AM2016/13 – Annualised Salaries

Submission in reply by the

Chamber of Commerce and Industry of Western Australia

18 November 2016

1. Pursuant to the directions handed down by the Full Bench on 5 September 2016 the Chamber of Commerce and Industry of Western Australia (Inc) (**CCIWA**) provides the following submissions in reply to the applications by:

   a. The Australian Services Union (ASU), to vary the annual salary provisions of the following clerical awards:

      i) *Clerks – Private Sector Award 2010* (MA000002);

      ii) *Contract Call Centre Award 2010* (MA000023); and

      iii) *Legal Services Award 2010* (MA000099).

   b. United Voice (UV), to vary the annual salary provisions of the following hospitality awards:

      i) *Hospitality Industry (General) Award 2010* (MA000009); and

      ii) *Restaurant Industry Award 2010* (MA000119)

2. CCIWA opposes the unions' applications on the basis that:

   a. the applicants have failed to discharge their evidentiary burden and as such there is insufficient information to support their claims;

   b. the proposed amendments are contrary to the modern award objective, and would result in:

      i) unnecessary complexity in the establishment and administration of salaried provisions; and

      ii) uncertainty in the validity of existing salaried arrangements, impacting upon the establishment of a stable system of modern awards.

3. We set out our response to the aforementioned applications below.

An overview of ASU claim

4. At the simplest level the ASU claim seeks to replace the annualised salary clauses currently contained in the respective clerical awards, with the annualised salary clause prescribed in clause 14.7 of the *Local Government Industry Award 2010* [MA000112].

5. The primary basis for the application is centred around four core arguments, being:

   a. that the ASU does not believe that the current clause contains sufficient safeguards;

   b. that the then Australian Industrial Relations Commission (AIRC) erred in incorporating the current annualised salary clause when creating the respective modern awards;

   c. that the then Fair Work Australia (FWA) erred in not granting the ASU's 2012 applications to have the annualised salary clauses removed from the respective modern awards and that the Fair Work Commission (FWC) erred in dismissing its appeal against these earlier decisions; and

   d. the ASU believes the current clauses undermines the model award flexibility clause.

6. The application largely seeks to re-agitate old complaints regarding the operation of these awards without the benefit of any fresh argument or new evidence.

An overview of United Voice's claim

7. In its application, UV is seeking to amend the annualised salary clauses within the respective hospitality awards to:

   a. include an expressed right for employees to refuse a direction to work additional hours;

   b. for employees on annualised salaries to have access to any daily records of their start and finish times; and

   c. the employer will review the earnings of employees on annualised salaries against what he/she would have earned had they not been on such an arrangement every six months or earlier if the employment ends.

8. The basis for these claims appears to be premised on concerns that employees on such arrangements are being underpaid and that they are working unreasonable hours.

9. In the view of CCIWA, UV has not provided any evidence or substantial argument to justify their concerns.

Modern Award Objective

10. In considering the preliminary jurisdictional issues for conducting the current four yearly review of modern awards, the FWC[1] has concluded that:

    Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective.

11. The argument of the ASU is at odds with the above conclusion of the Full Bench.

12. The bulk of the ASU's submission (being paragraphs 5 to 21 and 26 to 35) provides a historical perspective of the relevant decisions of the AIRC, FWA and FWC during the award modernisation process and the 2012 modern award review relating to annualised salaries in the relevant clerical and other awards, and in very general terms their dis-satisfaction with these decisions.

[1] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, at 24.

13. The ASU appears to be inviting the FWC to revisit the validity of these decisions without providing any detailed arguments to substantiate their claim that the FWC and its predecessor organisations erred in reaching their decision. This is despite the original decisions[2] having already been unsuccessfully challenged by the ASU on appeal[3].

14. In the *Preliminary Jurisdictional Issues* decision the FWC identified that *"[p]revious Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so."*[4] The ASU have not advanced any compelling reasons to support their claim.

15. United Voice at paragraphs 53 – 56 of their submission identify that the modern award objective was varied with effect from 1 January 2014 to insert s134(1)(da) into the FW Act which provides that:

> *(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*

16. However, UV has failed to advance any argument to demonstrate how the annualised salary clauses results in the relevant hospitality awards not meeting the modern award objective.

17. We contend that the inclusion of annualised salaried clauses is consistent with the modern award objective, as varied. These clauses do not displace the entitlement to overtime, shift and other penalties; rather they provide an alternative means for compensating employees for these provisions.

18. Evidentiary Burden

19. The FWC has made it clear that where any significant change is proposed to the modern awards, it must be supported by *"probative evidence properly directed to demonstrating the facts supporting the proposed variation"*.[5] This is necessary in order to ensure a *'stable'* modern award system.[6]

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[2] *Australian Municipal, Administrative, Clerical and Services Union [2012] FWA 9025* and *Motor Traders' Association of New South Wales and others [2012] FWA 9731*

[3] *Australian Municipal, Administrative and Clerical Services Union [2013] FWCFB 1228* and *Re Clerks – Private Sector Award 2010 [2010] FWAFB 969*.

