 826 at [236].

[49] Following the making of the Professionals Award, APESMA sought transitional provisions to be included in the Award reflecting certain NAPSAs which provided for specified rates of pay during periods of overtime. In its decision,[32] rejecting APESMA's proposed transitional arrangements, the Full Bench said: (emphasis added)

> 'In relation to the *Professional Employees Award 2010* the Association of Professional Engineers, Scientists and Managers, Australia (APESMA), sought a number of additional transitional arrangements. First, it sought the continuation of some provisions specific to a named employer. We have generally not retained conditions applicable to specific employers, even on a transitional basis, as they rarely constitute part of the safety net. It would not be appropriate to make an exception in this case. Such matters are capable of being dealt with by agreement. Secondly, APESMA sought special transitional provisions related to overtime and public holiday penalty rates. We note that cll.18.3 and 18.4 of the *Professional Employees Award 2010* provide a system of compensation for work in excess of ordinary hours. APESMA seeks to preserve the terms of Notional Agreements Preserving State Awards (NAPSAs) which provide that hours worked in excess of ordinary hours attract penalty rates for a period of five years. This would be inconsistent with the terms of the modern award, as APESMA concedes. The modern award provision should be implemented. APESMA also sought to preserve until 31 December 2014 a vehicle allowance…'

[50] Ai Group contends that these developments again highlight the AIRC's recognition of the importance of the flexible, non-prescriptive provisions which are inherent in the hours of work clause in the Professionals Award. The Full Bench determined that the compensation provided for in clauses 18.3 and 18.4 of the Professionals Award provided an appropriate system for dealing with hours of work, including any additional hours.

[51] The relevance of past decisions, including those during the Award Modernisation process, was canvassed in the Penalty Rates Decision[33] at paragraph [269] where the Full Bench said:

> 'The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
>
> - The legislative context which pertained was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision;
>
> - The extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
>
> - The extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'

[52] In the present matter, APESMA contends that:

1. During the Award Modernisation proceedings no evidence was presented regarding the operation of the Hours of Work clauses that were applicable to employees covered by

[32] [2009] AIRCFB 943 at [20]

[33] [2017] FWCFB 1001

the relevant pre-reform awards.' Parties made assertions on a range of issues including the nature of professional employment. These assertions were not tested.

2. The current proceedings are the first occasion whereby an actual case including submissions, witness statements and survey evidence has been presented. The evidence covers the following:

- Hours of Work Survey (paragraphs 70-89) and the accompanying Witness Statement of Mr. Alex Crowther – APESMA Surveys Manager (Attachment C). The key results are summarised in paragraph 77 and include;
    - Different impact on the level of remuneration for working additional hours between Levels 1 & 2 and Levels 3 & 4.
    - The average professional works 45 hours per week.
    - 56% of professionals do not receive compensation for working additional hours.
    - 13.5% of professionals are paid below minimum award rate.
    - When all hours worked are calculated 28% at Level 1 and 19.4% at Level 2 are paid below the minimum award rate. If standard penalty rates are applied the underpayments would be greater.
    - 52.3% of professionals work alongside those who are paid for working additional hours.
    - When explicit compensation is paid to professionals for working additional hours, they are less likely to do so than those compensated through their annual salary.
    - High workloads and strong "cultural expectations" are key reasons why professionals work additional hours.
- Witness Statement – Michelle Anthony – APESMA Principal Legal Officer (Attachment D) Ms. Anthony's evidence covers the interaction between common law contracts of employment and the provisions of the PEA. Attached to the Witness Statement are a sample of redacted common law contracts of employment. As referenced in paragraph 95 it is claimed that existing Clause 13 – Hours of Work of the PEA *"allows an employer to pay a minimal amount for additional hours and not be in breach regardless of the number of additional hours worked".*
- As previously mentioned in this submission information on more advantageous provisions in other Modern Awards is also set out (paragraphs 98 – 108)

3. Due to the nature of the Award Modernisation proceedings and due to the lack of a detailed contested case being conducted, there were no detailed reasons in its Decision[34] as to why the Full Bench adopted the current provision.

4. The provisions in the Act pertaining to Annualised Salaries as set out in s.139(i)(f) are also relevant.

[53] For the reasons identified by APESMA we propose to afford very little weight to the AIRC decisions in respect of the Professionals Award referred to by Ai Group.

