[2022] FWCFB 51

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, 7 APRIL 2022

Review of annualised salary provisions in modern awards – draft determinations.

Introduction

[1] This decision is concerned with the finalisation of two outstanding matters in the common issue proceeding concerning annualised wage arrangements conducted as part of the 4 yearly review of modern awards. The two matters were identified in the last decision we issued in this proceeding on 23 December 2019[1] (December 2019 decision). They are as follows (with award references updated to the awards in their current form):

(1) What should be the "outer limit" numbers of penalty rate hours and overtime hours prescribed in the annualised wage arrangements provisions to be placed in the *Hospitality Industry (General) Award 2020* (Hospitality Award), the *Restaurant Industry Award 2020* (Restaurant Award) and the *Marine Towage Award 2020* (Marine Towage Award).[2]

(2) Whether annualised wage arrangements under the *Health Professionals and Support Services Award 2020* (Health Professionals Award) should be available in respect of employees classified as Health Professional Levels 1-3?[3]

[2] We deal with each of these matters in turn below. We also deal with some incidental matters concerning the drafting of the annualised wage arrangements provisions to be inserted into the four identified awards.

"Outer limits" of penalty rate hours and overtime hours in the Hospitality Award, the Restaurant Award and the Marine Towage Award

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[1] [2019] FWCFB 8583

[2] Ibid at [2]

[3] Ibid at [9]-[10]

Background

[3] In an initial decision published on 20 February 2018[4] (2018 decision), we reviewed the annualised wage arrangement provisions which exist in 19 modern awards. In that decision, we identified three of the 19 awards, being the Hospitality Award, the Restaurant Award and the Marine Towage Award, as containing a requirement for any annualised wage arrangement that the salary be a minimum percentage amount above the relevant base award weekly wage. We said:

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

[4] We went on in this decision to state a number of conclusions concerning what was necessary for an annualised wage arrangements provision to form part of the fair and relevant minimum safety net of terms and conditions required by s 134(1) of the *Fair Work Act 2009* (FW Act).[5] Eight requirements in this respect were identified, including the following:

> "…(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:
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> > (A) A requirement for a minimum increment above the base rate of pay prescribed in the annualised wages clause itself.
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> > (B) A requirement that the arrangement identify the way the annualised wage is calculated.

[4] [2018] FWCFB 154

[5] Ibid at [129]

(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, <u>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</u>.
…"
(underlining added)

[5] We then expressed the provisional view there were four model annualised wage arrangements clauses which would give effect to these conclusions.[6] In respect of awards which covered employees who may work highly variable hours or significant ordinary hours which attract penalty rates under the award, we set out two variants of a possible model clause.[7] The second of these (Model Clause 4) contained a requirement of the type referred to in paragraph [3] above, that is a requirement for any agreed annualised wage amount to be a prescribed percentage above the minimum weekly wage in the award.[8] We invited further submissions concerning the provisional views expressed in the decision, including whether the proposed model clauses should be adopted and whether any existing annualised wage arrangement provision in a modern award should be varied to reflect any of the proposed model terms.[9] We then dealt with some issues raised by various parties about the existing annualised wage arrangement provisions in specific awards. In relation to the Hospitality Award and the Restaurant Award, we dealt with issues raised by United Voice (as it then was, now the United Workers' Union or UWU) as follows:

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

[6] After the receipt of submissions in response to our provisional views, we published a further decision on 27 February 2019[10] (February 2019 decision). In that decision, we

[6] Ibid at [130]

[7] Ibid at [132] – [133]

[8] Ibid

[9] Ibid at [134], [143] and [148]

[10] [2019] FWCFB 1289

determined a number of questions of general principle raised by the parties' submissions. In relation to the Hospitality Award, the Restaurant Award and the Marine Towage Award, we determined that Model Clause 2 would apply to the Hospitality Award in respect of employees classified as managerial staff and that Model Clause 4 would apply to the Restaurant Award, the Marine Towage Award, and the Hospitality Award in respect of non-managerial staff.[11]

[7] Our next decision was published on 4 July 2019[12] (July 2019 decision). In that decision, we confirmed our conclusion that Model Clause 4 would be added to the Restaurant Award, the Marine Towage Award, and the Hospitality Award in respect of non-managerial staff.[13] We also amended Model Clause 4 to provide as follows "subject to modification of clause X.1(a) in each case to contain the full range of award entitlements which may currently be encompassed in an annualised wage arrangement and to retain the currently-specified percentage uplift":[14]

> **X. Annualised wage arrangements**
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> X.1 *Annualised wage instead of award provisions*
>
> (a) An employer and a full-time employee may enter into a written agreement for the employee to be paid an annualised wage of an amount that is at least X% more than the minimum weekly wage prescribed in clause X multiplied by 52 for the work being performed in satisfaction, subject to clause X.1(b), of any or all of the following provisions of the award:
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> > (i) clause X – Minimum weekly wages;
> > (ii) clause X – Allowances;
> > (iii) clause X – Overtime penalty rates
> > (iv) clause X – Weekend and other penalty rates; and
> > (iv) clause X – Annual leave loading
>
> (b) The employee must not be required by the employer in any pay period or roster cycle to work in excess of:
>
> > (i) an average of X ordinary hours which would attract a penalty rate under this provisions of this award per week; or
> >
> > (ii) an average of X overtime hours per week
>
> without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).
>
> (c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified in clause X.1(b), such hours will not be covered by the

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[11] Ibid at [60]

[12] [2019] FWCFB 4368

[13] Ibid at [32]

[14] Ibid

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

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

(i) the annualised wage that is payable;

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

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

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

(f) The agreement may be terminated:

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

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

X.2 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or if the employment ceases or the agreement terminates earlier over such lesser period as has been worked).

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

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

> This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.
>
> X.3 *Base rate of pay for employees on annualised wage arrangements*
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> For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under this clause comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause X - Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

[8] However, we reconsidered the view expressed in the February 2019 decision that Model Clause 2 should be placed in the Hospitality Award in respect of managerial staff, and invited further submissions concerning, among other things, whether the existing "*Salaries absorption (Managerial Staff (Hotels))*" provision in the Hospitality Award was concerned with annualised wage arrangements as contemplated by s 139(1)(f) of the FW Act.[15]

[9] In the December 2019 decision, we identified the outstanding issue concerning the insertion of Model Clause 4 in the Restaurant Award, the Marine Towage Award, and the Hospitality Award in respect of non-managerial staff as follows:

> "[2] In respect of clause 27.1 of the *Hospitality Industry (General) Award 2010* (*Hospitality Award*) applying to non-managerial employees, as well as clause 13.2 of the *Marine Towage Award* and clause 28 of the *Restaurant Industry Award*, we determined in paragraph [32] of the July 2019 decision that the existing provisions should be replaced with model clause 4. We have not yet received submissions concerning the "outer limit" numbers of hours that should apply in subclause X.1(b)(i) and (ii) with respect to these awards. In respect of the *Hospitality Award* and the *Restaurant Industry Award*, where there is a pay uplift of 25%, we have provisionally decided that the outer limit of ordinary-time penalty rate hours under clause X.1(b)(i) shall be an average of 16 over the pay period or roster, and the outer limit of overtime hours under clause X.1(b)(ii) shall be an average of 10 over the pay period. In the *Marine Towage Award*, where the required pay uplift is 40%, the respective figures shall be 20 and 15. These provisional conclusions are reflected in the draft determinations for these awards."

