

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Further Submission**

Annualised Wage Arrangements  
(AM2016/13)

**27 March 2018**

**Ai**  
GROUP

## 4 YEARLY REVIEW OF MODERN AWARDS AM2016/13 – ANNUALISED WAGE ARRANGEMENTS

### 1. INTRODUCTION

1. This submission is made in response to the Commission’s decision of 20 February 2018<sup>1</sup> (**February 2018 Decision**) in the *Four Yearly Review of Awards – Annual Wage Arrangements* proceedings.
2. In the February 2018 Decision, the Full Bench invited submissions on various matters, including the following:
  - a. Whether the terms of the four draft model clauses set out in the February 2019 Decision (i.e. Model Clause 1, Model Clause 2, Model Clause 3 and Model Clause 4) are appropriate to be adopted as model annualised wage arrangement provisions;
  - b. 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 in the Decision concerning the specific claims advanced in the proceedings);
  - c. Whether any modern award which does not currently contain an annualised wage arrangement should be varied to include one of the proposed model clauses;
  - d. Whether annualised wage provisions are capable of having any practical application to part-time employees (including any proposals to that end);
  - e. Whether Model Clause 3 or Model Clause 4 are appropriate for inclusion in the *Horticulture Award 2010* (**Horticulture Award**);
  - f. Whether the *Clerks - Private Sector Award 2010*, (**Clerks Award**) should be varied to include Model Clause 1 or Model Clause 2;

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<sup>1</sup> [2018] FWCFB 154.

- g. Whether the *Legal Services Award 2010* (**Legal Services Award**) should be varied to include Model Clause 1 or Model Clause 2;
  - h. Whether the *Contract Call Centres Award 2010* (**Contract Call Centres Award**) should be varied to include Model Clause 1 or Model Clause 2; and
  - i. In relation to the classes of employees encompassed by Ai Group's claim to vary the *Health Professionals and Support Services Award 2010* (**Health Professionals Award**), whether Model Clause 3 or Model Clause 4 should be introduced into the Award;
3. The above issues and related matters are addressed below.

## 2. GENERAL ISSUES

4. Before addressing the four draft model clauses set out in the February 2018 Decision, there are a number of important general matters that need to be considered, including:
- a. The conclusions set out at paragraph [129] of the February 2018 Decision;
  - b. The record-keeping requirements in the *Fair Work Regulations 2009*;
  - c. That a requirement to keep records of starting and finishing times of additional hours for employees paid an annual salary would be unworkable;
  - d. Relevant considerations surrounding s.139(1)(f)(iii) of the *Fair Work Act 2009* (**FW Act**):
  - e. The importance of identifying which award provisions are to be included and excluded when conducting a comparison for the purposes of the annualised salary clause in a particular award;
  - f. The meaning of "overtime" when assessing any disadvantage;

- g. That an annual review does not need to be an annual reconciliation;
- h. The relevant safeguards that are included in the FW Act;
- i. That most existing annualised salary clauses reflect the outcome of lengthy negotiations and/or Commission proceedings;
- j. The importance of not disturbing existing flexibilities; and
- k. Terminology. In particular, whether “annualised salary” clauses should be re-named “annualised wage” clauses.

## **2.1 The conclusions set out at paragraph [129] of the February 2018 Decision**

- 5. At paragraph [129] of the February 2018 Decision, the Full Bench stated:

**[129]** Having regard to these matters we have reached the following conclusions concerning what is necessary for an annualised wages arrangement provision to form part of the fair and relevant minimum safety of terms and conditions required by s 134(1) taking into account the matters identified in paragraphs (a)-(h) of the subsection:

(1) The first concerns the circumstances in which individual agreement should be a requirement for entering into an annualised wage arrangement, as distinct from the employer having the right to introduce it. Where the employee works a reasonably stable pattern of hours such that the fixed amount of annualised salary would not vary significantly from the amount that would otherwise be payable to the employee under the relevant modern award in any given pay period, we do not consider, having regard to the requirement in s 138 that modern award provisions achieve the modern awards objective of a fair and relevant safety net, that the introduction of an annualised wage should require employee agreement since any potential prejudice to the employee by the introduction of such a system is likely to be slight. Subject to further submissions about this issue (as discussed later in this decision), we think that, as an example, employees under the *Clerks Award* are likely to fall in this category. However, where the working hours of the employee are highly variable (whether from one week to the next or over the course of a year because of seasonal factors), and/or the employee works to a significant degree hours which under the relevant modern award would be subject to overtime, weekend, evening or other penalty rates, we consider fairness requires that annualised wage arrangements should only be able to be applied by agreement. This is because the employee in that circumstance should be able to decide whether, in their own interests, they would prefer to have the stability of an annualised wage or to receive the full amount of their pay entitlements under the relevant modern award for hours worked at the time of the pay period in which those hours are worked. Subject to further submission,

employees under the Horticultural Award, the *Hospitality Award* and the *Restaurant Award* are likely to fall in this category.

(2) The arrangement (whether introduced by agreement or by employer right) should be in writing. Because an annualised wage arrangement is likely to effect such a fundamental change to the employee's pay entitlements in any given pay period, any agreement to such an arrangement should be clearly evidenced to put beyond doubt that the agreement exists. A copy of the agreement should be kept by the employer as part of the pay records, and a further copy should be provided to the employee.

(3) Where the annualised wage arrangement is by agreement, it should be terminable by the employer or employee at annual intervals upon notice. Where an employee is working highly variable hours and/or hours that would otherwise be subject to penalty rates, there is a reasonable likelihood that the employee may form the view that the annualised wage arrangement no longer suits their interests, and if so they should be afforded a reasonable opportunity to return to the other award provisions. The employer too may become dissatisfied with the arrangement (for example, because the number of hours worked by the employee no longer justifies the salary being paid), and should therefore have an equivalent opportunity to return to the other award provisions.

(4) In no circumstances should an annualised wage arrangement clause in a modern award permit or facilitate an employee receiving less pay over the course of a year than they would have received had the terms of the modern award been applied in the ordinary way, and it is essential that the clause contain a mechanism or combination of mechanisms to ensure that this does not happen. We consider that there are three types of mechanism which would likely be effective in this respect:

(A) A requirement for a minimum increment above the base rate of pay prescribed in the annualised wages clause itself.

(B) A requirement that the arrangement identify the way the annualised wage is calculated.

(C) A requirement that the employer undertake an annual reconciliation or review exercise.

(5) In respect of the mechanism (A) above, any such provision in an award should be justifiable by reference to reasonable assumptions about the number of hours which are being paid for, and impose outer limits on the number of overtime hours or other penalty-rate hours which are to be taken as paid for by the increment.

(6) In relation to mechanism (B), the calculation method for the annualised wage must expose any assumptions made about the number of overtime and penalty-rate hours that are to be worked on average. Additionally, the arrangement should contain an outer limitation on the number of such hours in a pay period or across a roster cycle that are paid for by the annualised wage, with any excess hours to be paid for in accordance with the normally applicable overtime or other penalty rate provisions. This outer limitation is not intended to reflect the average number of overtime and penalty rate hours upon which the annualised wage is calculated but rather a higher number of such hours

representing the maximum that an employee can reasonably be asked to work in a given pay period without being entitled to an amount in excess of the annualised wage.