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788*, at 27.

[5] Ibid, at 24.

[6] Ibid at 60; *Fair Work Act 2009 (Cth)*, s 134(1)(g).

20. It is the experience of CCI that annualised salary arrangements are commonly utilised in the engagement of administrative and clerical employees, many of whom exercise significant discretion in the performance of their roles. In the case of the hospitality industry, annualised salaries are also regularly established with chefs and managerial employees. Given the frequency by which these provisions are utilised, any amendments to the operation of these provisions constitute a significant change.

21. CCIWA submits that the ASU and the UV have failed to produce any probative evidence in this matter.

22. In support of its application, the ASU appear to be largely reliant on the witness statement of Terry O'Loughlin who is an industrial officer of the ASU. In his statement Mr O'Loughlin makes unsupported claims that the ASU has had an unspecified number of disputes with employers regarding the operation of these arrangements. The witness statement provides no detail as to the nature of these disputes, or whether the arrangements in question had a detrimental impact on the employees concerned.

23. Consequently the witness statement is not a statement of fact rather simply one of opinion. There is no means by which the FWC can verify the validity of the claims and as such we contend that it should be given no weight.

24. Given the ASU allegation that the existing clerical annualised salary clauses contain insufficient safeguards to protect employees, it is noticeable that it has not been able to furnish any evidence of employees being disadvantaged under these arrangements, nor are such concerns raised in Mr O'Loughlin's witness statement.

25. Rather Mr O'Loughlin's statement identifies that the disputes that he refers to are is relation to confusion as to which award provisions are satisfied by the arrangement. One would expect that were there concerns that employees were being disadvantaged, this would be clearly identified.

26. The ASU also tendered two documents (Attachments C and D of their submission) which identify that the annual salary provisions in the relevant clerical awards are easier to establish and provide greater surety than the flexibility arrangements clauses contained in the same award. It is unclear what the ASU seeks to establish in tendering these documents, other than to confirm that the existing annualised salary clauses are contributing to the award meeting the modern award objective by ensuring *"a simple, easy to understand, stable and sustainable modern award system"* as prescribed by s 134(g) of the FW Act.

27. In its application UV, relies on the witness statement of Jun Yuan who outlines his employment history, hours of work and expresses some dis-satisfaction with his current level of remuneration. Accompanying his witness statement is a single payslip, his PAYG payment summary for the 2015/16 financial year, and the employee's timesheets for this period.

28. It is unclear as to the purpose of the inclusion of Mr Yuan's timesheets. To the extent that UV wishes to advance arguments based on this information it was incumbent on them to outline that in their submission, or alternatively upon the lodgement of Mr Yuan's witness statement. Their failure to do so has inhibited the respondents' ability to respond to this material and as such we say it should not be taken into evidence.

29. The concerns of Mr Yuan principally centre on his level of remuneration for the hours that he works. As identified in paragraph 28 of his witness statement Mr Yuan states that he does not mind working the hours that he does, rather his dis-satisfaction is with respect to how much he is paid for those hours.

30. Whilst it is open to Mr Yuan to hold the views expressed in his witness statement, UV have not demonstrated in their submission as to how these concerns would be addressed by the amendments proposed. Furthermore the views of a single employee does not provide a suitable quantum of evidence to justify significant changes to a modern award. Given the size of the industry and UV's membership levels it would be reasonable to assume that were there significant issues regarding the operation of these provisions greater evidence would be available.

31. In their submission, UV also relies on a presentation given at the 2016 Association of Industrial Relations Academics of Australia's conference by Ms Susan Belardi, Research Assistant at the University of Sydney, who is the co-author on an unpublished paper entitled *"The role of job quality in recruitment and retention challenges in the Australian restaurant industry"*.[7] Given its unpublished status it is not possible for the FWC or the respondents to examine the findings of the paper and draw any conclusions from it. This is particularly relevant given that Ms Belardi's presentation noted that there are a variety of factors influencing employee retention within the industry with differing levels of influence, with pay identified as unimportant for existing employees. On this basis we submit that the FWC should give no consideration to the statements made at paragraph 60 of UV's submission.

32. In the absence of any compelling evidence to suggest that the current requirements are resulting in employees being disadvantages, we believe that these applications should be dismissed.

Providing for simple, easy to understand, modern awards

33. One of the components of the modern award objective is *"the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards"*.[8]

34. Both the ASU and UV applications seek to make the annualised salary provisions more complex and in doing so may disrupt the arrangements currently applicable to the employees and employers covered by these arrangements.

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[7] Paragraph 60 of United Voice submission dated 10 October 2016.