[54] Ai Group submitted that the draft award variations are the outcome of those extensive negotiations and 'are a package and significant and difficult concessions have been made by

[34] [2009] AIRC 826

each party on that basis'. Ai Group's position is encapsulated in the following extract from its submission of 30 September 2019 at paragraphs 82-83.

> 'Ai Group does not oppose the package of award amendments set out in Attachment A to APESMA's submission, but this position is based on the Commission's support for the whole package. Ai Group would strongly oppose APESMA's hours of work claim, if the package is disturbed in any way that imposes more restrictions, inflexibilities or costs upon employers.
>
> In the interests of natural justice, Ai Group seeks that the Commission give Ai Group the opportunity to file detailed evidence and make further detailed submissions if the package of award variations is not supported by the Commission and more inflexible or costly provisions are proposed.'

[55] Ai Group also submitted that common law set off arrangements are very common in employment contracts that apply to professional employees, including employees covered by the Professionals Award.

[56] Ai Group and APESMA agreed that changes to the hours of work clause in the Professionals Award must not invalidate or regulate common law "set off" arrangements for employees covered by the Award. The terms of the agreement reached on this matter are set out in the following paragraph 4 of APESMA's submission of 15 July 2019 as follows:

> '4. APESMA and Ai Group have also agreed that the award clauses do not seek to invalidate or regulate an annual salary arrangement that compensates for or "buys out" various identified award entitlements in accordance with the principles stated in *Australia and New Zealand Banking Group v Finance Sector Union of Australia* 111 IR 227 and *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* 240 FCR 578.'

[57] We also note that ABI submitted that it was 'broadly supportive' of the consent position reached by the parties, noting that:

> 'This support is based on the understanding that the Award's hours of work clause is not currently, and will not become, an annualised wage provision.'

Consideration

[58] We turn first to clause 18 of the current award (set out at [34] above).

[59] In its Outline of Submission APESMA identified several deficiencies with the current provision which it submits, fails to meet the modern awards objective. The key concerns are summarised as follows:

- Averaging of 38 Hours Over a Cycle – no definition of a cycle and the consequential issues of lack of prescribed compensation in Hours of Work clause for the working of additional hours.[35]

- No enforceable minimum standard for working additional/unsociable hours – including no provision for record keeping/reconciliation.[36]

[35] APESMA submission at paras. 44-49

[36] APESMA submission at paras. 50-56

- Employees covered by the award are disadvantaged when compared to other modern awards with more advantageous provisions, including modern awards covering professional/managerial employees and non-professional employees performing similar work alongside professional employees in a similar environment.[37]

[60] APESMA submits that the current provision is unenforceable and fails to meet the modern awards objective in that it fails to provide a fair and relevant safety net and, accordingly, changes are 'necessary' to achieve the modern awards objective.

[61] We agree with APESMA's assessment. In its current form clause 18 does not achieve the modern awards objective.

[62] Before turning to the proposed amendment we wish to comment on one aspect of the submissions before us.

[63] Ai Group's submission in relation to the 'package' of amendments proposed relies heavily on the fact that the amendments proposed are the outcome of 'extensive negotiations … between Ai Group and APESMA over several months'. Ai Group submits that:

> 'Both Ai Group and APESMA have a deep knowledge of the types of businesses and employees covered by the Professionals Award and the working arrangements in place within those businesses. Ai Group submits that the Commission should be very mindful of this when considering proposals that are the outcome of extensive discussions and negotiations between Ai Group and APESMA.
>
> While, of course, the Full Bench needs to ensure that any award variations are consistent with the modern awards objective, the main industrial parties are very well placed to assess the impact of particular variations on employers and employees.'

[64] While the position of interested parties – such as APESMA and Ai Group – in respect of a proposed variation to a modern award remains a relevant consideration, such views are accorded less weight than in the past. The nature of modern awards under the Act is quite different from the awards made under previous legislative regimes.[38] In times past awards were made in settlement of industrial disputes and the respondent parties to such awards were the parties to the relevant industrial dispute. Modern awards perform a very different function to that performed by awards of the past.

[65] Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, the purpose of modern awards, together with the National Employment Standards and national minimum wage orders, is to provide a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees (see ss.3(b) and 43(1)).

[66] Modern awards are essentially regulatory instruments which apply to, or cover, certain persons, organisations and entities (see ss.47 and 48), but these persons, organisations and entities are not 'respondents' to the modern award in the sense that there were named respondents to awards in the past. The nature of this shift is made clear by s.158 which sets out who may apply for the making of a determination making, varying or revoking a modern award.