(7) In relation to mechanism (C), the annual reconciliation exercise should involve a comparison between the amount paid by way of the annualised wage and the amount that would have been payable had the award provisions been applied in the ordinary way, with a requirement to pay to the employee any shortfall between the former and latter amounts within a specified period. Because of the apparent lack of a requirement in the FW Regulations to keep records of overtime and other penalty-rate hours where an annualised wage arrangement displaces the award requirements for payment for such hours, it is necessary that in establishing a reconciliation mechanism the award clause contain a requirement for such records to be kept. It is only by this means that the reconciliation requirement could practically operate. The inclusion of such a provision in a modern award is authorised by s 142 of the FW Act: it is incidental to an annualised wage arrangement provision made pursuant to s 139(1)(f), and is essential to make such a provision operate in a practical way.

(8) Although it was not the subject of debate in the hearing before us, we have proceeded on the basis that annualised wages provisions only have application in relation to full-time employees. The proposition that a casual employee could be paid pursuant to an annualised wage arrangement is oxymoronic, and no workable proposition has been advanced that such arrangements could apply to part-time employees engaged to work fixed numbers of hours per week. However we will provide parties with an opportunity to advance any proposal they wish to make as to how an annualised wage provision might practically apply to part-time employment.

6. Some aspects of the above conclusions will have a very significant adverse impact upon the flexibility contained within the award system, to the detriment of employers and employees. The conclusions were made in the context of Commission proceedings that centred around the annualised salary clauses in a limited number of awards and with (limited) evidence that related only to a few of those awards. Moreover, the proceedings were conducted through the prism of separate proposals to vary such awards, rather than any wide ranging review of existing approaches to the regulation of annualised wage arrangements within the award system generally.
7. For the above reasons, we urge the Full Bench to be prepared to review the above conclusions in the light of the issues raised in this submission and in the light of further submissions and hearings in the current proceedings.

## 2.2 The record-keeping requirements in the *Fair Work Regulations 2009*

8. There is some relevant and important history relating to the record-keeping requirements in the *Fair Work Regulations 2009* and predecessor regulations that we wish to bring to the attention of the Full Bench.
9. When the *Workplace Relations Act 1996* was varied in 2006 to implement the *Workplace Relations Amendment (Work Choices) Act 2005*, new regulations were made.
10. The *Workplace Relations Regulations 2006* came into operation in March 2006. The original version of these Regulations contained the following requirement relating to the content of records of hours worked:

### **19.9 Contents of records — hours worked**

- (1) The record relating to the employee must contain the following:
    - (a) the employee's daily starting and finishing times;
    - (b) the total number of hours worked by the employee during each day;
    - (c) the employee's nominal hours and any variations to those hours.
  - (2) Strict liability applies to a physical element in subregulation (1).
- Note* For **strict liability**, see section 6.1 of the *Criminal Code*.
- (3) Subregulation (1) is a civil remedy provision.

11. The above Regulation 19.9 immediately proved to be unworkable because:
  - The requirements applied to every employee, including managers and professionals;
  - The requirements were not limited to the hours that an employer required an employee to work.
12. Regulation 19.9 was amended on 1 June 2006 through the [Workplace Relations Amendment Regulations 2006 \(No.2\)](#) as follows:

## 19.9 Contents of records — hours worked

- (1) The record relating to the employee must contain the following:
- (a) the employee's daily starting and finishing times, if an overtime loading may be paid to the employee under:
    - (i) a workplace agreement; or
    - (ii) an award; or
    - (iii) a transitional award; or
    - (iv) a pre-reform AWA; or
    - (v) a pre-reform certified agreement; or
    - (vi) a preserved State agreement; or
    - (vii) a notional agreement preserving State awards; or
    - (viii) a contract; or
    - (ix) an employment agreement mentioned in section 887 of the Act; or
    - (x) a workplace determination mentioned in section 4 of the Act; or
    - (xi) an exceptional matters order mentioned in item 1 of Schedule 7 of the Act; or
    - (xii) a section 170MX award mentioned in item 1 of Schedule 7 of the Act; or
    - (xiii) an old IR agreement mentioned in item 1 of Schedule 7 of the Act;
  - (b) the total number of hours worked each day by the employee, being hours that the employee was required or requested to work by the employer, if the employee's base annual salary is less than the greater of the following amounts:
    - (i) \$55 000;
    - (ii) on and after 1 July 2007, in relation to the financial year ending on 30 June 2007 and subsequent financial years — the amount worked out by indexing that amount in accordance with regulation 12.6.

*Example 1* An employee has a base annual salary of \$70 000. The employee goes on a part-time arrangement, so that the employee actually earns \$40 000 each year. Because the employee's base annual salary has not changed (it remains over \$55 000) records do not need to be kept of that employee's total hours worked in each day.

*Example 2* An employee has a base annual salary of \$45 000. The employee is promoted but the employee's base annual salary does not change. Instead, the employee receives a \$10 000 vehicle allowance. But because the employee's base annual salary remains \$45 000, records still need to be kept of the employee's total hours worked in each day.

- (1A) In subregulation (1):

**base annual salary**, for an employee, means a salary identified as follows:

- (a) if the employee is a full-time employee whose annual salary is specified in a written instrument (including a workplace agreement or a contract), the base annual salary is that annual salary, but not including any of the following:

- (i) incentive-based payments or bonuses;
  - (ii) loadings;
  - (iii) monetary allowances;
  - (iv) penalty rates;
  - (v) employer contributions for superannuation;
  - (vi) any other similar separately identifiable entitlement;
- (b) if the employee is a part-time employee whose annual salary is specified in a written instrument (including a workplace agreement or a contract), the base annual salary is the equivalent annual salary that would be payable if the employee were a full-time employee, but not including any of the matters mentioned in subparagraphs (a) (i) to (v);
- (c) if:
- (i) the employee does not have an annual salary of the type mentioned in paragraphs (a) or (b); and
  - (ii) the employee is paid at a rate of regular salary during a period;
- the base annual salary is the annual salary that the employee would earn at that regular rate;
- (d) if:
- (i) the employee does not have an annual salary of the type mentioned in paragraphs (a) or (b); and
  - (ii) the employee is a piece rate employee or another employee who is not paid at a rate of regular salary during a period;
- the base annual salary is the employee's annual earnings as reasonably estimated by the employee's employer, but not including any of the matters mentioned in subparagraphs (a) (i) to (v).

*Example for a piece rate employee mentioned in paragraph (d)*

An employer might use a piece rate employee's earnings over a previous year of employment to reasonably estimate the employee's annual earnings over the subsequent year.

- (2) Strict liability applies to a physical element in subregulation (1).

*Note* For **strict liability**, see section 6.1 of the *Criminal Code*.

- (3) Subregulation (1) is a civil remedy provision.

13. The [Regulation Impact Statement](#) that accompanied the above regulatory changes highlighted the 'significant', 'unnecessary' and 'unduly onerous' burden on employers of a requirement to record starting and finishing times of senior employees and those with flexible and irregular hours. The amendment was aimed at providing 'a balance between ensuring that businesses, are not burdened with 'red tape' and protecting lower paid workers'.