[10] In relation to managerial staff under the Hospitality Award, we determined that the existing provision was not an annualised wage arrangements provision at all and therefore determined not to vary it, contrary to the earlier view expressed.[16] We invited further submissions from interested parties concerning the issue identified in paragraph [2] of the December 2019 decision. Draft determinations consistent with the provisional views expressed in relation to the Hospitality Award, the Restaurant Award and the Marine Towage Awards were published in conjunction with the December 2019 decision, and interested parties were also invited to file submissions in relation to the terms of these.[17]

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[15] Ibid at [33]-[35]

[16] [2019] FWCFB 8583 at [3]-[5]

[17] Ibid at [8]

[11] Submissions were subsequently received in early 2020 from the Australian Hotels Association (AHA), the UWU, the Australian Industry Group (Ai Group), Accommodation Australia (AA), Restaurant and Catering Australia (RCA), Australian Business Industrial and the NSW Business Chamber (ABI), and the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU).

[12] The proceeding then fell into desuetude for some time as events were overtaken by the Covid-19 pandemic. On 9 February 2022, directions were made to allow interested parties to file further submissions in response to the December 2019 decision to address any changed circumstances since the previous submissions were received in 2020. Further submissions were filed by the AHA, the UWU and the Ai Group.

AHA Submissions

[13] The AHA's submissions concerned the Hospitality Award and the Restaurant Award. In its submissions filed on 7 February 2020, the AHA submitted that, contrary to the provisional view expressed in the December 2019 decision, the outer limit of overtime hours should be in the range of 12-17 hours in both awards (instead of 10), and the outer limit of penalty rate hours should be 32 instead of 16.

[14] In relation to overtime hours, the AHA noted that the outer limit should take into account the other safeguards built into the proposed annualised wage arrangement provisions – in particular, the minimum of 25% wage uplift, the requirement to specify in writing the annualised wage, and the reconciliation and rectification process. It also submitted that a requirement to pay additional amounts for exceeding an outer limit without getting the benefit of, or accounting for, periods when the employee works less than what the annualised wage arrangement is based on, will unfairly impact industries such as hospitality and restaurants which experience a high degree of trading fluctuations and/or seasonality, and is at odds with the concept of an *annual* salary or wage. In relation to overtime, an outer limit of 12-17 hours would accommodate, for example, a fixed roster of five x 10 hour days during peak trading periods or seasons without requiring additional payments and allowing for some fluctuation.

[15] As to penalty rate hours, the AHA submitted that the 16-hour limit proposed in the December 2019 decision was too low and would make annualised wage arrangements unworkable because:

- in relation to the Hospitality Award, penalty rates applied between 12.00am-7.00am and 7.00pm-12.00am on weekdays as well as for 24 hours on Saturdays and Sundays, and for varying lengths of time on Public Holidays;

- under both the Hospitality Award and the Restaurant Award, peak trading periods occur during penalty rate hours;

- the proposed outer limit can be reached by working two shifts over a weekend and does not take into account seasonality or the occurrence of public holidays or clusters of public holidays;

- an employee could exceed a 16-hour limit during the Monday-Friday penalty rate periods and would thus require additional payments to be made notwithstanding that the minimum uplift of 25% is sufficient to cover all late night and early morning penalties;

- if an employee works one or more public holidays during a pay period and exceeds the penalty rate outer limit but not the overtime limit, the employer will have to pay the full public holiday rate of 225% on top of the salary, which includes the ordinary rate component (100%), rather than the difference between the ordinary rate and the public holiday rate (125%).

[16] The AHA submitted that a limit of 32 hours would allow for a combination of weekend, evening/morning and public holiday work as well as reasonable fluctuations throughout the annualised wage arrangement period.

[17] In relation to the draft determination for the Hospitality Award, the AHA identified a number of drafting defects, including the apparent omission of annual leave loading as an entitlement that could be absorbed into salary for managerial staff, and also submitted that the capacity for an employer to elect to pay an employee on an annualised wage arrangement monthly should be retained.

[18] In relation to the Restaurant Award, the AHA submitted that the list of entitlements able to be comprehended in annualised wage arrangements should be modified, including to encompass all allowances. It also maintained its submissions, which had been advanced earlier in the proceeding, that compliance with the new annualised wage arrangement provisions in respect of any existing annualised wage arrangement should not be required until the first anniversary of the existing arrangement falling on or after the date commencement of the new provision.

[19] In its further submissions filed on 23 February 2022, the AHA maintained its earlier submission concerning appropriate outer limits for overtime and penalty rate hours, but submitted that the overall detrimental impact of the Covid-19 pandemic justified an appropriate implementation date of 6-12 months from the date of decision. The AHA also identified further technical drafting changes which were now required to the draft determinations as a result of the making of the 2020 versions of the awards.

UWU submissions

[20] In submissions dated 7 February 2020, the UWU submitted that it supported the inclusion of Model Clause 4 in the Hospitality Award and the Restaurant Award, and agreed with the provisional view in the December 2019 decision that the outer limit of overtime hours in each award should be 10, but that the limit of penalty rate hours should be increased to 22 hours. In its submissions, it pointed to some matters of factual context, including the following:

- the hospitality sector has the highest proportion of employees working weekends (60 percent), compared with 27.5 percent across all industries;

- annualised wage arrangements clauses are likely to apply to chefs or more senior "front of house" staff who can be expected to work a large proportion of unsocial hours and rostered and unrostered overtime;

- both awards: contain limitations on the rostering of permanent full-time employees that require days off to avoid the payment of overtime; provide that ordinary hours can be rostered at any hour of the week subject to payment of the relevant penalty rates; provide for the absorption of evening and weekend penalty rates into overtime penalty rates so that only the higher penalty rate is payable; and allow for the averaging of overtime over a roster cycle of up to 4 weeks; and

- there has been significant abuse of the current annualised salary provisions in the hospitality industry, as confirmed by various enforcement actions taken by the Fair Work Ombudsman.

[21] The UWU submitted that annualised wage arrangements are intrinsically problematic in the sectors covered by the Hospitality Award and the Restaurant Award principally due to the prevalence of unsocial hours of work, the variability of hours of work and apparent entrenched non-compliance with award standards by some employers. It also submitted that while, ideally, the pattern of work under an annualised wage arrangement should not consistently require the payment of "overs", an occasional requirement that "overs" be paid is not an indication that the proposed clauses are unworkable. The UWU submitted that such payment places some incentive on employers not to over-utilise employees for unsocial hours and to ensure the arrangement is set at an appropriate amount.

[22] In respect of the outer limit for overtime, the UWU submitted that the proposed limit of 10 hours is generous from the perspective of the employer and should not be varied, since it allows an average 48-hour week over a 4-week roster cycle. The UWU submitted that the clause should provide that the limit is for 10 overtime hours per week *in excess of ordinary hours*, since this would avoid difficulties with the arbitrary allocation of overtime to penalty rate hours or disputes concerning whether any particular hour is a penalty rate hour or an overtime hour. This would mean that, in a 4-week roster, the 153rd hour worked and all other subsequent hours are overtime, which would be advantageous to the employer.

