IN THE FAIR WORK COMMISSION

Matter No:
AM2016/13
FOUR YEARLY REVIEW OF MODERN AWARDS
ANNUALISED SALARIES

Party:
AUSTRALIAN HOTELS ASSOCIATION
ACCOMMODATION ASSOCIATION OF AUSTRALIA
MOTOR INN AND MOTEL ACCOMMODATION ASSOCIATION

FURTHER SUBMISSIONS

Introduction

1. These submissions are made on behalf of the Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn and Motel Accommodation Association (collectively "the Associations") in response to the decision of the Full Bench of the Fair Work Commission (**Full Bench Decision**)[1], which calls for further submissions in relation to four matters.[2]

Annualised Salaries/Wage Arrangements generally

2. The Associations agree with the conclusions reached in the Full Bench Decision concerning the benefits of annualised wage arrangements for both employers and employees.[3]

3. In particular, the Associations agree with the conclusion that *"a permissible annualised wages term must guarantee that, **over the course of a year**, an employee does not receive*

[1] 2018 FWCFB 154;
[2] *Ibid* at [134];
[3] *Ibid* at [101];

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any less remuneration under the arrangement than would otherwise be payable under the provisions of the award".[4] (emphasis added)

Matters subject to further submissions

4. At paragraph [134] of the Full Bench Decision, further submissions are requested in relation to whether:

   (1) the terms of the above provisions are appropriate to be adopted as model annualised wage arrangement provisions;
   (2) any existing annualised wage arrangement provision in a modern award should be varied to reflect any of the proposed model terms (subject to the conclusions stated later in this decision concerning the specific claims advanced in these proceedings);
   (3) any modern award which does not currently contain an annualised wage arrangement should be varied to include one of the proposed model clauses; and
   (4) annualised wage provisions are capable of having any practical application to part-time employees (including any proposals to that end).

Item (1) – whether the terms of model provisions are appropriate to adopted as model annualised wage arrangement provisions

5. The Associations do not agree that the terms of Model Clauses 2 and 4 are appropriate for the *Hospitality Industry (General) Award 2010* (**HIGA**).

6. However, the Associations acknowledge that *some* aspects of the model provisions, or a variation of them, could be incorporated into the HIGA. We address this in our response to Item (2) below.

7. In relation to specific aspects of Model Clause 2 and Model Clause 4, we provide the following response.

[4] *Ibid* at [105];

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Minimum % Threshold (Model Clauses 2 and 4: Sub-clause X.1 (a))

8. The Associations submit that the minimum percentage threshold should be expressed as *"at least 25% above…"*

9. The hospitality industry is accustomed to that threshold where it has been the applicable minimum threshold for annualised wage arrangements in the HIGA or antecedent awards for at least 20 years.

Outer Limits Variation (Model Clauses 2 and 4: Sub-Clauses X.1 (b), (c), and (d) (iii))

10. It is the Associations view that the outer limits variation is not appropriate to be included in an annualised wage arrangement provision for the following reasons.

11. *First*, the provision is too complex taking into consideration the range of employers and employees who apply the provisions of modern awards on a day-to-day basis at the coalface.

12. *Second*, the provision appears to be at odds with the general conclusion in the Full Bench Decision that an annualised wage arrangement guarantee that an employee is not worse off "*over the course of a year*" as opposed to within a particular pay period.[5]

13. *Third*, on its face, the outer limits variation has the potential to impact employers unfairly by requiring additional payments to be made when going above the outer limit in a particular roster cycle, but not accounting for, or giving any credit for, the roster cycles where an employee has worked a significant number of hours below the outer limit. This is particularly important in those industries, such as hospitality, which are subject to a high degree of trading fluctuations and/or seasonality.[6]

[5] *Ibid* at [105];
[6] *Ibid* at [143];

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14. Accordingly, the Associations submit that the outer limits variation is not appropriate for an annualised wage arrangement in the HIGA.

Reconciliation (Model Clauses 2 and 4: Sub-clause X.2)

15. The Associations submit that the requirement to undertake a reconciliation as a matter of course at the conclusion of each 12 month period of the commencement of an annualised wage arrangement is excessive and not appropriate for the following reasons.

16. *First*, as was identified in the Full Bench Decision, such a requirement "*would obviate many of the benefits of an annualised wage arrangement*".[7]

17. *Second*, it would require employers to essentially run two payroll systems, or reconstruct 12 months of payroll on an annual basis, for each employee being paid in accordance with an annualised wage arrangement, placing a substantial administrative burden upon employers, particularly small employers.

18. *Third*, there was no direct evidence before the Fair Work Commission in these proceedings which demonstrated any widespread underpayments throughout the hospitality industry necessitating such requirement.

19. Accordingly, the Associations submit that a provision requiring a reconciliation to be completed each 12 month period is not appropriate.

Counter Signing Time and Wages Records (Model Clauses 2 and 4: Sub-Clause X.2 (c))

20. The Associations submit that the requirement that employees counter sign time and wages records in each roster cycle is not appropriate for the HIGA for two reasons.

[7] *Ibid* at [119];

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21. *First*, the requirement that employees counter sign the time and wages record in each roster cycle is excessive when compared to the requirements for employees who are not paid in accordance with an annualised wage arrangement.[8]

22. *Second*, the requirement does not take into account the prevalence of electronic time recording tools utilised by employers.

Termination – 12 months' notice (Model Clause 4: Sub-Clause X.1 (f))

23. The Associations submit that a 12 month termination is excessive and not appropriate.

24. An annualised wage arrangement should be able to be terminated by agreement at any time, or by one party giving the other four weeks' notice.