14. The [Explanatory Statement](#) that accompanied the regulatory changes provided the following explanation: (emphasis added)

**Item [18] – Chapter 2, Part 12, after paragraph 12.6(1)(a)**

**Item [19] – Chapter 2, Part 12, after paragraph 12.6(2)(a)**

**Item [21] – Chapter 2, Part 19, subregulation 19.9(1)**

**Item [22] – Chapter 2, Part 19, before paragraph 19.12(1)(a)**

**Item [23] – Chapter 2, Part 19, before paragraph 19.13(1)(a)**

Item [21] amends Chapter 2, regulation 19.9. It substitutes subregulation 19.9(1) and inserts new subregulation 19.9(1A). Item [18] amends Chapter 2, regulation 12.6(1) to provide for the annual indexation of the amount mentioned in paragraph 19.9(1)(b). Item [19] amends Chapter 2, regulation 12.6(2) to provide details of what constitutes the 'base weekly earnings average' for the amount mentioned in paragraph 19.9(1)(b). Items [22] and [23] amend subregulation 19.12(1) and subregulation 19.13(1), respectively, so that records relating to annual leave and personal leave must contain records for the employee's nominal hours within the meaning of section 229 of the Act.

The effect of these amendments is to modify the record-keeping requirements on employers in relation to hours worked by their employees. Employers will be required to keep records relating to daily starting and finishing times where overtime is payable to the employee under an industrial instrument as set out in paragraph 19.9(1)(a)

Paragraph 19.9(1)(b) provides that employers will be required to keep records relating to the total number of hours worked by an employee, being hours that the employee was required or requested to work, where the employee's 'specified annual salary' is less than \$55,000 (indexed). Indexation occurs after July 1 each year on and after 1 July 2007 and is in accordance with regulation 12.6.

Subregulation 19.9(1A) sets out what the employee's *base annual salary* is, by reference to whether the employee is a full-time or part-time employee whose annual salary is specified in a written instrument, or whether the employee does not have an annual salary specified in a written instrument and is paid at a rate of regular salary or not during a period.

Paragraph 19.9(1A)(a) provides that if the employee is a full-time employee whose annual salary is specified in a written instrument, the employee's annual earnings are the base annual salary, excluding certain listed entitlements. Paragraph 19.9(1A)(b) provides if the employee is a part-time employee whose annual salary is specified in a written instrument, the employee's annual earnings are the base annual salary excluding certain listed entitlements. Paragraph 19.9(1A)(c) provides that if the employee does not have an annual salary of the type mentioned in paragraphs 19.9(1A)(a) or (b) and the employee is paid at a rate of regular salary during a period, the base annual salary is the annual salary that the employee would earn at that regular rate. Paragraph 19.9(1A)(d) provides that if the employee does not have an annual salary of the type mentioned in paragraphs 19.9(1A)(a) or (b) and the employee is a piece rate employee or another employee who is not paid at a rate or regular salary during the period, the base annual salary is the employee's annual earnings as reasonably estimated by the employee's employer excluding certain listed entitlements.

The regulations include examples to illustrate how the \$55,000 threshold will apply and how an employer might reasonably estimate the employee's annual salary.

15. It can be seen that, following the amendments, employers were only required to:
  - a. Keep records of daily starting and finishing times where overtime was payable to an employee under an industrial instrument;
  - b. Keep records relating to total hours worked for employees whose annual salary was less than \$55,000 per annum;
  - c. Keep records for hours that an employer required or requested an employee to work.
  
16. When the former Labor Government implemented the FW Act it did not reinstate the previous highly problematic approach that was in place for approximately two months between late March 2006 and 31 May 2006. Instead, the Labor Government implemented the following requirements within the *Fair Work Regulations 2009* which, consistent with the previous Workplace Relations Regulations, only requires starting and finishing times to be recorded for overtime hours for which a penalty rate of loading is payable:

### **3.34 Records—overtime**

For subsection 535(1) of the Act, if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee, a kind of employee record that the employer must make and keep is a record that specifies:

- (a) the number of overtime hours worked by the employee during each day; or
- (b) when the employee started and ceased working overtime hours.

Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.

17. In the February 2018 Decision, the Full Bench reproduced the following extract from the *Pastoral Award* decision, concerning the record-keeping requirements of the *Fair Work Regulations 2009*:<sup>2</sup>

[165] The difficulty is that where an employee is paid pursuant to an annualised wage term in a modern award it is unclear whether there is a requirement to keep an employee record in respect of, for example, overtime hours worked.

[166] Regulation 3.34 deals with the requirement to make and keep employee records in respect of overtime by an employee, it provides:

### **3.34 Records—overtime**

For subsection 535(1) of the Act, if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee, a kind of employee record that the employer must make and keep is a record that specifies:

- (a) the number of overtime hours worked by the employee during each day; or
- (b) when the employee started and ceased working overtime hours.

Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.

(emphasis added)

[167] Regulation 3.34 only requires an employee record to be made and kept if ‘a penalty rate ... must be paid for overtime hours actually worked by an employee’. The essence of an annualised wage arrangement is that penalty rates for overtime hours do not need to be paid, because they are comprehended within the annualised wage. It would seem to follow that if an annualised wage arrangement is in place then there is no requirement to make and keep an employee record of the number of overtime hours worked by the employee each day.

18. Ai Group agrees with the above observations, except for the statement in paragraph [165] that “*where an employee is paid pursuant to an annualised wage term in a modern award it is unclear whether there is a requirement to keep an employee record in respect of, for example, overtime hours worked*”.
19. In Ai Group’s submission, when the history of the relevant provisions in the *Workplace Relations Regulations 2006* and the *Fair Work Regulations 2009* are considered, it is clear that there is no requirement to keep records of overtime

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<sup>2</sup> [2015] FWCFB 8810.

hours worked by an employee covered by an annualised salary arrangement where a penalty or loading is not paid for the overtime hours.

20. It is also clear that this was a deliberate policy decision of the Parliament and the Federal Government, given the problems that would arise if employers were required to keep records of starting and finishing times for additional hours worked by employees paid an annual salary, rather than overtime penalties.

### **2.3 A requirement to keep records of starting and finishing times of additional hours for employees paid an annual salary would be unworkable**

21. There are many reasons why employees who are paid an annual salary work additional hours. Common reasons include:

- There may be an employer requirement to work the additional hours;
- They may be an employer request to work the additional hours;
- The employee may choose to work the additional hours (e.g. because they enjoy the work; because they perceive that working additional hours will lead to career advancement; because they want to achieve more in their job; because the employee's train or bus arrives at a time that enables the employee to be in the workplace 15 or 30 minutes before the commencement time of ordinary hours and the employee chooses to start work, and numerous other reasons).

22. The above realities were key reasons why the record-keeping requirement that existed in the *Workplace Relations Regulations* between March 2006 and 31 May 2006 immediately proved to be unworkable.

23. Another key reason why those provisions proved to be unworkable was that managerial, professional and some other employees, work is not simply carried out in the workplace. A large proportion of employees have smart phones and other devices that enable them to read and respond to emails outside of ordinary working hours. Also, managerial, professional and some other

employees often formulate work-related ideas and strategies outside of work. For many employees, the point where work starts and finishes is often not crystal clear.

24. The inclusion in annualised salary clauses of a requirement to record the starting and finishing time of all additional hours worked would be unworkable in many circumstances. Such a requirement would cause major problems for employers and employees for the reasons described above.

## 2.4 Relevant considerations surrounding s.139(1)(f) of the FW Act

25. Section 139(1)(f) of the FW Act states:

### 139 Terms that may be included in modern awards—general

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

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- (f) annualised wage arrangements that:
- (i) have regard to the patterns of work in an occupation, industry or enterprise; and
  - (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
  - (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

### “Patterns of work in an occupation, industry or enterprise”

26. Any annualised salary arrangement in an award needs to “*have regard to the patterns of work in an occupation, industry or enterprise*” (s.139(1)(f)(i)). Where an annualised salary provision exists in an industry or occupational award, it can be safely assumed that such provision reflects the patterns of work in the relevant industry or occupation, and the pattern of work in enterprises covered by the award, in the absence of evidence to the contrary. This is because patterns of work and employment arrangements will typically be structured to take into account the provisions of the annualised salary clause of the relevant award, for employees to whom an annualised salary arrangement applies.