[23] In relation to penalty rate hours, the UWU submitted that there was merit in increasing the outer limit provided that penalty rate hours clearly included morning and evening penalty rate hours in both awards (which it considered to be ambiguous in the draft determinations). It submitted that a limit of 16 hours would only allow an employee in an annualised wage arrangement to work 8-hour shifts on both Saturday and Sunday with no penalties payable during the week and that setting the outer limit at a slightly higher number than 16 will avoid or diminish the payment of "overs" within a pay cycle. However, it submitted, setting the number too high would cause the employee's hours to be more unsocial and, if the number is set on a basis to entirely avoid the payment of "overs", then this will simply defer the payment of wages to the reconciliation process.

[24] The UWU's submissions contained a model roster of a chef who works a 48-hour week over a 4-week roster cycle, with split shifts each day and with Saturday and Sunday being rostered days of work. If this roster was worked by a chef either under the Hospitality Award

or the Restaurant Award, there would be 81 penalty rate hours and 40 overtime hours across the roster cycle. Importantly, under the UWU's model, it would require an uplift of over 65 percent upon ordinary wages in order to pay for this roster across the entire year and to avoid a reconciliation payment at the end of the year. On this basis, the UWU submitted, the threshold percentage figure in the clause should be increased to 40% rather than the current 25%.

[25] The UWU also submitted that:

- the draft determinations should be varied to better identify the penalty provisions of the two awards which would be the subject of the outer limit on penalty rate hours; and

- the new provisions should commence on 1 July 2020, and existing arrangements should not be maintained.

[26] In submissions filed on 22 February 2022, the UWU maintained its earlier position on the basis that there had been no factor or change in circumstances since its previous submissions on 7 February 2020. In further submissions filed on 2 March 2022 in response to the AHA's submissions of 23 February 2022, the UWU opposed the AHA's proposal that the operative date of variations be at least six months after the variations are made and submitted that the variations should become operative from the date of the first full pay period that starts on or after the date the variations are made. The negative impact of the Covid-19 pandemic on the hospitality and restaurant industries was not, it was submitted, a reason to further delay changes which are intended to ensure that the two awards meet the modern awards objective.

Ai Group submissions

[27] The Ai Group filed submissions on 31 January 2020 in which it addressed both the substantive and drafting issues in respect of the Hospitality Award and the Restaurant Award. In relation to the substantive issues, the Ai Group submitted that the proposed 16-hour outer limit on penalty rate hours and the proposed 10-hour outer limit on overtime hours had no discernible rational basis. The Ai Group further submitted that it was imperative that the outer limits not be set so low as to render the annualised wage arrangements provisions unworkable. In the context of the Hospitality Award and the Restaurant Award, it submitted, this was a particularly important issue having regard to the significant number of ordinary hours that are likely to be performed at unsociable hours and which attract evening or weekend penalty rates. The Ai Group submitted that a 16-hour outer limit on the average ordinary hours which would attract a penalty rate per week would effectively preclude the useful application of the provision to employees rostered to work more than two eight-hour days per week on penalty rates. Moreover, for employees working two eight-hour days for each of Saturday or Sunday, an employer would always need to pay the additional penalty rate each time a public holiday is worked if a weekly pay or roster period is implemented. In addition, it was submitted, the incentive for employers to pay an annualised salary over the minimum 25% increment would be diminished by an outer limit on penalty hours and overtime hours which was too low and required additional payments to be made over the annual salary. The Ai Group proposed that scope be afforded for increases in the outer limits where an annualised salary above the 25% increment is paid.

[28] The Ai Group's submissions identified some drafting deficiencies in the draft determination for the Hospitality Award, including an unintended removal of the capacity to pay non-managerial employees on an annualised salary on a monthly basis. The Ai Group also submitted that the draft clause did not accommodate the full range of award entitlements which may currently be encompassed in an existing annualised wage arrangement. In respect of the Restaurant Award, the Ai Group submitted that the draft determination did not provide for an annualised wage arrangement to encompass all allowances.

[29] In further submissions filed on 2 March 2022, the Ai Group maintained the position stated in its previous submissions, but agreed that there was merit in the Commission acceding to the AHA's request that an appropriate implementation date be between 6-12 months from the date of decision.

RCA submissions

[30] The RCA, in submissions filed on 30 January 2020, said that it did not support the outer limits proposed in the December 2019 decision in respect of the Restaurant Award because it failed to take into consideration the financial and operational requirements of employers which operated on Sundays and/or public holidays. It said that, according to the *Restaurant & Catering Industry Association Benchmark Report 2019* (Report), 57 percent of employers indicated that they opened on Sundays as well as public holidays, and submitted that adoption of such a low outer limit for penalty rate hours as that proposed would make it difficult for employers to operate on Sundays and public holidays and might lead to more restricted hours of operation. It submitted that, in the Report, employers had cited reduced penalty rates on public holidays and Sundays as key changes which would make the most difference to operating their businesses moving forward effectively, and that surcharges to cover the costs of penalty rates were not commercially or operationally viable.

[31] In respect of the outer limit for overtime hours, the RCA submitted that this was also too low since it would be difficult for employers to achieve service quality within a 10-hour limit and would leave employers with little choice but to limit any overtime performed by staff to save costs and would cause small business employers to work longer hours themselves. The RCA therefore sought that the outer limits be increased, but advanced no specific proposal for this to occur.

AA submissions

[32] In submissions filed on 10 February 2020, AA submitted that the outer limit amounts provisionally determined for the Hospitality Award are not appropriate for the accommodation sector and that it is a "*near impossible task*" to set the limits in a way that appropriately balances the needs of all stakeholders in the sector, including small to medium enterprises. Accordingly, it was submitted, the outer limit amounts should not be fixed and instead should be the subject of agreement between the employer and employee. AA submitted that:

- because employees may work highly variable hours over the course of a year, with weekend and overtime work required at peak periods but less so at other times, the effect of outer limit requirements is that the employer may be required to make top-up payments even though the employee, over the course of the year, is not disadvantaged;

- a requirement to make top-up payments would make employers less likely to accommodate requests for annualised wage arrangements due to increased costs, which may in turn lead to greater turnover of or difficulty in retaining staff in regional areas;

- if the Commission was not minded to change the proposed outer limit provisions in circumstances where the minimum 25 percent increment is paid, then alternatively a mechanism should be included whereby the outer limits are to be agreed in circumstances where the employer agrees to pay an amount in excess of the 25 percent increment;

- the inability to expand the outer limit amounts where an employer agrees to pay an employee in excess of the minimum 25 percent increment is counterintuitive and operates as a disincentive for employers to pay in excess of the minimum increment; and

- the penalty rate hours which are subject to an outer limit should not include the Monday-Friday evening and early morning loadings, since there are many employees in the accommodation industry who mainly work these hours.

[33] In relation to the draft determination for the Hospitality Award, AA supported the Ai Group's submissions concerning the removal of the capacity to pay employees on a monthly basis and the limitation on award-derived monetary benefits that may be satisfied by an annualised wage arrangement. It also proposed other drafting changes to the determination.