Other provisions

25. The Associations are not opposed to requirements that an annualised wage arrangement:
    a. be in writing;
    b. specify the annualised wage payable and the provisions of the award satisfied by the payment of the annualised wage; and
    c. be retained as a time and wages record.

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

26. Pursuant to s.139 (1) (f) of the *Fair Work Act 2009* (**FW Act**), a modern award may include a term about annualised wages arrangements that:

    i. Have regard to the patterns of work in an occupation, industry or enterprise; and

[8] See Division 3 of Part 3-6 of the *Fair Work Regulations 2009*;

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ii. *Provide an alternative to the separate payment of wages and other monetary entitlements; and*

iii. *Include appropriate safeguards to ensure that individual employees are not disadvantaged.*

27. The issue in these proceedings is whether various annualised wage arrangements satisfy the third requirement regarding appropriate safeguards.[9]

28. In providing for appropriate safeguards, it is important to note that a modern award can only include terms to the extent that they are necessary to achieve the modern awards objective.[10]

29. In order to ensure there is utility in the operation of an annualised wage arrangement, it needs to be flexible and modern[11]; not unnecessarily impact employers in relation to productivity, employment costs and regulatory burden[12]; and be simple and easy to understand[13].

30. The Associations submit that for an annualised wage arrangement provision to be relevant for an industry or occupation covered by a modern award, the provision must strike a fair balance between providing appropriate safeguards for employees to ensure they are not worse off, and ensuring that such a provision does not unnecessarily or excessively impose an administrative burden or employment costs on employers.

31. If an annualised wage arrangement provision is too complex in its application, or places an excessive administrative burden or increased employment costs upon employers, it will not be used and the provision will essentially become redundant.

[9] *Ibid* at [117];
[10] See s.138 of the FW Act;
[11] See s.134 (1) (d) of the FW Act;
[12] See s.134 (1) (f) of the FW Act;
[13] See s.134 (1) (g) of the FW Act;

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Annualised Wage Arrangements in the HIGA

32. There are two annualised wage arrangement provisions in the HIGA, namely clause 27.1 which applies to employees other than those classified as Managerial Staff (Hotels); and clause 27.2 which applies to employees classified as Managerial Staff (Hotels).

Clause 27.1 of the HIGA

33. In its current form, clause 27.1 of the HIGA:

    a. requires an annualised wage arrangement to be at least 25% above the prescribed minimum weekly rate; and

    b. provides that an annualised wage will satisfy penalty rates and overtime, and other specified award-derived monetary entitlements; and

    c. requires daily time and wages records to be retained; and

    d. requires the annualised wage to be sufficient to cover what the employee would have otherwise been entitled to.

34. While it is acknowledged that clause 27.1 of the HIGA does not specifically provide a requirement for a reconciliation, it does include the safeguard that the salary paid over the year must be sufficient to cover what the employee would have been entitled to if all award payment obligations had been complied with (i.e. the employee must not be worse off under the salaried arrangement).

35. If notwithstanding the above, the safeguards in clause 27.1 of the HIGA are still considered inadequate, the Associations submit that this can be remedied by incorporating the following requirements:

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a. requiring the annualised wage arrangement to be in writing (identifying the award derived monetary benefits satisfied by the annualised wage) and retained as a time and wages record; and

b. providing the employee with a right to request a reconciliation every 12 months; and

c. requiring an employer to provide a copy of the annualised wage arrangement award provision to the employee at the commencement of the arrangement; and

d. allowing the parties to terminate the arrangement at any time by agreement or by the provision of four weeks' notice.

Clause 27.2 of the HIGA

36. In its current form, clause 27.2 of the HIGA:

a. requires an annualised wage arrangement to be at least 25% above the prescribed minimum annual salary rate; and

b. provides that upon receipt of a salary at least 25% in excess of the annual salary rate, the employee will not get the benefit of a range of specified award provisions.

37. While it is acknowledged that clause 27.2 of the HIGA does not provide for a reconciliation, this provision has not been subject to any widespread non-compliance or disputation in the industry. As submitted during the proceedings, this provision applies to senior employees, one level below award-free employees, and often it is the market rate that determines salaries for persons classified as Managerial Staff (Hotels). For these reasons, it is submitted that clause 27.2 of the HIGA remain unchanged.

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38. In the alternative, the Associations submit that to the extent the safeguards in clause 27.2 are inadequate, this can be remedied by incorporating the following requirements:

    a. requiring the annualised wage arrangement to be in writing (identifying the award derived monetary benefits satisfied by the annualised wage) and retained as a time and wages record; and

    b. requiring the annualised wage to be sufficient to cover what the employee would have otherwise been entitled to; and

    c. provide the employee with a right to request a reconciliation every 12 months; and

    d. requiring an employer to provide a copy of the annualised wage arrangement award provision to the employee at the commencement of the arrangement.

Right to Request Reconciliation

39. The Associations submit that the right to request a reconciliation every 12 months is an appropriate safeguard which strikes a fair balance in addressing the concerns identified in the Full Bench Decision.[14]

40. The provision of a copy of the annualised wage arrangement clause will ensure employees are aware of their right to request a reconciliation and be paid any shortfall.

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

41. The Associations make no submission on this item.

[14] Full Bench Decision at [118]-[120];

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

42. The Associations consider that an annualised wage arrangement may be practical for part-time employees under the HIGA, in particular those employees classified as Managerial Staff (Hotels).

For the Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn and Motels Accommodation Association

26 March 2018

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