27. For this reason, the Commission should not lightly alter existing annualised salary arrangements. To do so, would risk implementing annualised salary provisions that are inconsistent with patterns of work in the relevant industry or occupation, and patterns of work in enterprises covered by the award, in conflict with s.139(1)(f)(i) of the Act.

**“Appropriate safeguards to ensure that individual employees are not disadvantaged”**

28. Section 139(1)(f)(iii) allows annualised salary provisions that have “*appropriate*” safeguards to be included in awards.

29. Safeguards can only be included in an annualised salary provision if they are “*appropriate*”. Inappropriate safeguards cannot be included.

30. A record-keeping requirement like the unworkable arrangements that were in place under the *Workplace Relations Regulations* between March 2006 and 31 May 2006 is not an “*appropriate*” safeguard, for the reasons set out in the [Regulation Impact Statement](#) for the [Workplace Relations Amendment Regulations 2006 \(No.2\)](#). Such a safeguard would impose an ‘*unnecessary*’ and ‘*unduly onerous*’ burden on employers.

31. Any “*appropriate*” safeguards that are implemented should “*ensure that individual employees are not disadvantaged*”. The word “*ensure*” is used many times in the FW Act, including in many contexts where it is impossible for the FWC to achieve absolute certainty that the requirement is achieved for every employee.

32. For example:

- Subsection 134(1) requires that the Commission “*ensure that that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*”;

- Paragraph 134(1)(g) requires that the Commission take into account *“the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards”*;
  - Subsection 302(1) empowers the Commission to make orders *“to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value”*;
  - Subsection 381(2) provides that the unfair dismissal procedures and remedies in the FW Act *“are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned”*.
33. Similar to the practical judgement that needs to be made by the Commission when exercising powers under the above sections of the Act, a practical judgement needs to be made by the Commission when determining what safeguards are *“appropriate”* to *“ensure that individual employees are not disadvantaged”* under an annualised salary clause in an award.
34. When the Commission is exercising such a practical judgement, the elements of the modern awards objective are relevant, including:
- s.134(1)(f): *“the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden”*;
  - s.134(1)(g): *“the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards”*; and
  - s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

35. Also, when exercising such practical judgment, the Commission is required to carry out its functions in a manner that is consistent with s.577 of the Act, including avoiding unnecessary technicalities (s.577(a)).
36. When considering the issue of whether there is likely to be any “*disadvantage*” to employees under an annualised salary arrangement entered into in accordance with an award, the following factors are centrally important:
- If the safeguards in an annualised salary clause in an award are too onerous (e.g. if a record keeping requirement like the unworkable arrangements that operated for two months in 2006 is incorporated within the clause), a large number of employers will undoubtedly choose not to offer annualised salary arrangements to their employees, and this will disadvantage the large number of employees who value these arrangements (e.g. due to the income security and predictability that such arrangements provide). In these regard, onerous safeguards will disadvantage employees.
  - If employers choose not to offer annualised salary arrangements because the safeguards are too onerous, this will operate as a barrier to businesses retaining existing employment levels and to increasing employment, thus reducing job security for employees. Accordingly, such onerous safeguards will disadvantage employees.
  - If employers choose not to offer annualised salary arrangements because the safeguards are too onerous, this will operate as a barrier to productivity and competitiveness. Businesses that are productive and competitive have more capacity to provide generous salaries and working conditions to their employees. Once again, such onerous safeguards will disadvantage employees.
37. The notion of “*disadvantage*”, as contemplated by s.139(1)(f)(iii) of the Act, should not be applied in an unduly narrow sense. Any assessment of disadvantage cannot be reduced to a mere mathematical calculation to determine whether an employee would receive a greater quantum of pay

under the annualised wage arrangement than under the otherwise applicable award terms. As mentioned above, there are other benefits that flow to employees from the application of annual wage/salary arrangements and these are also relevant considerations. The Full Bench has itself noted that such benefits include the receipt of a fixed and certain remuneration amount each pay period regardless of the number of hours worked, which carries with it the advantages of income security and predictability of earnings for the purpose of budgeting and obtaining finance.<sup>3</sup>

38. Any assessment of disadvantage needs to be undertaken holistically. This broader approach should guide the Full Bench's considerations of what safeguards are "*appropriate*".

## **2.5 Which provisions of the award are relevant for the purposes of any comparison?**

39. With regard to s.139(1)(f)(iii), in the February 2018 Decision, the Full Bench said: (emphasis added)

**[105]** The requirement in s 139(1)(f)(iii) is that an annualised wage arrangements term include "*appropriate safeguards to ensure that individual employees are not disadvantaged*". .... Therefore, in summary, a permissible annualised wages term must guarantee that, over the course of a year, an employee does not receive any less remuneration under the arrangement than would otherwise be payable under the provisions of the award.

40. An extremely important point that cannot be overlooked is – what provisions of the relevant award should be taken into account when considering whether an employee is likely to be disadvantaged under an annualised salary arrangement, compared to the provisions of the award?
41. Annualised salary arrangements often apply to employees in higher classifications under an award, and in some awards overtime, shift and/or weekend penalties do not apply to employees in higher classifications. If such penalties do not apply to employees in higher classifications under an award, it is not appropriate for such penalties to be taken into account when considering

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<sup>3</sup> [2018] FWCFB 154 at 101.

whether an employee in such a higher classification is disadvantaged compared to the award.

42. Various awards contain provisions which state that overtime, shift and/or weekend penalties do not apply to specified classifications, including for example:

- Under clause 21 of the *Business Equipment Industry Award 2010*:
  - Employees in the technical stream who earn more than \$58,150 do not receive overtime, shift and weekend penalties (clause 21.1);
  - Employees in the clerical stream do not receive overtime, shift and weekend penalties (clause 21.2); and
  - Employees in the commercial travellers' stream do not receive overtime, shift and weekend penalties (clause 21.3).
- Under clause 28.1(b) of the *Nurses Award 2010*, Registered Nurses Levels 4 and 5 do not receive overtime penalties.
- Under clause 23.2 of the *State Government Employees Award 2010*, an employee in receipt of a salary in excess of that prescribed for the top rate for an Administrative Officer Grade 6 (currently \$60,142) is not eligible for overtime payments.
- Under clause 15 of the *Telecommunications Services Award 2010*, Principal Customer Contact Leaders, Telecommunication Associates and Clerical and Administration Level 5 do not receive overtime, shift and weekend penalties but must be compensated for any:
  - time worked regularly in excess of ordinary hours of duty;
  - time worked on public holidays;
  - time spent standing by in readiness for a call back;

- time spent carrying out duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or
- time worked on afternoon, night or weekend shifts;

either by:

- taking this factor into account in the fixation of annual remuneration;
  - granting special additional remuneration;
  - granting a special allowance or loading; or
  - granting other compensation such as special additional leave.
- Under clause 18.5 of the Contract Call Centres Award, Principal Customer Contact Leaders, Clerical and Administration Employees Level 5 and Contract Call Centre Industry Technical Associates do not receive overtime, shift and weekend penalties but must be compensated for any:
    - time worked regularly in excess of ordinary hours of duty;
    - time worked on public holidays;
    - time spent standing by in readiness for a call back;
    - time spent carrying out duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or
    - time worked on afternoon, night or weekend shifts;

either by:

- taking this factor into account in the fixation of annual remuneration;
- granting special additional remuneration;

- granting a special allowance or loading; or
  - granting other compensation such as special additional leave.
43. Where an award states that particular award provisions do not apply to particular classifications, it is generally not appropriate for those award provisions to be taken into account when assessing disadvantage compared to the relevant award.