ABI submissions

[34] ABI's submissions filed on 12 March 2020 were concerned with the Hospitality Award only. ABI submitted that the outer limits proposed in the December 2019 decision did not reflect the conditions of the hospitality industry, in which penalty rate hours are regularly worked and the peak periods are outside the standard span of hours as well as on weekends and public holidays. It submitted that an annualised wage arrangements clause within the Hospitality Award would need to provide an outer limit high enough that it would not be routinely exceeded and, given that a requirement to separately pay for above outer limit hours would negate the administrative benefit (if not actually increase the burden) of entering into an annualised wage arrangement, setting the outer limit too low would serve as a strong disincentive to the use of such arrangements under the Hospitality Award. In respect of penalty rate hours, the 16-hour limit would be significantly diminished by routine early morning and/or late night work, and where a venue operated on weekends, the outer limit would be routinely breached. Likewise, ABI submitted, a 10-hour overtime limit, which would allow for a range of 38-48 hours per week for salaried employees, does not accommodate what is reasonably required of such an employee in the hospitality industry. Accordingly, ABI endorsed the outer limits proposed by the AHA.

[35] ABI also submitted that the weekday loadings for evening and nights/early mornings were significantly different in character from Saturday, Sunday, public holiday and overtime penalties, and should not be included in the penalty rate hours the subject of an outer limit. Otherwise, it submitted, an employee is in many cases likely to use up all of their permitted

hours under the annualised wage arrangement on low penalty evening work before an overtime shift or weekend shift (which attracts material penalties) is even worked, which would make it difficult to properly set an aggregate salary for an employee that works a mix of weekdays and weekends.

CFMMEU submissions

[36] The CFMMEU was the only party to make submissions concerning the Marine Towage Award. In submissions dated 31 January 2020, the CFMMEU submitted that the outer limit of 20 penalty rate hours proposed in the December 2019 decision was too high, and should instead be set at 16 hours. The CFMMEU submitted that the only circumstance under the Marine Towage Award when an employee is entitled to a penalty rate is when they are required to perform work continuously in excess of 16 hours, in which case the prescribed rate is 200% of the employee's minimum hourly rate. The CFMMEU submitted that:

- the proposed penalty rate outer limit requires the employee to be either working continuously for 20 hours on one occasion during a week or working in excess of 16 hours on more than one occasion in a week;

- for the classification of Rating and General Purpose Rating their minimum weekly rate (as at the date of the submission) is $820.20 in a 35 hour week. If they work 20 hours on 1 day and 15 hours for the rest of the week then they would be entitled to $1,288.65 or 157% of their weekly rate before applying the overtime provisions;

- the fewest number of hours that can be worked to attract a penalty rate is 16 on one day with the remaining 19 hours of the week being paid the ordinary rate. In this scenario the employee would be entitled to $1,194.53 or 146% of their weekly rate before applying the overtime provisions; and

- given 16 is the fewest number of hours that can be worked to attract a penalty rate, and it results in a weekly entitlement in excess of 140% of the weekly rate before applying the overtime provisions, the penalty rate outer limit should be set at 16 hours.

Consideration – Hospitality Award and Restaurant Award

[37] The purpose of the "outer limits" concept developed in the 2018 decision was not to regulate the rostering of an employee the subject of an annualised wage arrangement in a way which would require the regular payment of what the UWU characterised as "overs" payments, but to ensure that annualised wage arrangements are not exploited such that employees in particular roster periods are being required to work extreme amounts of unsociable or additional hours. We accept the point, articulated in varying ways in the submissions of all parties, that in considering what might amount to exploitative use of an annualised wage arrangement, we need to take into account the non-contentious premise that the industries covered by the Hospitality Award and the Restaurant Award involve peak periods of work during unsociable hours, particularly during evenings, weekends and public holidays.

[38] In respect of penalty rate hours, the starting point must necessarily be to identify when penalty rates and other additional payments apply in respect of each award. In the Hospitality

Award, clause 29.2 provides for the following penalty rates and additional payments (referable to the ordinary hourly rate) for full-time and part-time employees:

(1)	Monday to Friday – 7.00pm to midnight:	100% plus $2.37 per hour or part thereof
(2)	Monday to Friday – midnight to 7.00am:	100% plus $3.55 per hour or part thereof
(3)	Saturday:	125%
(4)	Sunday	150%
(5)	Public holiday:	225%

[39] In the Restaurant Award, clause 24.2 provides for the following penalty rates and additional payments (referable to the minimum hourly rate) for full-time and part-time employees:

(1)	Monday to Friday – 10.00pm to midnight:	100% plus $2.37 per hour or part thereof
(2)	Monday to Friday – midnight to 6.00am:	100% plus $3.55 per hour or part thereof
(3)	Saturday:	125%
(4)	Sunday	150%
(5)	Public holiday:	225%

[40] The 16-hour outer limit for penalty rate hours (averaged over a roster cycle which may, under either award, be up to 4 weeks) proposed in the December 2019 decision was largely based on the limited scope for the accommodation of penalty rate and overtime hours if the annualised wage arrangement only uplifted the minimum award rate by the minimum 25 percent currently permitted. The criticism of this proposal in the submissions may, for the most part, be reduced to two interrelated propositions:

(1) The prevalence of penalty rate hours in the Monday-Friday period applicable during the normal hours of operation of hospitality establishments and restaurants will effectively "eat up" the penalty rate limit and thereby unrealistically restrict the capacity to roster employees on weekends and public holidays.

(2) The 16-hour limit would only allow two 8-hour shifts to be rostered on each Saturday and Sunday, so that if this was done, it would not allow hours to be rostered on any public holiday which might fall within the roster period, and would also prevent any penalty rate hours being rostered Monday-Friday.

[41] Subject to one observation which we make later, we accept the reasonableness of these two propositions. The question is then how they may be addressed.

[42] In respect of weekday penalties, it may be seen that they fall into two categories: evening work (7.00pm to midnight in the Hospitality Award and 10.00pm to midnight in the Restaurant Award) and early morning work (midnight to 7.00am in the Hospitality Award and midnight to 6.00am in the Restaurant Award). Although both categories involve the disability of working at unsociable hours, the latter category of work, which for the most part requires the working of "graveyard" hours clearly has a significantly higher level of disability than the former category which (particularly in the case of the Hospitality Award) requires working during the normal evening operating hours of the employer's businesses. The UWU submitted, consistent with the evidence earlier received in this matter and without contradiction from any other party, that full-time employees on annualised wage arrangements under these two awards are most likely to be chefs and more senior "front of house" staff. These employees might reasonably expect that evening work would form part of their normal working hours such that it cannot be said to be exploitative for them to normally be required to work such hours, but the same cannot be said of early morning work.

[43] As earlier set out, AA and ABI proposed (among other things) that the weekday penalty rates be exempted from the penalty rate hours outer limit. We consider that, rather than trying to make an assessment as to what outer limit number would be necessary to reasonably accommodate weekday penalty rate hours, the first difficulty identified in paragraph [40] above would be better addressed by adopting, in part, the proposal advanced by AA and ABI so as to exclude from the operation of the penalty rate hours outer limit any hours worked from 7.00pm to midnight in the case of the Hospitality Award and any hours worked from 10.00pm to midnight in the case of the Restaurant Award. This conclusion does not mean, of course, that employees on annualised wage arrangements under these awards would lose the financial benefit of the penalty rates for such work, since the reconciliation mechanism in Model Clause 4 would otherwise ensure that an employee does not receive less remuneration under an annualised wage arrangement than they otherwise would under the relevant award.