[8] Fair Work Act 2009 (Cth), s 134(1)(g).

35. The ASU refer to a decision of the Western Australian Industrial Magistrates Court[9] in which the Magistrate found that the annual salary arrangement established between the employer and the employee did not comply with the requirements prescribed by the *Clerks' – Private Sector Award 2010* and as such there was no barrier to her perusing a claim for overtime worked.

36. Notably in this decision no consideration was given as to whether the employee was adequately renumerated for the work performed. One would reasonably expect that had the employee been worse off in real terms this would have been the primary argument of the Applicant's representative. Rather, the focus of the argument was on whether the contract had complied with the requirement of the relevant award and to the extent it did not whether the employer could rely on the terms agreed between the parties. In concluding that the employer could not, the Magistrate has put employers on notice that any non-compliance with the specific requirements of the annual salary clauses may invalidate these arrangements.

37. This has significant risk implications for employers seeking to utilise annual salary arrangements.

38. Both the ASU and UV seek to increase the requirements, thereby making it more complicated for employers to establish annualised salary arrangement and increasing the risk that it may subsequently be found deficient, resulting in the employer facing a significant monetary claim despite having adequately compensated the employee.

39. In the case of the UV claim, the proposed clauses add to the complexity of the relevant clauses, making it administratively more complex for employers to manage these arrangements. UV have provided no evidence to support the need for such inclusions, rather it would appear that the intention is to make the arrangements so administratively complex as to discourage their use. United Voice's, and other unions, general aversion to provisions that allow for individual arrangements does not appear to be supported by its members at large, given the absence of any significant employee evidence to support their position.

40. CCIWA is also concerned that the ASU claims threatens the stability of the modern award system by invalidating existing salaried arrangements. The changes sought would mean that existing salaries arrangements would no longer comply with the requirement of the award, hence flowing the reasoning of *Stewart v Next Residential Pty Ltd*[10] the employer would not be able to rely on its provisions.

41. This instability impacts on employees covered by these arrangements. In allowing either party to terminate the arrangement by giving four weeks' notice employees may not be able to rely upon the certainty of income provided by salaried arrangements. In our experience employees often value salary structures as it provides a consistent level of income, at levels generally significantly higher than the relevant award rate of pay.

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[9] *Stewart v Next Residential Pty Ltd [2016] WAIRC 00756*

[10] *Stewart v Next Residential Pty Ltd [2016] WAIRC 00756*

42. Consequently we believe that proposed amendments would be contrary to the need to provide for a stable award system.

No one set of provisions

43. The *Preliminary Jurisdictional Issues* decision also identifies that

"Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective."[11]

44. In its application, the ASU is effectively arguing that the current annualised salary clauses contained in the clerical awards are inferior because the union prefers the restrictions prescribed by the *Local Government Industry Award 2010.*

45. Given the limited arguments presented by the ASU as to why the relevant clauses in the clerical awards are inferior, it appears that the ASU's claim centres around having a consistent annualised salary clause in the awards that it has a significant interest in.

46. In line with the aforementioned reasons of the FWC, we submit that there is no coherent basis for advocating the adoption of clauses from the *Local Government Industry Award 2010* into the relevant clerical awards. In particular it should be noted that the relevant instruments do not share a common history and the level of bureaucracy found in the management of local governments is not a common feature of most private sector businesses. It is the view of CCIWA that there is no merit in seeking to impose public sector provisions within private sector awards.

Annualised Salaries and Flexibility Arrangements

47. The ASU argues that the current annualised salary clauses within the relevant clerical awards creates an anomaly arising from the Part 10A award modernisation process in that the clauses operate differently from the award flexibility provisions.

48. The ASU's argument on this matter was considered by the FWC as part of the 2012 modern award review, during which SDP Kaufman concluded that:

"As to the ASU's submission that whilst the Award contains both an annualised salary arrangements provision and an award flexibility provision, the Award does not operate effectively without anomalies or technical problems arising from the Part 10A award modernisation process, the ASU largely makes the same argument that it does in relation to s 134(1)(g). There is no evidence to support the ASU's assertions".[12]

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[11] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788*, at 34

[12] *Australian Municipal, Administrative, Clerical and Services Union [2012] FWA 9025 at 31*

49. In the current application the ASU provides no clear argument to support their view that the annualised salary arrangement results in an anomaly. The fact that both clauses can be used to obtain a similar outcome does not create an anomaly.

50. This is particularly so given that the annualised salary clause is narrow in its effect, whereas the award flexibility provision can be used for a far wider range of circumstances. Consequently the annualised salary provisions do not negate the use of the award flexibility term, with it possible for an individual flexibility arrangement to be established for salaried employees.

Conclusion

51. For the reasons cited above CCIWA submits that the applications by the ASU and UV for the variation on annualised salary clauses should be dismissed.

Submitted on behalf of the

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