## 2.6 Meaning of “overtime” when assessing any disadvantage

44. Many awards define “*overtime*” as time that the employer requires or directs an employee to work, or require that applicable penalty rates are payable only where a requirement or direction to work overtime is given by the employer.

45. For example, the *Commercial Sales Award 2010* states: (emphasis added)

An employee directed by the employer to perform any work .... in excess of the ordinary hours of work .... will be paid at a rate of time and a half of the applicable rate set out in clause 13.1.

46. Also, clause 24.1 of the *Local Government Award 2010* states:

Unless otherwise provided, overtime means all work performed at the direction of the employer:...

47. To the extent that overtime provisions would otherwise apply to an employee not covered by an annualised salary arrangement, in assessing any disadvantage for the purposes of an annualised salary clause, it is not appropriate to include additional hours that an employee is not required by the employer to work.

48. The standard reasonable hours clause that arose from the *2002 Working Hours Case*<sup>4</sup> only related to overtime that “*an employer may require an employee to work*”.

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<sup>4</sup> PR072002.

49. Similarly, s.62 of the FW Act only relates to additional hours that an employer requires or requests an employee to work.

## **2.7 An annual review does not need to be an annual reconciliation**

50. Several existing annualised salary clauses in awards require that the employer carry out an annual review of the salary being paid.

51. For example, the annualised salary clause in the Contract Call Centres Award was part of a package of award conditions that resulted from three years of negotiations between Ai Group, the ACTU, the ASU, the CPSU and the NUW, and associated AIRC proceedings. A summary of key developments concerning the annualised salary clause is set out at paragraphs 52 to 60 of Ai Group's [reply submission of 18 November 2016](#).

52. The following provisions were agreed upon for inclusion within clause 8 (Annual Salary Arrangement for Higher Classifications) of the *Contract Call Centres Industry Award 2003*: (emphasis added)

**8.2.3** The following obligations apply to employers in relation to the higher classifications set out in 8.2.1.

**8.2.3(a)** The ordinary hours of work of employees in those classifications set out in 8.2.1 should not exceed the ordinary hours of duty in the particular industry or sector of industry in which the employee is employed. Employers will compensate for:

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

**8.2.3(a)(ii)** time worked on public holidays;

**8.2.3(a)(iii)** time spent standing-by in readiness for a call back;

**8.2.3(a)(iv)** time spent carrying out duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or

**8.2.3(a)(v)** time worked on afternoon, night or weekend shifts;

**8.2.3(b)** either by:

**8.2.3(b)(i)** taking this factor into account in the fixation of annual remuneration;

**8.2.3(b)(ii)** granting special additional remuneration; or

**8.2.3(b)(iii)** granting a special allowance or loading; or

**8.2.3(b)(iv)** granting other compensation such as special additional leave.

**8.2.3(c)** An employee shall be advised in writing upon engagement, or in any other case upon a request being made in writing to the employer, of the method of compensation being used and the normal starting and finishing times in the relevant establishment. The methods of compensation are set out in 8.2.3(b). The provisions of 8.2.3(a) and 8.2.3(b) are to be used as the basis for the calculation of the annual salary. If the employer is compensating the employee by a method identified in 8.2.3(b), the employer shall identify the special additional remuneration, allowance or loading which is being paid.

#### **8.2.4 Salary Review**

An employee's salary will be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the factors in 8.2.3(a).

53. The above salary review mechanism in clause 8.2.4 of the pre-modern award is now found in clause 18.5(e) of the modern Contract Call Centre Award.
54. The review mechanism is obviously a relevant safeguard, but it was never intended to require an annual reconciliation of the hours and pattern of work of an employee, or intended as a mechanism for an employee to claim back-pay.
55. The inclusion of a salary review mechanism in an annualised salary clause is appropriate in relevant circumstances, but a requirement for employers to record starting and finishing times of additional hours, coupled with an annual reconciliation requirement, is not appropriate for the reasons outlined in this submission.

## **2.8 Relevant safeguards are included in the FW Act**

56. The FW Act includes safeguards which prevent employers requiring employees to work an unreasonable number of additional hours or to unreasonably work on a public holiday, including employees covered by an annualised salary arrangement.

57. The following provisions in s.62 of the Act are relevant: (emphasis added)

**62 Maximum weekly hours**

- - -

*Employee may refuse to work unreasonable additional hours*

(2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.

*Determining whether additional hours are reasonable*

(3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:

- - -

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

58. The following provisions in s.114 of the Act are also relevant: (emphasis added)

**114 Entitlement to be absent from employment on public holiday**

*Employee entitled to be absent on public holiday*

(1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.

*Reasonable requests to work on public holidays*

(2) However, an employer may request an employee to work on a public holiday if the request is reasonable.

(3) If an employer requests an employee to work on a public holiday, the employee may refuse the request if:

(a) the request is not reasonable; or

(b) the refusal is reasonable.

(4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:

- - -

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;

59. In the February 2018 Decision, the Full Bench made the following comments about s.62 of the Act:

[128] ... It is not sufficient to rely on the NES maximum weekly hours provision in s 62. ....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)...”.

60. Even though, on their own, ss.62 and 114 do not guarantee that no employee will be disadvantaged under an annualised salary arrangement, the safeguards in these sections need to be taken into account in assessing whether the safeguards in a particular annualised salary clause are “*appropriate*”. The existence of the safeguards in the Act obviates the need for onerous safeguards to be included in award clauses.

## **2.9 Most existing annualised salary clauses reflect the outcome of lengthy negotiations and/or Commission proceedings**

61. Most existing annualised salary arrangements reflect the outcome of lengthy negotiations and/or Commission proceedings.
62. For example, the clause in the Contract Call Centres Award was part of a package of award conditions that resulted from three years of negotiations between Ai Group, the ACTU, the ASU, the CPSU and the NUW, and associated AIRC proceedings. Such processes typically mean that the provisions are developed with detailed regard to the circumstances of an industry or occupation and the needs or characteristics of employers and employees covered by the instrument. In relation to the clause in the Contract Call Centres Award, Kaufman SDP made the following apposite remarks:

[40] It is manifestly undesirable that an Award that resulted from the agreed adoption of the Contract Call Centres Award 2003, which itself was made by consent after lengthy negotiations involving not only the ASU and AiG, but with other unions as well as the ACTU, should not be disturbed in the 2012 Review without, Fair Work Australia being provided with very strong cogent reasons for so doing. This, the ASU has failed to do.<sup>5</sup>

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<sup>5</sup> *Australian Municipal, Administrative, Clerical and Services Union* [2012] FWA 9025 at [40].

63. Existing annualised salary clauses should only be disturbed to include additional safeguards if it is absolutely essential to do so, and only to the minimum extent required.
64. Crucially, existing annualised salary provisions should not be altered absent a solid basis (including potentially a proper evidentiary basis where the matter is contested) for establishing any factual proposition that may be said to warrant such a change (such as any contention that such provisions have in reality resulted in relative disadvantage to employees), and a proper basis for concluding that the operation of any alternate provision will be workable and reasonable within the context of particular awards.