[44] In respect of the second difficulty identified in paragraph [40], we accept that some accommodation should be made for the working of public holidays. A reasonable adjustment to our provisional view in the December 2019 decision would be to increase the outer limit for penalty rate hours from 16 to 18 hours average per week. Across a 4-week roster cycle, this would allow an employee to be rostered for 8 ordinary hours on each Saturday and Sunday during the cycle and also for one public holiday.

[45] In relation to the outer limit for overtime, the provisional view in the December 2019 decision that this should be an average of 10 hours allows, on average, for a 48-hour week to be worked across a 4-week roster cycle. This involves the working of a significant amount of overtime, and little of substance has been put before us to suggest that this will inhibit the practical operation of annualised wage arrangements. However, for more abundant caution, we will increase the outer limit to 12 hours in order to ensure that peak periods may be accommodated.

[46] It needs to be made clear, however, that if an employee on an annualised wage arrangement is required to work at or near these outer limits over the course of a year, the minimum payment uplift of 25 percent will be nowhere near enough to properly compensate the employee. The operation of the reconciliation mechanism will require the employer to make a significant payment to the employee to cover the shortfall unless the payment uplift is much

higher than 25 percent. This is demonstrated by the modelling undertaken by the UWU, which is not challenged by any party, and shows that an uplift upon the minimum weekly wage of over 65 percent is necessary to cover an average 48-hour week with rostered evening and weekend work. Thus, our adjustment to the outer limits should not be understood as an endorsement of the proposition that the minimum 25 percent uplift will necessarily, or even likely, be sufficient to properly compensate employees with work patterns that are typical for full-time employees under the Hospitality Award or the Restaurant Award. We note the submission made by the UWU that the minimum percentage should be increased, but we consider that we are too far down the road in the conduct of the review of annualised wage arrangements to entertain such a proposition at this stage. It is of course open for the UWU to make a separate application for such a change to be made if the new arrangements prove to provide inadequate protection for employees.

[47] In relation to the major drafting issues raised by the parties in respect of the draft determination for the Hospitality Award and the Restaurant Award:

- the capacity of the employer to pay wages monthly pursuant to an annualised wage arrangement under the Hospitality Award has been maintained in clause 23.1 of the 2020 version of the award, and this will not be altered ;

- the references in clauses X.1(b) and (c) to "*pay period*" will be removed, so that the outer limits will be applicable across the roster cycle only;

- the absorption of the annual leaving loading into salaries for managerial staff under the Hospitality Award is be maintained in clause 25.2(g), and this will not be altered;

- annual leave loading and allowances will be included in the list of entitlements able to be incorporated by agreement into an annualised wage arrangement under the Hospitality Award, since this is already permitted under this award;

- we will not alter the entitlements specified in the draft determination for the Restaurant Award as able to be comprehended in an annualised wage arrangement, since the Restaurant Award is currently more restricted in this respect than the Hospitality Award; and

- the overtime outer limits will be calculated by reference to those hours worked in excess of ordinary hours, as proposed by the UWU.

[48] Other minor drafting changes will be made to the determinations to correct errors and to adjust clause numbering in line with the 2020 versions of the two awards.

[49] The operative date of the variations will be 1 September 2022. This will give employers and employees a reasonable opportunity to adjust any existing annualised wage arrangements so as to meet the requirements of the new provisions.

Consideration – Marine Towage Award

[50] As the CFMMEU has submitted, the only situation under the Marine Towage Award where a penalty rate may be payable in respect of ordinary hours is where the employer requires the employee to perform work continuously in excess of 16 hours in the limited circumstances prescribed by clause 12.3(b). Where that occurs, clause 19.2 provides for payment as follows:

> **19.2 Penalty rates—extended hours**
>
> Subject to any agreement under clause 14.2, an employee who is required to perform work in excess of 16 hours, in accordance with clause 12.3(b), must be paid for such work at **200%** of the employee's minimum hourly rate.

[51] The CFMMEU's submissions appear to proceed on the premise that the penalty rate in clause 19.2 is payable for the whole day's work, not just for that part of the day's work which exceeds 16 hours. That is debatable, but we do not propose to determine that issue of interpretation here. Even if the CFMMEU's interpretation is correct, it does not justify the outer limit for penalty rate hours being set at 16 rather than 20, as proposed by the CFMMEU for the following reasons:

(1) A 16-hour limit upon penalty rate hours would, on the CFMMEU's approach, mean that there could never be any penalty rate hours worked at all. The penalty rate provided for in clause 19.2 is only payable if more than 16 hours are worked continuously, but if clause 19.2 renders *all* hours worked in that circumstance as penalty rate hours, then clause 12.3(b) would have no work to do, because working in excess of 16 penalty rate hours would not be permitted.

(2) In the alternative to (1), the CFMMEU's submission does not take into account that under clause 19.1(a) of the Marine Towage Award, all hours worked outside the span of hours prescribed in clause 12.2 are overtime. Unless there is an agreement under clause 12.2(b) with a majority of employees at a particular port to alter the span of hours, clause 12.2(a) operates to apply a span of hours of 7.00am to 5.00pm - i.e. a 10-hour span. Thus, if an employee works for more than 16 hours, only the first 10 hours will be penalty rate hours, and the remaining hours will be overtime (noting that clause 19.3(b) provides that if penalty rates are payable under both clauses 19.1 and 19.2, the higher amount will be paid). These overtime hours will not count for the purpose of the penalty hours limit.

(3) The fact that hours worked in a given week may, if an annualised wage arrangement was not in place, require wages to be paid under the award in excess of the minimum "uplift" of 40% for an annualised wage arrangement prescribed by clause 14.2(c), does not mean that the outer limits need to prevent this from ever happening. Annualised wage arrangements are intended to operate in respect of the hours worked across the entire year, and the wage paid does not have to align with the hours worked in every single week. As earlier explained, the purpose of the outer limit provisions is to prevent the exploitative use of annualised wage arrangements. And, in any event, the 40 percent uplift

> prescribed by clause 14.2(c) is only a minimum, so that agreement can be reached for a higher rate of annualised wage than this if it is necessary to cover the hours which are likely to be worked.

[52] Accordingly, we do not propose to depart from the provisional view stated in the December 2019 decision concerning the outer limits of penalty rate hours and overtime hours to be prescribed in the Marine Towage Award. The award will be varied consistent with the provisional view effective from 9 May 2022.