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[37] APESMA submission at paras. 98-108

[38] *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [18]

Under previous legislative regimes the named respondents to a particular award would automatically have the requisite standing to make such applications; that is no longer the case.[39]

[67] A consequence of the shift in the nature and purpose of modern awards is that the weight to be given to the views of interested parties is, generally speaking, less now than it was previously.

[68] We also note that no evidence is advanced to support of Ai Group's assertion that the parties to the proposed package are 'very well placed to assess the impact of particular variations'. No indication is given as to the number of Ai Group members covered by the award; nor the number of employees covered by the award who are employed by those members. In our view the fact that Ai Group and APESMA had a role in the formulation of the predecessor instruments to the Professional Employees Award falls well short of making good the assertion made. In any event we must decide for ourselves whether the variations proposed have merit and are necessary to ensure that the award achieves the modern awards objective.

[69] We would also observe that the Commission is not required to make a decision in the terms applied for[40] and, in a Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578.

[70] We now turn to the characterisation of the proposed amendment.

[71] Ai Group stridently denied that the proposed hours of work term was an annualised wage arrangement within the meaning of s.139(1)(f), contending that:

> 'The hours of work clause in the Professionals Award has never been regarded as an annualised wage arrangement provision and, if varied in accordance with the draft variations in Attachment A to APESMA's submission of 15 July 2019, it would remain an hours of work provision and not an annualised wage arrangement provision.
>
> Annualised wage arrangement provisions are typically found in the wages clauses of awards, not in hours of work clauses.
>
> The amendments that APESMA has proposed to the hours of work clause of the Professionals Award, and which Ai Group is not objecting to, are not annualised wage arrangements.
>
> Employees covered by the Professionals Award are typically paid an annual salary – not an annualised wage.
>
> As stated in s.139(1)(f)(ii), annualised wage arrangements "provide an alternative to the separate payment of wages and other monetary entitlements". This is not what the hours of work clause in the Professionals Award does. The Award and its predecessors have never included specific overtime penalties, shift penalties or weekend penalties.
>
> The hours of work clause in the Professionals Award and the clauses in the predecessor pre-modern awards have never been characterised as, or considered to be, an annualised wage arrangement provision.

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[39] *The Australian Industry Group re Manufacturing and Associated Industries and Occupations Award 2012* [2012] FWA 2556

[40] See s.599 of the FW Act.

> The inclusion of some additional safeguards in the hours of work does not alter the character of the clause.'[41]

[72] APESMA characterised the proposed clause 18 as 'a composite or 'hybrid' provision. It covers a range of issues within one clause'. Further, during the course of oral argument Mr Butler, on behalf of APESMA, initially rejected the proposition that the proposed clause created a default overtime rate[42] but later described the proposed clause in the following terms:

> 'It's a very broad based overtime clause to cover employees, some of whom would work a traditional working week; others would work unsociable hours … and it's an attempts to built in rights independent of any rates of pay.'[43]

[73] The true character of the provision depends on its terms not on the label the parties have attached to it and whatever label the parties choose to attach to the proposed term cannot bind us.

[74] Despite Ai Group's assertion to the contrary it seems to us that various elements of the proposed term have many of the features of an annualised wage arrangement. The proposed term provides, relevantly, that:

- the working of additional hours (as defined in clause 18.3(a)) may be compensated by an annual salary;
- an annual salary must be reviewed annually 'to ensure that it is set at an appropriate level;
- if an employee is paid an annual salary the employer must each 12 months, or at the end of a cycle of averaging of the 38 hour week or upon termination of employment, conduct a reconciliation of the amount of addition hours worked and the compensation provided and pay the employee the amount of any shortfall.

[75] The reasons advanced by Ai Group in support of its contention that the proposed term is *not* an annualised wage arrangement within the meaning of s.139(1)(f) are wholly unconvincing. The fact that a term is sequested in an hours of work clause and described as an annual *salary* rather than an annual *wage* does not alter its true character. To borrow an expression from Gray J in *re Porter*:[44]

> '… the parties cannot create something that has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck.'[45]

[76] The correct characterisation of the proposed amendment is a necessary step in determining whether it is capable of being included in a modern award. Section 136(1) provides that:

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[41] Ai Group submission 30 September 2019 at paras. 69-75

[42] Transcript 13 December 2019 at [119]-[120]

[43] Ibid at [130]

[44] [1989] 34 IR 179

[45] Ibid at p 184

136 What can be included in modern awards

Terms that may or must be included

(1) A modern award must only include terms that are permitted or required by:

(a) Subdivision B (which deals with terms that may be included in modern awards); or

(b) Subdivision C (which deals with terms that must be included in modern awards); or

(c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or

(d) Part 2-2 (which deals with the National Employment Standards).

Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.

Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.

[77] While proposed clause 18.1 may be said to be permitted by s.136(1)(d) (and s.139(1)(c)) the jurisdictional basis for the rest of proposed clause is, on the submissions put, unclear. In short, if the proposed term is not a term dealing with overtime rates and annualised wage arrangements, then what is it?

[78] It seems to us that the proposed term inappropriately conflates terms dealing with ordinary hours, overtime, annualised wage arrangements and time off in lieu of overtime (TOIL).

[79] A question then arises is whether the proposed term is consistent with s.139(1)(f) which provides:

(1) A modern award may include terms about any of the following matters:

(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;

[80] The issue of annualised wage arrangements was one of the 'common issues' dealt with as part of the 4 yearly review of modern awards (AM2016/13). In a decision[46] published on 20 February 2018 the Annualised Wage Arrangements Full Bench stated eight conclusions concerning what is necessary for annualised wage arrangements provisions in modern awards to form part of a fair and relevant minimum safety net of terms and conditions, as required by s.134(1), as follows:

(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

[46] [2018] FWCFB 154

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.'

[81] The submissions put fail to address the above principles. It is evident that, in a number of respects, the proposed clause is not consistent with the above principles. First, the proposed clause 18.3, as we comprehend it, allows the employer to determine unilaterally (and presumably alter unilaterally) the additional compensation which is to be paid regardless of the variability in the number of hours worked from week to week and the extent to which hours on weekends or at other unsociable time are required to be worked. The submissions did not in this context address the fairness issue identified in the first of the above principles. As a corollary of this, there is no capacity for the employee to terminate the arrangement on notice if it proves contrary to the employee's interest (see the third principle above).

[82] Second, in respect of the means of compensation provided for in proposed clause 18.3(b)(ii) and (iv), none of the protective mechanisms identified in the fourth principle above are provided for: neither the method of calculation of nor the reasonable assumptions as to

working hours underpinning any 'special additional remuneration' or 'special allowance or loading' need be identified, there is no provision for an outer limit of overtime, weekend or unsociable hours that may be regarded as having been paid for by such additional payments, and there is no requirement for any form of annual reconciliation. The review requirement in proposed clause 18.3(e) is devoid of any specificity as to what the employer is actually obliged to do and does not protect the employee from financial disadvantage, similar to the provisions discussed at [121] of the Annualised Wage Arrangements decision.

[83] Third, as to any annual salary payable under proposed clause 18.3(b)(iii), there is likewise none of the protective mechanisms identified in the fourth principle above apart from the reconciliation requirement in proposed clause 18.3(f). However that requirement permits the reconciliation to be deferred until the termination of the employee's employment, which self-evidently means that the reconciliation may be less than annual and stretch over a large number of years. This is inconsistent with principles 4(C) and 7 above. As was explained in [105] of the Annualised Wage Arrangements decision, the requirement in s 139(1)(f)(iii) that an annualised wage arrangement include 'appropriate safeguards to ensure that individual employees are not disadvantaged' means that such an arrangement, to be permissible in a modern award, 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 annual salary facility in proposed clause 18.3(b)(iii) does not meet this requirement and is therefore not a permissible award term.

[84] Fourth, proposed clause 18.4, to the extent that it may be characterised as allowing for annualised wage arrangements, is simply not consistent with any of the eight principles identified in the Annualised Wage Arrangements decision.

[85] Further, there are at least four other deficiencies in the proposed clause:

1. As we have mentioned, the proposed clause inappropriately conflates terms dealing with ordinary hours, overtime, annual salary and time off in lieu of overtime (TOIL). These subject matters need to be dealt with separately and the parties need to justify any departure from the principles enunciated by the Annualised Wage Arrangements Full Bench.

2. Proposed clause 18.3(b) appears to provide TOIL as a means of compensating for additional hours worked beyond ordinary hours of work, at the election of the employer rather than by agreement. The proposed term is inconsistent with the model TOIL term determined as part of the 4 yearly review of modern awards.[47]

3. Proposed clause 18.3(f) provides that if an employee is paid an annual salary the employer must conduct a reconciliation of the amount of additional hours worked and the compensation provided and pay the employee the amount of any shortfall. Such a reconciliation must be conducted 'each 12 months, or at the end of a cycle of averaging of the 38 hour week or upon termination of employment'. Given that clause 18.2 prescribes a cycle of 6 months for averaging the 38 ordinary hours per week ,why does clause 18.3(f) permit a reconciliation 'each 12 months'?