## **2.10 The importance of not disturbing existing flexibilities?**

65. Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia's national competitiveness and our capacity to continue to improve Australian living standards. Annualised salary arrangements in awards provide vital flexibility to employers and employees.
66. In the current environment of rapid workplace changes and major, global competitive threats, the imposition of new restrictions within annualised salary clauses in awards would be contrary to the interests of employers, employees and the broader community, and would threaten jobs.
67. Modern awards need to enable businesses to rapidly respond to changes in markets, the economy, technology and demographics. Awards need to promote agility, not rigidity. The imposition of onerous new "safeguards" in existing annualised salary clauses would not be in the interests of employers, employees or the broader community.
68. Onerous safeguards are not required because they are not "*appropriate*" for the purposes of s.139(1)(f)(iii). Only "*appropriate*" safeguards can be included in an annualised salary clause in an award.
69. The imposition of new onerous safeguards in annualised salary clauses would not be "fair" upon the employers or employees whose work arrangements are

currently structured in accordance with such clauses, and would conflict with the modern awards objective, particularly:

- s.134(1): the requirement to ensure “*a fair and relevant minimum safety net*”;
- s.134(1)(f): “*the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden*”;
- s.134(1)(g): “*the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards*”; and
- s.134(1)(h): “*the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy*”.

## **2.11 Terminology: Annualised salaries vs annualised wages**

70. Even though s.139(1)(f) use the term “*annualised wage arrangement*”, this is not a sufficient reason to require that “*annualised salary*” clauses in awards be re-named “*annualised wage*” clauses.
71. Ai Group negotiated several of the annualised salary clauses which now appear in modern awards, with relevant unions and peak union bodies. It was agreed between the parties that the expression “*salary*” would be used in several of the clauses, rather than “*wage*”, to better align with the work arrangements and classifications covered by the clauses.
72. There are a very large number of clauses in modern awards with titles that do not align with terms used in s.139 of the Act. Accordingly, there is no need to align the title of annualised salary clauses in awards with the expression used in s.139(1)(f).

### **3. MODEL ANNUALISED SALARY PROVISIONS**

#### **3.1 Is there a need for model annualised salary provisions?**

73. At paragraph [134] of the February 2018 Decision, the Full Bench invited submissions in relation to matters including 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...
74. For the purposes of these submission we have proceeded on the basis that point (1) identified above encapsulates a consideration of both whether the proposed terms are appropriate and whether it is appropriate to develop “model provisions” for potential promulgation through the award system.
75. Ai Group holds a number of major concerns regarding various elements of the Commission’s proposed model annualised wage clauses. Our overarching concern regarding the unworkable nature of the approach adopted in the model clauses, including the proposed new record keeping requirement for additional hours, has already been addressed in the proceeding sections of this submission. More specific concerns relating to elements of the proposed model clauses are addressed in the sections that follow.
76. As to the broader point, Ai Group is not convinced that there is a need for model annualised salary clauses across the award system. There are specific considerations associated with the content of particular awards, and the industry or occupational context in which they operate, that weigh against the implementation of a uniform approach to annualised salary clauses.
77. Nonetheless, it is difficult to address point (1) comprehensively when the terms of any such model provisions are not yet settled.

78. In relation to point (2), given our concerns regarding the content of the currently proposed model clauses, we are not seeking that any existing annualised salary provision be varied to reflect the proposed provisions.
79. In relation to point (3), we contend that there may be a benefit in the inclusion of annualised salary provisions in a greater number of awards. Moreover, the *necessity* for such provisions may grow depending on the outcome of the payment of wages common issues proceedings.<sup>6</sup> In the context of those proceedings a separately constituted Full Bench is grappling with the issue of when an entitlement to various payments prescribed by awards and the NES should fall due, or more relevantly, what limitations should there be on payments in arrears of amounts that are due under awards. It appears that while payment of wages provisions in most awards prescribe frequency of payments (weekly, fortnightly, monthly, etc), this is not understood to regulate the extent to which payments may be made in arrears.<sup>7</sup>
80. The outcome of the payment of wages common issues proceedings may well be a catalyst for a greater need for flexibility to be afforded to employers through award annualised wage/salary arrangements.<sup>8</sup> As identified by the Full Bench in the current proceedings, an annual salary that is merely provided for in a contract of employment may not amount to compliance with an award requirement that pay entitlements are required to be made to an employee within a specified pay period.<sup>9</sup> However, given the payment of wages common issue proceedings are yet to be concluded it is difficult to advance a definitive view in relation to such matters. The subject matter dealt with in those proceedings and these are inherently interconnected.

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<sup>6</sup> As contemplated by s.138 of the Act.

<sup>7</sup> [2016] FWCFB 8463. See p.31 in particular.

<sup>8</sup> The difficulties that may flow from the implementation of a new obligation regarding payment in arrears were canvassed in an [Ai Group written submission](#) of 7 November 2017 advanced in the payment of wages common issues proceedings being conducted as part of this review. See paragraphs 28 to 49 in particular.

<sup>9</sup> [2008] FWCFB 154 at 102.

81. Regardless of such complexities, given our serious concerns regarding the proposed model clauses, we do not here identify any modern awards that should be varied to include the proposed model clauses.

### **3.2 Concerns relating to the proposed model clauses**

82. The concerns expressed in section 2 of this submission are relevant to the four model clauses that the Commission proposed in the February 2018 Decision.

83. In the sections that follow we raise additional concerns regarding aspects of the proposed model clauses.

#### **The inclusion of multiple safeguards in each clause is excessive**

84. The various model clauses include a raft of proposed safeguards. Some of these appear to reflect those found in some current award provisions. Others go further, in line with the reasoning and conclusions of the Full Bench. The safeguards in Model Clauses 1, 2, 3 and/or 4 include:

- Identification of the award provisions that can be satisfied by an annualised wage (see subclause X.1(a) in Model Clause 1, 2, 3 and 4);
- An obligation to advise an employee in writing of various matters pertaining to the nature of the annualised wage arrangement (see subclause X.1(b) of Model Clause 1 and 3, and subclause X.1(d) of Model Clause 2 and 4);
- An obligation to keep a record of the matters advised to the employee in writing (see subclause X.1(b) of Model Clause 1, subclause X.1(d) in Model Clause 2, subclause X.1(d) in Model Clause 3 and subclause X.1(e) in Model Clause 4).
- An obligation to identify an outer limit on the hours that can be compensated by an annualised wage arrangement and to separately compensate employee for additional hours worked (see paragraph X.1(b)(iv) and subclause X.1(c) of Model Clause 1, subclause X.1(c) and

paragraph X.1(d)(iii) in Model Clauses 2 and 4, and paragraph X.1(b)(iv) and subclause X.1(c) in Model Clause 3).

- A requirement to pay an as yet unspecified percentage above minimum award rates under an annualised wage arrangement (see clause X.1(a) of Model Clause 2 and Model Clause 4);
- A requirement that employees not be paid less pursuant to the annualised wage arrangement than what would have been otherwise been payable pursuant to the award for the work performed (see clause X.2(a) of Model Clauses 1, 2, 3 and 4);
- A requirement to undertake a reconciliation process and to make up any shortfall (see subclause X.2(b) in Model Clauses 1, 2, 3 and 4);
- A requirement that agreement be reached as to the implementation of an annualised wage arrangement; (see subclause X.1(a) of Model Clause 3 and 4);
- A right for parties to terminate the annualised wage arrangement (see subclause X.1(3) of Model Clause 3 and subclause X.1(f) of Model Clause 4).