Annualised wage arrangements under the Health Professionals Award

Background

[53] In the 2018 decision, we considered a draft determination filed by the Ai Group to vary the Health Professionals Award to insert a provision that gave employers the option to pay employees an annualised salary in respect of particular provisions in the Award. The Ai Group's proposed provision also provided for any annualised salary to be reviewed by the employer "at least annually" and what the base rate of any employee receiving an annualised salary would be. The Ai Group proposed that employees in the classifications of Support Services Employee Levels 8 and 9, and all levels of Health Professional employees should have access to this annualised wage arrangement provision.[18]

[54] The Ai Group's claim was supported by the Chiropractors' Association Australia (CAA), except that the CAA did not consider that any annualised salary provision should be restricted to particular classifications.[19] United Voice, the Health Services Union (HSU) and the Australian Services Union (ASU) opposed the claim.[20]

[55] We were not satisfied that the Health Professionals Award should be varied to include the annualised salary provision proposed by the Ai Group. We said:

> "[141]… Having regard to our earlier general conclusions, we do not consider that the proposed provision complies with the requirement in s 139(1)(f)(iii) or meets the modern awards objective for the following reasons:
>
> > (1) The employees to be covered by the proposed provision work, as submitted by United Voice, complex rosters covering unsociable hours. As a result, shift loadings and penalty rate payments constitute a significant element of their overall remuneration. Because the interests of the employee would be so critically affected by the introduction of an annualised wage arrangement, we consider that fairness would require the agreement of the employee.
> >
> > (2) The provision does not require the annualised wage to be transparently constructed on the basis of the award entitlements to shift allowances and penalty rates and reasonable assumptions about the number and pattern of working

[18] [2018] FWCFB 154 at [56]

[19] Ibid at [59]

[20] Ibid at [60] – [63]

hours. Nor does it provide for any safeguards if working hours diverge significantly from any such assumptions.

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

[56] As set out above, in the 2018 decision we also expressed the provisional view that there were four model annualised wage arrangements clauses which could give effect to the conclusions we reached in that decision.[21] In relation to the Health Professionals Award, we invited the Ai Group, United Voice and other interested parties to file submissions considering whether Model Clause 3 or Model Clause 4 should be introduced in respect of classes of employees included in the Ai Group's claim.[22]

[57] After receiving submissions in response to our provisional view regarding the Health Professionals Award, we handed down the February 2019 decision.[23] The CAA submitted that Model Clauses 3 and 4 would not be suitable for chiropractic employers, and that it saw no reason why part-time employees should not have access to any annualised wage arrangement.[24] The HSU continued to oppose the introduction of an annualised wage arrangements provision in the Health Professionals Award, but in the alternative submitted that modifications should be made to Model Clause 3 or 4 if either was added to the Health Professionals Award, and that any provision should only apply to employees classified as Health Professional Level 4 under the award because only they could be described as managerial and supervisory level employees.[25] The Ai Group opposed the introduction of either Model Clause 3 or Model Clause 4 into the Health Professionals Award.[26]

[58] In the February 2019 decision we concluded that we were prepared to vary the Health Professionals Award to include an annualised wage arrangements provision that would apply to managerial or supervisory employees only and was otherwise in the form of Model Clause 3. We invited interested parties to provide further submissions as to whether we should take this proposed course or in the alternative, whether we should dismiss the Ai Group's application for an annualised wage arrangements provision to be added to the award.[27]

[59] In our next decision, the July 2019 decision, we concluded that Model Clause 3 should be added to the Health Professionals Award, applying only to supervisory and managerial employees within the classifications of Support Services Employee Levels 8 and 9 and all the Health Professional classifications.[28] This was consistent with the provisional view we expressed at paragraph [142] of the February 2018 decision, and paragraph [59] of the February 2019 decision, although we did not identify specific classifications of employees to whom the annualised wage arrangements clause would apply in those decisions, and instead referred to managerial and supervisory level employees generally. We did not accept the HSU's

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[21] Ibid at [129] – [130]

[22] Ibid at [142]

[23] [2019] FWCFB 1289

[24] Ibid at [3]

[25] Ibid at [4]

[26] Ibid at [31]

[27] Ibid at [59]

[28] [2019] FWCFB 4368 at [29] – [30]

submission that the provision should only apply to employees classified at Health Professional Level 4.[29]

[60] In the December 2019 decision we published a schedule of draft determinations arising from the awards we considered in the July 2019 decision.[30] However, we did not publish a draft determination for the Health Professionals Award because we considered that some confusion had arisen in respect of the classifications of employees that would be able to access the proposed annualised wage arrangements clause. We explained this as follows (footnotes omitted):

> "[9] … In respect of [the Health Professionals Award], we expressed the conclusion in the July 2019 decision that Model Clause 3 should be added to this award on the basis that it be applicable to the classifications of Support Services employee Levels 8 and 9 and Health Professional Levels 1-4. This confirmed the provisional views expressed in paragraph [142] of our decision of 20 February 2018 (February 2018 decision) and paragraph [59] of our decision of 27 February 2019 (February 2019 decision) that managerial and supervisory-level employees under the Health Professionals Award should have access to an appropriate annualised wage arrangements provision. However, in a submission dated 1 August 2019, the Health Services' Union (HSU) contended that Health Professional Levels 1-3 do not in fact perform managerial or supervisory duties. The HSU submitted that, consistent with the February 2018 decision and the February 2019 decision, the new annualised wage arrangements provision should only apply to the classifications of Support Services employee Levels 8 and 9 and Health Professional Level 4.
>
> [10] It is apparent that there is a disjuncture between the reasoning in the February 2018 decision and the February 2019 decision on the one hand and the conclusion stated in the July 2019 decision on the other hand. We note that the Ai Group, which originally applied for the addition of an annualised wage arrangements provision to the Health Professionals Award, submitted on 10 April 2019 (at [32]) that '…Model Clause 3, with the minor amendments proposed in section 2 of this submission, should be inserted into the Health Professionals Award for managerial and supervisory employees'. However in a subsequent submission in response to the HSU submissions referred to above, the Ai Group pointed to paragraph [142] of the February 2018 decision, in which we invited further submissions about whether model clauses 3 or 4 should apply 'in relation to the classes of employees encompassed by the Ai Group's claim', which included Health Professional Levels 1-3…"

[61] To address this, we deferred the publication of a draft determination containing any annualised wage arrangements provision until further submissions could be provided by the parties. We asked that these submissions address whether the classifications of Health Professional Levels 1-3 perform managerial or supervisory duties and whether there is any other rationale for an annualised wage arrangements provision to apply to these classifications.[31]

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[29] Ibid at [30].

[30] [2019] FWCFB 8583

[31] Ibid at [10]

[62] Submissions were received in early 2020 from the Ai Group and the HSU. However, as with the awards identified earlier in this decision, the proceedings with respect to the Health Professionals Award were overtaken by the Covid-19 pandemic. On 23 February 2022, directions were made to allow any party wishing to file further written submissions addressing the matters in paragraphs [9] – [10] of the December 2019 decision, and any changed circumstances since any previous submissions were filed to do so. Further submissions were filed by the Ai Group on 16 March 2022 and the HSU on 18 March 2022.

Ai Group submissions

[63] In its submission filed on 16 March 2022, the Ai Group confirmed that it would continue to rely on paragraphs [71]-[95] of its submission provided on 31 January 2020 in response to the December 2019 decision, and did not consider that there were any changed circumstances since those submissions were filed which would justify a variation to the approach it proposed therein.

[64] In its 31 January 2020 submissions, the Ai Group noted that its initial proposal to include an annualised wage arrangements provision in the Health Professionals Award did not intend to limit the application of the provision only to employees with managerial or supervisory responsibilities. Instead, the Ai Group submitted that the professional nature of the roles performed by employees classified as Health Professional employees under the award was sufficient to support the application of any annualised wage arrangements provision. In particular, the Ai Group submitted that it agrees with paragraph [30] of the July 2019 decision that Model Clause 3 should apply to all Health Professional classifications as well as Support Services Employees Levels 8 and 9.