[47] [2016] FWCFB 4570

4. Proposed clause 18.4 has some of the deficiencies of the current clause 18. It fails to provide a reconciliation mechanism or for any record to be kept of ordinary hours and additional hours worked. These deficiencies render the requirement for compensation in clause 18.4(a) practically unenforceable.

[86] In our view, the proposed clause lacks merit and we reject it.

[87] We propose to provide the parties an opportunity to rectify the deficiencies in their proposed award variation. APESMA and Ai Group will have until **4pm** on **Friday 3 July 2020** to file a revised proposed variation and submissions in support. If nothing is filed by the prescribed time, we will review the clause 18 and publish our *provisional* views as to its amendment.

PRESIDENT

Hearing

2019.
13 December.
Melbourne and Sydney.

Appearances

M. Butler, for the Association of Professional Engineers, Scientists and Managers Australia

S. Smith for the Australian Industry Group with H. Harrington

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ATTACHMENT A

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

4 yearly review of modern awards – Professional Employees Award 2010
(AM2019/5)

PRESIDENT ROSS
VICE PRESIDENT HATCHER
COMMISSIONER JOHNS

SYDNEY, ___ DECEMBER 2019

4 yearly review of modern awards – Professional Employees Award 2010 – substantive claims

A. Further to the decision [_____] issued by the Full Bench of the Fair Work Commission on _____ 2019, the above award is varied as follows:

1. In the definition of "**Experienced information technology employee**" in clause 3.3, delete paragraph (b) and replace with the following paragraph (b):

    (b) that they, not having so graduated, have sufficient qualifications and experience to be a Certified Professional of the Australian Computer Society plus a further four years' experience on professional information technology duties.

2. In the definition of "**Graduate information technology employee**" in clause 3.3, delete paragraph (b) and replace with the following paragraph (b):

    (b) has sufficient qualifications and experience to be a Certified Professional of the Australian Computer Society.

3. In the definition of "**Professional information technology duties**" in clause 3.3, delete paragraph (b) and replace with the following paragraph (b):

    (b) has sufficient qualifications and experience to be a Certified Professional of the Australian Computer Society.

4. In clause 3.4, delete the definition of "**Experienced scientist**" and replace with the following definition:

    Experienced scientist means a Professional scientist possessing the following qualifications and engaged in any particular employment, the adequate discharge of any portion of the duties of which, requires the possession of such qualifications.

The qualifications are:

(a) A degree or diploma and the following further experience in professional scientific duties obtained after their degree or diploma:

(i) when a graduate (four or five year course) – four years' experience;

(ii) when a graduate (three year course) – five years' experience, or

(b) that they possess qualifications acceptable to:

(i) the Royal Australian Chemical Institute for admission to the grade of Chartered Member; or

(ii) the Australian Institute of Physics for admission to the grade of Member (MAIP); or

(iii) the Australasian Institute of Mining and Metallurgy for admission to the grade of Member; or

(iv) the Australian Institute of Food Science and Technology for admission to the grade of Professional Member.

5. In clause 3.4, delete the Academic Schedule and replace with the following Academic Schedule:

Academic schedule

(a) A degree in science from an Australian, New Zealand or United Kingdom university or from an Australian tertiary educational institution.

(b) Academic qualifications acceptable to the Royal Australian Chemical Institute for admission to the grade of Graduate Chemist (MRACI), Early Career Chemist (MRACI)(CChem) or Member (MRACI).

(c) Academic qualifications acceptable to The Australian Institute of Physics for admission to the grade of Member (MAIP).

(d) Academic qualifications in metallurgy, metallurgical engineering or technology acceptable to either the Australasian Institute of Mining and Metallurgy for admission to the grade of Graduate Member, or the Institution of Materials, Minerals Mining (London) for admission to the grades of Professional Graduate Member or Associate Member.

(e) Academic qualifications acceptable to the Australian Institute of Agricultural Science and Technology for admission to the category of 1st Year Graduate Member, 2nd Year Graduate Member or Full Member.

(f) Academic qualifications acceptable to the Australian Institute of Food Science and Technology for admission to the grade of Graduate Member.