85. The inclusion of *multiple* safeguards in each model clause is unwarranted (and hence not “*appropriate*” for the purposes of s.139(1)(f)(iii)). The safeguards would, cumulatively, impose an unreasonable regulatory and administrative burden upon employers.

86. The Full Bench has effectively proposed that it be a requirement that an annualised wage for an employee must be set at a level that is no less than that which the employee would have received under the relevant award and that the employer undertake a reconciliation exercise involving a comparison between the amount paid by way of the annualised wage and the amount that would have been payable had the award provisions been applied in the ordinary way, with an associated requirement to pay to the employee any shortfall between the former and latter amounts within a specified period. Ai Group strongly

opposes this safeguard for the reasons set out in section 2 of this submission. However, in the event that the Commission decides to include such a safeguard despite Ai Group's strong objections, it is hard to see why multiple other safeguards are warranted.

### **Provisions requiring written advice regarding the annual wage arrangement**

87. Each of the proposed model clauses contain certain minimum requirements regarding written advice that must be provided to employees and records that must be kept. By way of example, some of these requirements are set out within clause X.1(b) of Model Clause 1.

88. Elements of these proposals are unreasonably burdensome for employers. Relevantly, clause X.1(b)(iii) requires an employer to set out "*...the method by which the annualised wage arrangement has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation.*"

89. We assume that that provision is intended to constitute what is identified as 'mechanism (B)' in the Full Bench's contemplation of measures directed to ensuring that a clause does not permit or facilitate an employee receiving less than that which would otherwise be applicable under the terms of the relevant award. In this regard the Full Bench said: (emphasis added)

[129] ....

(6) In relation to mechanism (B), the calculation method for the annualised wage must expose any assumptions made about the number of overtime and penalty-rate hours that are to be worked on average. Additionally, the arrangement should contain an outer limitation on the number of such hours in a pay period or across a roster cycle that are paid for by the annualised wage, with any excess hours to be paid for in accordance with the normally applicable overtime or other penalty rate provisions. This outer limitation is not intended to reflect the average number of overtime and penalty rate hours upon which the annualised wage is calculated but rather a higher number of such hours representing the maximum that an employee can reasonably be asked to work in a given pay period without being entitled to an amount in excess of the annualised wage.

90. In many circumstances an annualised salary may have been struck based on a consideration of matters that are in no way related to the issues identified in clause X.1(b)(ii). For example, a salary may have been selected having regard

to market conditions, instead of with reference to any detailed consideration of the award related matters. It may nonetheless be set at a level that is so high as to obviously alleviate any realistic concerns regarding whether the minimum requirements of the award would be satisfied by the quantum being paid. In such circumstances, it is difficult to identify how an employer could be expected to comply with the proposed clause. The clause proceeds on an erroneous assumption regarding how annual salaries are often set in practice (at least in the context of many industries/occupations) and is consequently likely to be unworkable in many circumstances.

91. At the very least the proposed clause would greatly magnify the regulatory and administrative burden imposed upon employers.
92. This element of the proposed provision should not be implemented. There is no apparent justification for compelling a party to identify the method by which the annualised wage has been devised or each component of the wage.
93. Notwithstanding such observations, we acknowledge that a clause that requires employers to make assumptions relating to the anticipated hours that the employer will require or direct an employee to work, and to reveal those assumptions, may be a more “*appropriate*” safeguard than one that requires a detailed reconciliation process underpinned by onerous recording keeping obligations pertaining to hours of work.
94. Moreover, we do not here seek to preclude the possibility that this *kind* of mechanism may be appropriate in some awards. Instead we contend that any conclusion in this regard should only be based upon a proper consideration of the characteristics of employers and employees covered by particular awards and existing practices regarding the payment of annualised salaries. For example, such a mechanism may be less problematic in the context of an award that covers a limited number of large employers with similar operations than in the context of the diverse range of employers that engage employees under the *Clerks – Private Sector Award 2010*.

## Hours that an employee may choose to work vs hours that an employee is required to work

95. Section 2.6 above outlined the reasons why it is essential that annualised salary clauses not take into account additional hours that an employee chooses to work, as opposed to additional hours that an employer requires the employee to work.
96. Subclause X.1(c) in Model Clauses 1, 2, 3 and 4 inappropriately include additional hours that an employee may choose to work rather than just those additional hours that the employer requires an employee to work.

## Issues associated with the cessation of employment

97. Each model clause contains the following provisions:

### *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 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 upon the termination of employment of the employee 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, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause X.2(b). This record must be signed by the employee each pay period or roster cycle.

98. **Firstly**, in relation to subclause (a), we note that the requirement that the annual wage be no less than amount that would be payable for work performed up to the date of termination is inherently problematic, as are the associated obligations to notify an employee in writing of the annualised wage as well as relevant assumptions underpinning its calculation, or to reach an agreement with an employee as to the quantum of the wage. Put simply, at the time at which the wage is first set an employer will not always know what the quantum would need to be in order to accommodate a potentially unexpected date of

cessation of employment. This date is a variable factor that is often determined by the employee. Consequently, it seems likely that if the current drafting is maintained employers will very commonly be in breach of the proposed award clause.

99. **Secondly**, Ai Group contends that it would be inappropriate for a reconciliation process to be required at the time of termination in circumstances where termination of employment is not at the initiative of the employer. Such a provision is not necessary in the sense contemplated by s.138 and not necessary to ensure that the clause conforms with the requirements of s.134(1)(f)(iii).
100. In the February 2018 Decision, the Full Bench stated:
- [105]** .... That the subject matter is *annualised* wage arrangements suggests that the issue of disadvantage may be assessed over the course of a year (and not necessarily within the pay periods prescribed in the award). Therefore, in summary, a permissible annualised wages term must guarantee that, over the course of a year, an employee does not receive any less remuneration under the arrangement than would otherwise be payable under the provisions of the award.
101. In circumstances where an employee resigns during the course of a year in which they are paid an annual salary, any “disadvantage” that results could be said to flow from the employee’s actions rather than from the annual wage arrangement per se. Accordingly, a clause that stops short of addressing such circumstances would not conflict with s.139(1)(f).
102. It is only fair that if a bargain has been struck between parties, both remain bound by it. Fairness needs to be considered from the perspective of both the employer and employee.
103. If the current wording of the proposed provisions is maintained an employer may, in practical terms, be prevented from receiving the benefit of the annual wage arrangement. For example, it is easy to conceive of circumstances where an employer may be required to pay an employee additional money pursuant to the proposed provisions because the individual resigned following a busy period, but then have to pay a replacement employee the annualised wage during an ensuing quiet period.

104. In support of this approach we note that there is currently no proposal to require an employee to repay an employer amounts that have been paid to them in circumstances where, as a product of the termination of employment, assumptions regarding hours to be worked are not borne out and the employee has consequently received far more than they would be entitled to under the award. While we do not seek to argue for such provisions, we contend that an entirely one-sided approach is inherently unfair.