[65] The Ai Group further submitted that the Commission's reference to "managerial and supervisory employees" in the 2018 decision was a reference to employees in the Support Services stream, and that the Commission did not in fact intend to narrow the application of any annualised wage arrangements provision further from the Ai Group's original submission in relation to such a clause.

[66] Although the Ai Group did not consider that managerial or supervisory duties should be a benchmark for determining the application of an annualised wage arrangement provision, it made the following submissions in relation to whether employees in the classifications of Health Professional Levels 1-3 perform managerial or supervisory duties:

- The description of a Health Professional Level 2 contained in the Health Professionals Award contemplates that employees at this classification "*may be required to contribute to the supervision of discipline specific students*".

- On this basis, the Ai Group submitted it could be assumed that employees in the Health Professional Level 3 classification would have at least the same degree of managerial and supervisory capacity as a Level 2 employee, but noted that performing this type of work was not directly referenced in the classification description in the award. The Ai Group submitted that this managerial and supervisory function could be assumed on the basis of the following components of the classification definition in clause A.2.3(b)(v) –(vii) of the award:

> "• *may be accountable for allocation and/or expenditure of resources and ensuring targets are met and is responsible for ensuring optimal budget outcomes for their customers and communities;*
>
> • *may be responsible for providing regular feedback and appraisals for senior staff to improve health outcomes for customers and for maintaining a performance management system; and*
>
> • *is responsible for providing support for the efficient, cost effective and timely delivery of services*."

- Employees classified as Health Professional Levels 2 or 3 exercise a high level of independence in their day to day work which supports the extension of any annualised wage arrangements provision to them.

- The Ai Group submitted that a Health Professional Level 1 employee is unlikely to have any managerial or supervisory responsibilities. However, the Ai Group reiterated that the engagement of these employees in a professional capacity should be sufficient to persuade us to extend the application of any annualised wage arrangements provision in the Health Professionals Award to these employees.

HSU submissions

[67] In submissions filed on 18 March 2022 the HSU sought to rely on its previous submissions provided on 19 March 2018, 27 March 2019, 1 August 2019 and 23 February 2020, and stated that it did not have any further information or evidence to add since the February 2020 submissions were filed.

[68] In its 19 March 2018 submissions the HSU stated that it did not consider that it was appropriate to include any annualised wage arrangement in the Health Professionals Award at all. In the alternative, should the Commission come to a different view, the HSU submitted that it was opposed to any provision being applied to all levels of employees in the Health Professional classifications as suggested by the Ai Group. In this regard, it was the HSU's submission that employees classified as Health Professionals under the award are not "*professionals*" in the sense that the term is used in other awards. Further, the HSU submitted that employees classified as Health Professional Levels 1 and 2 required supervision by senior employees and did not exercise any managerial or supervisory functions themselves. Likewise, it was the HSU's submission that employees classified as Health Professional Level 3 may not have any managerial or supervisory responsibilities.

[69] In the HSU's submission, only employees classified as Health Professional Level 4 under the award could be described as managerial and supervisory employees. Ultimately, the HSU remained of the view that it would be inappropriate to introduce any annualised wage arrangements clause for these employees at this stage because no such provision had existed in the past. The submission that any annualised wage arrangements provision extend only to the Health Professional Level 4 classification was reiterated in the HSU's submissions dated 27 March 2019 and 1 August 2019.

[70] The HSU further submitted in its 1 August 2019 submissions that employees classified as Health Professional Levels 1-3 could in no way be required to exercise supervisory or managerial responsibilities and on that basis there were no grounds upon which the Commission could be satisfied that Model Clause 3 should apply to these employees. The HSU referred to the classification descriptors in the award which, in the case of employees at Levels 1-3 of Health Professional classifications, it submitted included no reference to supervisory functions. In the HSU's submission this was in contrast to the Health Professional Level 4 classification which referred to employees classified at this level "*supervis[ing] staff where required*". The HSU provided a number of position descriptions with its 1 August 2019 submissions which it said supported its contention that employees classified as Health Professional Levels 1-3 are not required to perform supervisory or managerial duties, and that only employees classified as Health Professional Level 4 had these responsibilities. Ultimately the HSU reiterated its submission that should any annualised wage arrangements provision be introduced to the Health Professionals Award, its application should be confined to employees engaged in the Health Professional Level 4 classification.

[71] In its 23 February 2020 submissions the HSU sought to reply to the Ai Group's submissions dated 31 January 2020, and stated that it continued to rely on its previous submissions in this matter which we have summarised above to the extent that they relate to the question of whether particular classifications of Health Professional employees under the Health Professionals Award perform supervisory or managerial duties. In relation to the Ai Group's submissions on the question of whether employees classified as Health Professional Levels 1-3 exercise managerial or supervisory responsibility, the HSU submitted as follows:

- The Ai Group's position that employees classified as Health Professional Levels 2 and 3 under the award should be considered to perform managerial or supervisory duties should not be accepted. The HSU submitted that the Ai Group's reliance on the words "*supervision of discipline specific students*" in the classification definition for Health Professional Level 2 employees to support its view that they perform supervisory duties does not refer to supervision in a managerial sense. Instead, the HSU submitted, that this is a reference to clinical supervision of students training within a particular health discipline.

- The Ai Group's contention that because employees classified as Health Professionals Levels 2-3 have a high level of independence and therefore any annualised wage arrangement provision inserted into the award should apply to them is not supported by any evidence and appears to conflate exercising independence with performing managerial and supervisory duties. The HSU does not agree that employees exercising independence in performing their work are also performing managerial and supervisory duties because of this.

- The Ai Group's submission that employees classified as Health Professional Level 1 should have access to any annualised wage arrangement provision that is inserted into the award because they are "*professionals*" should be rejected. In this HSU's submission the Ai Group's submission is based on a misunderstanding of the meaning of the term "*professional*" in the health professional context.

Consideration

[72] As outlined above, the outstanding issue requiring determination is whether the facility for annualised wage arrangements in Model Clause 3 should apply to the classifications of Health Professional Level 1, Level 2 and Level 3. We have already determined that Model Clause 3 shall apply in respect of the classifications of Support Services employees at Level 8 and 9, and Health Professional Level 4 on the basis that employees at this level perform managerial or supervisory duties.

[73] Model Clause 3, as formulated in the July 2019 decision,[32] is in the following terms:

X. Annualised wage arrangements

X.1 *Annualised wage instead of award provisions*

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

(i) clause X – Minimum weekly wages;
(ii) clause X – Allowances;
(iii) clause X – Overtime penalty rates
(iv) clause X – Weekend and other penalty rates; and
(iv) clause X – Annual leave loading

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

(i) the annualised wage that is payable;
(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;
(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and
(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

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

[32] [2019] FWCFB 4368 at [24]

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

(e) The agreement may be terminated:

(i) by the employer or the employee giving 12 months' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or
(ii) at any time, by written agreement between the employer and the individual employee.

X.2 *Annualised wage not to disadvantage employees*

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or if the employment ceases or the agreement terminates earlier, over such lesser period as has been worked).