(g) Academic qualifications acceptable to a pharmacy board or council within the Commonwealth of Australia provided that the award will not apply to pharmacists employed in a retail pharmacy shop.

6. Delete clause 18 – Ordinary hours of work and rostering, and replace with the following clause 18:

18. Ordinary hours of work and rostering

18.1 For the purpose of the NES, ordinary hours of work under this award are 38 per week.

18.2 An employee who by agreement with their employer is working a regular cycle (including shorter or longer hours) must not have ordinary hours of duty which exceed an average of 38 hours per week over a six-month cycle.

18.3 Employees classified at Level 1 and Level 2

(a) For employees classified at Level 1 and Level 2 in Schedule B and Schedule C, employers must compensate for:

(i) time required by the employer to be worked in excess of ordinary hours of duty;

(ii) time required by the employer to be worked on call-backs;

(iii) time required by the employer to be spent standing by in readiness for a call-back;

(iv) time required by the employer to be spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or

(v) time required by the employer to be worked on afternoon, night or weekend shifts or on public holidays.

(b) Compensation may include:

(i) granting time off on the basis of one hour of time off for each additional hour worked beyond the ordinary hours of work; Time off shall be taken at a time agreed upon between the employer and employee within 12 months, or paid out by the employer at the minimum award rate specified in clause 15.

(ii) granting special additional remuneration;

(iii) taking relevant factors in clause 18.3(a) into account in the fixation of an annual salary; or

(iv) granting a special allowance or loading.

(c) An employee shall be advised in writing by the employer of the method of compensation being used in respect of any of the matters specified in clause 18.3(a). If the employer is compensating the employee by a method identified in clause 18.3(b)(ii) or clause 18.3(b)(iv), the employer shall identify the amount of the special additional remuneration, special allowance or loading that is being paid.

(d) In circumstances where an employee is paid compensation in accordance with clause 18.3(a)(v) for work on afternoon, night or weekend shifts or on public holidays in an office or other establishment where the majority of employees are carrying out similar work in the same work environment and are entitled to loadings or penalties for such similar work in the same working environment under a different award, the employee's compensation shall not be less than the compensation paid to the majority of employees.

(e) The compensation in clause 18.3(b) must be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in this clause.

(f) If an employee is paid an annual salary in accordance with clause 18.3(b)(iii), the employer must each 12 months, or at the end of a cycle of averaging of the 38 hour week, or upon termination of employment, calculate the number of ordinary hours worked by the employee and any additional hours that the employee was required by the employer to work. If the salary that has been paid is less than the amount that the employee would have received if the employee was paid at the relevant minimum award rate in clause 15 for each ordinary hour and each additional hour that the employee was required by the employer to work, the employer shall pay the employee the amount of the shortfall within one month.

(g) The employer must keep a record of the ordinary hours of work and any additional hours that the employee is required by the employer to work. In addition, the employer must keep a record of the arrangements implemented in accordance with clause 18.3(b). The employer must make a copy of these records available for inspection and copying on request by the employee to whom the record relates.

18.4 Employees classified at Level 3, Level 4 and Level 5

(a) For employees classified at Level 3 and Level 4 in Schedule B, and at Level 3, Level 4 and Level 5 in Schedule C, employers must compensate for:

(i) time required by the employer to be worked regularly in excess of ordinary hours of duty;

(ii) time required by the employer to be worked on call-backs;

(iii) time required by the employer to be spent standing by in readiness for a call-back;

(iv) time required by the employer to be spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or

(v) time required by the employer to be worked on afternoon, night or weekend shifts.

(b) Compensation may include:

(i) granting special additional leave;

(ii) granting special additional remuneration;

(iii) taking relevant factors in clause 18.4(a) into account in the fixation of an annual salary;

(iv) granting a special allowance or loading.

18.5 Transfers

(a) Where an employee is transferred permanently from day work to shiftwork or from shiftwork to day work, such employee should receive at least one month's notice, unless the employer and the employee may agree on a lesser period of notice.

(b) Clause 18.5(a) is subject to the requirements of clause 9A - Consultation about changes to rosters or hours of work.

7. In clause B.1.1, delete the words "Graduate professional engineer, Professional scientist and information technology employee" and replace with the words "Graduate engineer, Graduate information technology employee and Qualified scientist".

8. In clause B.1.7, delete the words "Experienced Professional" and replace with the words "Experienced engineer, Experienced information technology employee and Experienced scientist".

B. This determination come into effect on _____.

PRESIDENT

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