**The model clauses should only apply to annual wage arrangements that are implemented pursuant to the relevant award clauses.**

105. It is somewhat unclear to us whether the “*annual wage*” as contemplated by the proposed clauses is intended to capture or include all contractual arrangement concerning the payment of an annualised salary, or whether is intended to constitute something separate. The clause does not define the term “*annual wage*”.
106. A major deficiency of each of the model clauses is consequently that they appear to potentially impose a raft of obligations upon all employers that utilise annual salary arrangements, including in circumstances where the employer would be meeting all of the relevant award provisions absent an annualised salary provision being included within the relevant award. An award clause that regulates over award arrangements would be at odds with recent decisions of the Commission which have confirmed that awards should only regulate minimum wages and conditions, consistent with the concept of a “safety net”.<sup>10</sup>
107. Without doubt, many thousands of employers and employees have already enter into common law contractual arrangements providing for the payment of annualised salaries. Whether or not there is any necessity for an award clause to specifically endorse or permit such practices in order to ensure that the practice does not contravene any provision of the award or Act will be dependent upon the individual circumstances at play. This will include, for example, the precise nature of the relevant contractual terms underpinning the

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<sup>10</sup> [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

annual salary arrangement, the applicable award derived entitlement and any associated obligation under either the Act or award governing when the relevant payment must be made.

108. Many employers undoubtedly pay employees by way of an annualised salary in circumstances where there is no need for award endorsement of the practice in order to bring them into conformity with the provisions of the award and s.323 of the Act. For example, many employers provide award covered employees with a contractual entitlement to a guaranteed salary of a sufficient quantum so as to satisfy any applicable entitlement that may arise under the award within each pay period without the need to rely on amounts paid in other pay periods to set off such obligations.
109. In the February 2018 Decision, the Full Bench relevantly stated: (emphasis added)

[102] Of course it is not necessary to have an annualised wage provision in a modern award in order for an employer to be able to pay an employee to whom the award applies an annualised salary that compensates for or “buys out” various identified award entitlements. The principles by which this might be done were stated in the Federal Court Full Court decision in *Poletti v Ecob* and subsequently affirmed in the Full Court decisions in *Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia* and *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate*. In short, under a contract of employment the employer and employee may agree that the salary payable under the contract has the purpose of satisfying the obligation to pay identified award entitlements (such as, for example, base wages, overtime rates, shifts and weekend penalty rates, allowances and annual leave loading). The payment of salary pursuant to such a contract of employment may be relied upon by the employer as satisfying in part or whole any claim by the employee for under-payment of the identified award entitlements. However this means of paying an annualised wage to an employee to whom a modern award applies is not entirely free from legal difficulty. If there is a lack of a “close correlation between the nature of the contractual obligation and the nature of the award obligations”, then payment of the salary may not satisfy the relevant award entitlements. Further, the fact that an annual salary provided for in a contract of employment may, over the course of a year, equal or exceed identified award entitlements such as to discharge payment of them may, arguably, not amount to compliance with an award requirement that pay entitlements are required to be made to the employee within a specified pay period. Issues such as these may make the payment of a salary pursuant to an annualised wages provision in a modern award a more desirable and legally certain option.

110. An annualised salary clause should not now impose a new and entirely unnecessary record-keeping obligation upon employers who are relying upon common law “set off” rights. Put another way, if, contrary to our strong objections, the Full Bench maintains a view that a record-keeping obligation should be included in the relevant award clauses, it should only apply in circumstances where an employer seeks to utilise the capacity to enter into an annualised wage arrangement pursuant to the award. It should not apply in all circumstances where an annualised salary is paid in accordance with common law “set off” arrangements.

#### **4. WHETHER ANNUALISED SALARY PROVISIONS ARE CAPABLE OF HAVING ANY PRACTICAL APPLICATION TO PART-TIME EMPLOYEES**

111. We see no reason why annualised salary arrangements are incapable of having practical application to part-time employees.
112. For example, the annual salary clause in the Clerks Award (17.2) applies to full-time and part-time employees. For the purposes of paragraph 17.2(a), in calculating “*the amount the employee would have received under this award for the work performed over the year for which the salary is paid ..*” for a part-time employee, the calculations would be based on the award entitlements applicable to the part-time employee. Under the award, ordinary working hours are required to be specified for all employees.

#### **5. HORTICULTURE AWARD**

113. In the February 2018 Decision, the Full Bench invited submissions on whether Model Clause 3 or Model Clause 4 are appropriate for inclusion in the Horticulture Award.
114. For the reasons outlined in this submission, Ai Group does not support Model Clause 3 or Model Clause 4, as drafted. Accordingly, we do not support either of these clauses, as drafted, being included in the Horticulture Award. We do,

however, support the inclusion of an appropriate annualised salary clause in the Horticulture Award.

## **6. CLERKS AWARD**

115. A summary of key developments concerning the annualised salary provision in the Clerks Award is set out at paragraphs 42 to 51 of Ai Group's [reply submission of 18 November 2016](#).
116. In the February 2018 Decision, the Full Bench invited submissions on whether the Clerks Award should be varied to include Model Clause 1 or Model Clause 2.
117. For the reasons outlined in this submission, Ai Group does not support Model Clause 1 or Model Clause 2, as drafted. Accordingly, we do not support either of these clauses, as drafted, being included in the Clerks Award.
118. We support the retention of the existing annualised salary clause in the Award. Existing annualised salary clauses should only be disturbed to include additional safeguards if it is absolutely essential to do so, and only to the minimum extent required.

## **7. LEGAL SERVICES AWARD**

119. A summary of key developments concerning the annualised salary provision in the Legal Services Award is set out at paragraphs 61 and 62 of Ai Group's [reply submission of 18 November 2016](#).
120. In the February 2018 Decision, the Full Bench invited submissions on whether the Legal Services Award should be varied to include Model Clause 1 or Model Clause 2.
121. For the reasons outlined in this submission, Ai Group does not support Model Clause 1 or Model Clause 2, as drafted. Accordingly, we do not support either of these clauses, as drafted, being included in the Legal Services Award.

122. We support the retention of the existing annualised salary clause in the Award. Existing annualised salary clauses should only be disturbed to include additional safeguards if it is absolutely essential to do so, and only to the minimum extent required.

## **8. CONTRACT CALL CENTRES AWARD**

123. A summary of key developments concerning the annualised salary provision in the Contract Call Centres Award is set out at paragraphs 52 to 60 of Ai Group's [reply submission of 18 November 2016](#).
124. In the February 2018 Decision, the Full Bench invited submissions on whether the Contract Call Centres Award should be varied to include Model Clause 1 or Model Clause 2.
125. For the reasons outlined in this submission, Ai Group does not support Model Clause 1 or Model Clause 2, as drafted. Accordingly, we do not support either of these clauses, as drafted, being included in the Contract Call Centres Award.
126. We support the retention of the existing annualised salary clause in the Award. Existing annualised salary clauses should only be disturbed to include additional safeguards if it is absolutely essential to do so, and only to the minimum extent required.

## **9. HEALTH PROFESSIONALS AWARD**

127. In the February 2018 Decision, the Full Bench invited submissions on whether the Health Professionals Award should be varied to include Model Clause 3 or Model Clause 4.
128. For the reasons outlined in this submission, Ai Group does not support Model Clause 3 or Model Clause 4, as drafted. Accordingly, we do not support either of these clauses, as drafted, being included in the Health Professionals Award.
129. We do, however, support the inclusion of an appropriate annualised salary clause in the award. In these proceedings, Ai Group has proposed a particular

clause. Additional safeguards should only be included in the clause if it is absolutely essential to do so, and only to the minimum extent required.