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

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

X.3 *Base rate of pay for employees on annualised wage arrangements*

For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under this clause comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause X—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

[74] Model Clause 3 contains the following protections against the employee the subject of an annualised wage arrangement being disadvantaged:

- the arrangement requires the written agreement of the employee;
- the written agreement must specify the provisions of the award which will be satisfied by payment of the annualised wage and the method by which the annualised wage has been calculated, including the specification of each separate component of the annualised wage and any overtime or penalty rate assumptions used;
- the written agreement must also specify outer limits of penalty rate and overtime hours beyond which the annualised wage does not apply and must separately be paid for;
- the arrangement may be terminated unilaterally by the employee upon 12 months' notice, or at any time by agreement;
- the employer must keep records of hours worked and, every 12 months, calculate whether there has been any shortfall compared to the earnings the employee would have earned under the award if the annualised wage arrangement had not applied, and pay the shortfall within 14 days.

[75] Clause 4.1(b) provides that the Health Professionals Award covers, relevantly, employers engaging a "*health professional employee*" in the classification definitions in Schedule A. The expression "*health professional employee*" is not defined in the award. However, Schedule B of the award sets out a list of in excess of 50 "*Common Health Professionals*". The list includes degree-qualified professionals such as (by way of example) pharmacists, psychologists, speech pathologists and medical imaging technologists. For other examples, a diploma or other VET qualification may be sufficient (such as for dental hygienists and medical laboratory technicians). Clause 17 confirms that an employee may enter the Health Professional classifications with an "*undergraduate 2*" qualification, defined in clause 2 to mean a diploma or equivalent. Therefore it is clear that "*health professional employees*" are not all "professionals" in the industrially-recognised sense of having an undergraduate degree.

[76] The classifications definitions of Health Professional Levels 1-3 in Schedule A are as follows:

> **A.2.1 Health Professional—level 1**
>
> **(a)** Positions at level 1 are regarded as entry level health professionals and for initial years of experience.
>
> **(b)** This level is the entry level for new graduates who meet the requirement to practise as a health professional (where appropriate in accordance with their professional association's rules and be eligible for membership of their professional association) or such qualification as deemed acceptable by the employer. It is also the level for the early stages of the career of a health professional.
>
> **A.2.2 Health Professional—level 2**
>
> **(a)** A health professional at this level works independently and is required to exercise independent judgment on routine matters. They may require professional supervision

from more senior members of the profession or health team when performing novel, complex, or critical tasks. They have demonstrated a commitment to continuing professional development and may have contributed to workplace education through provision of seminars, lectures or in-services. At this level the health professional may be actively involved in quality improvement activities or research.

(b) At this level the health professional contributes to the evaluation and analysis of guidelines, policies and procedures applicable to their clinical/professional work and may be required to contribute to the supervision of discipline specific students.

A.2.3 Health Professional—level 3

(a) A health professional at this level would be experienced and be able to independently apply professional knowledge and judgment when performing novel, complex, or critical tasks specific to their discipline. At this level health professionals will have additional responsibilities.

(b) An employee at this level:

(i) works in an area that requires high levels of specialist knowledge and skill as recognised by the employer;

(ii) is actively contributing to the development of professional knowledge and skills in their field of work as demonstrated by positive impacts on service delivery, positive referral patterns to area of expertise and quantifiable/measurable improvements in health outcomes;

(iii) may be a sole discipline specific health professional in a metropolitan, regional or rural setting who practices in professional isolation from health professionals from the same discipline;

(iv) is performing across a number of recognised specialties within a discipline;

(v) may be accountable for allocation and/or expenditure of resources and ensuring targets are met and is responsible for ensuring optimal budget outcomes for their customers and communities;

(vi) may be responsible for providing regular feedback and appraisals for senior staff to improve health outcomes for customers and for maintaining a performance management system; and

(vii) is responsible for providing support for the efficient, cost effective and timely delivery of services.

[77] It is not necessary to set out the Health Professional Level 4 classification. It is accepted that an employee at this level will, among other things, perform functions of a managerial/supervisory nature.

[78] The minimum pay rates for the Health Professional classifications are set out in clause 17. Level 1 has 6 pay points (with separate entry points prescribed for undergraduate 2 qualification, 3 year degrees, 4 year degrees, masters degrees and PhDs). The pay rates range from $943.60 to $1194.30 per week. For Level 2, there are 4 pay points, ranging from $1200.80 to $1343.30 per week. For Level 3, there are 5 pay points, ranging from $1401.60 to $1594.00 per week. These pay rates are, in the context of minimum rates prescribed by the modern award system, relatively high, and are for example higher than for equivalent classifications in the *Professional Employees Award 2020*.

[79] We accept the HSU's submission that the classifications of Health Professional Levels 1-3 do not involve the exercise of managerial or supervisory functions. However, that is not the end of the matter, since a broader scope of consideration is required in order to determine to which classifications annualised wage arrangements should apply.

[80] We do not consider that annualised wage arrangements should apply to the Health Professionals Level 1 classification, since this is an entry level classification for employees who have just gained their relevant qualification. Employees at this level may not have sufficient experience of employment as a health professional to give informed consent to an annualised wage arrangement, particularly if it is offered at the outset of the employment when the employee has no familiarity with the usual patterns of working hours across the year and is likely to have little bargaining power.

[81] However, we consider that annualised wage arrangements should be available for employees in the Health Professional Level 2 and Level 3 classifications. Employees at these levels will have had a number of years of experience in employment as health professionals and thus will be well placed to assess whether a proposed annualised wage arrangement is appropriate having regard to their pattern of working hours over the long term. Such employees are required, in accordance with the applicable classification definitions, to work independently and apply independent judgment to some or all of their tasks and, as earlier stated, enjoy relatively high minimum pay rates in the context of the modern award system. They may therefore be characterised as employees for whom a salary-type arrangement would broadly be appropriate. Finally, we note that employees in the Health Professional Level 2 and Level 3 classifications have higher minimum rates than for managerial/supervisory employees classified as Support Services Employees Level 8 or 9 under the Health Professionals Award. It would be an anomalous outcome, we consider, for annualised wage arrangements to be applicable to the latter group of employees but not the former.

[82] Accordingly, we consider that the Health Professionals Award should be varied to include Model Clause 3, which will be applicable to employees in the classifications of Support Services Employee Level 8 and Level 9 and Health Professional Level 2, Level 3 and Level 4. For the reasons given in the 2018 decision, the February 2019 decision, the July 2019 decision and this decision, we consider that a variation of this nature is required to achieve the modern awards objective in s 134(1) of the FW Act. In reaching this conclusion, we have placed particular weight on the considerations in paragraphs (d), (da) and (f) of s 134(1), with the other consideration being of marginal relevance and neutral weight.

[83] The operative date for the variation to the Health Professionals Award to give effect to our conclusion will be 9 May 2022.

Next steps

[84] Draft determinations to give effect to this decision will be published in conjunction with this decision. Interested parties will be given an opportunity to make submissions as to the terms of the draft determinations (but not in relation to the merit issues which have already been determined in this and previous submissions). Such submissions shall be filed **within 14 days of the date of this decision**.

VICE PRESIDENT

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