Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Annualised Wage Arrangements
Various Awards
(AM2016/13)

31 January 2020

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

1. INTRODUCTION

1. These submissions are made by the Australian Industry Group (**Ai Group**) in response to the Decision issued by the Fair Work Commission (**Commission**) on 23 December 2019 (**December Decision**) in the *4 Yearly Review of Modern Awards – Annual Wage Arrangements Case* and the schedule of draft determinations published at the same time.[1]

2. The Commission has invited parties to make submissions pertaining to technical and drafting matters in the draft determinations.

3. Submissions have also been invited in relation to matters raised in paragraph [2] of the December Decision concerning the "outer limit" number of hours that should apply in subclauses X.1(b)(i) and (ii) of Model Clause 4 as imported into clause 27.1 of the *Hospitality Industry (General) Award 2010* (**Hospitality Award**), clause 13.2 of the *Marine Towage Award 2010* and clause 28 of the *Restaurant Industry Award 2010* (**Restaurant Award**).

4. An outstanding issue remains as to the appropriate classifications to which an annualised wage arrangement provision, in the form of Model Clause 3, should apply in the *Health Professionals and Support Services Award 2010* (**HPSS Award**). Ai Group has been invited to make further submissions on this issue.

5. These submissions address each of the above matters but should be read together with Ai Group's past submissions filed with respect to this matter, including those dated 10 April 2019 and 27 March 2018, particularly as they relate to the adverse impact which the model clauses would have on businesses and their employees.

[1] [2019] FWCFB 8583.

2. TECHNICAL AND DRAFTING ISSUES

6. We have reviewed the Draft Determinations issued by the Commission in relation to the Awards listed in paragraph [1] of the December Decision in which Ai Group has a significant interest.

7. Clause X.1(a) in each Model Clause lists the following provisions in satisfaction of which an annual salary may be paid:

   (i) Minimum weekly wages;

   (ii) Allowances

   (iii) Overtime penalty rates

   (iv) Weekend and other penalty rates; and

   (v) Annual leave loading

8. Where an existing 'annualised wage arrangement' provision provided for other entitlements which are not included in cl. X.1(a), the Commission expressed its intention for the provision to be added to the model clause.

9. At paragraph [54] of the Commission's 27 February 2019 Decision (**February 2019 Decision**), the Full Bench said: (emphasis added)

> Model Clause 1 sets out in paragraph (a) of subclause X.1 five classes of award entitlement for which an annualised wage may be paid in satisfaction thereof: minimum weekly wages, allowances, overtime penalty rates, weekend and other penalty rates, and annual leave loading. Where a modern award in Category 1 currently allows a wider range of award entitlements to be encompassed in an annualised wage arrangement, those award entitlements may be added to subclause X.1. In the case of the Legal Services Award, having regard to the conclusions stated in paragraph [140] of the 2018 decision, shift allowances will be added to the classes of award entitlements in subclause X.1.

10. The same intent was expressed in paragraph [61] of the decision:

> Subclause X.1(a) of the respective model clauses will however be modified to contain the full range of award entitlements which may currently be encompassed in an annualised wage arrangement.

11. At paragraph [25] of the July Decision, the Full Bench confirmed this approach:

> As noted in paragraph [61] of the 2019 decision, clause X.1(a) of each model clause will need to be modified to contain the full range of award entitlements which may currently be encompassed in an annualised wage arrangement.

12. It is apparent from the above extracts that the intent of the Commission was to provide for the model clauses, as included in each draft determination, to allow for annualised wage arrangements to encompass the provisions listed in clause X.1(a)(i)-(v) but where an existing provision allowed for other entitlements to also be encompassed, these were to be added. The entitlements which may be absorbed into an annualised salary were therefore neither limited to those listed in clause X.1(a)(i)-(v) nor to those in a current award clause. The list of entitlements which may be encompassed in an annualised wage arrangement pursuant to the draft determinations was intended to be an aggregate of these.

13. Clause X.1(a)(iv) lists 'weekend clauses and other penalty rates' as one of the entitlements which may be encompassed in an annualised wage arrangement. On an ordinary reading of this sub-clause, the phrase 'other penalty rates' is broad enough to refer to any penalty rate not otherwise mentioned in the title to the sub-clause. After reviewing the draft determinations, Ai Group notes that in most cases, not all penalty rates have been listed as entitlements in satisfaction of which an annualised wage arrangement may be paid.

14. Ai Group proposes that each draft determination should be varied to include all penalty rates (including any relevant penalty rates applicable to shift workers, any which apply on public holidays or which apply when an employee works through a meal break) as entitlements which may be satisfied through the payment of an annualised salary.

15. In the below table, Ai Group has listed a number of provisions containing entitlements in satisfaction of which an annualised salary may be paid pursuant to clause X.1(a)(iv) of each Model Clause that have been omitted from each draft annualised salary provision. It is noted that this list is by no means exhaustive and other penalty rates may be contained in each award which should be included:

Award	***Clause containing omitted 'other penalty rates' or 'overtime rates'***
Banking, Finance and Insurance Award 2010	22.8(b), 27.4
Broadcasting, Recorded Entertainment and Cinemas Award 2010	26.2,
Clerks (Private Sector) Award 2010	26.1, 31.4
Contract Call Centres Award 2010	30.4
Horticulture Award 2010	22.3(d), 23.1(b), 28.3
Hospitality Industry (General) Award 2010	26.4, 29.1(d)(ii), 31.4
Hydrocarbons Industry (Upstream) Award 2010	None found
Legal Services Award 2010	31, 33.1(b)
Manufacturing and Associated Industries and Occupations Award 2010	34.5(b), 36.2(f), 36.5(d), 38.5, 39.4
Mining Industry Award 2010	22.3(a)(iii)
Oil Refining and Manufacturing Award 2010	23.3(a)(iii)
Pastoral Award 2010	15.1(b), 30.3, 35.9
Restaurant Industry Award 2010	32.3, 34.2, 34.4
Salt Industry Award 2010	22.3(a)(iii)
Telecommunications Services Award 2010	None found
Water Industry Award 2010	25.4(d), 31.2
Wool Storage, Sampling and Testing Award 2010	24.3(a)(iii)

16. Where additional issues have been detected in the draft determinations, these have been outlined below.

Banking, Finance and Insurance Award 2010

17. No additional technical or drafting issues have been identified in the draft determination for this award.

Broadcasting and Recorded Entertainment Award 2010

18. In its 4 July 2019 Decision (**July Decision**) finalising the annual wage arrangement model clauses, the Commission stated its intention to modify each model clause to accommodate the full range of award entitlements which may currently be encompassed in an existing annual wage arrangement provision.[2]

19. Existing clause 44 of the *Broadcasting and Recorded Entertainment Award 2010* states that, by agreement with the employer, an employee classified as a Journalist Grade 5 or above may be paid a total salary package instead of "ordinary pay, overtime, shift penalties, annual leave loading and distant engagement provisions".

20. The entitlements which may be substituted via the payment of a total salary package are not listed by reference to individual clauses in the Award. However, the draft determination issued to replace clause 44 exhaustively lists the provisions containing entitlements in satisfaction of which an annualised salary may be paid.

21. The listing of specified clauses in proposed clause 44.1(a) risks unintentionally altering the entitlements which may be absorbed into an annual salary, where this is not the approach utilised in the current award.

22. We propose that the approach in the current award be followed and the list of entitlements in proposed clause 44.1(a) be expressed by reference to the subject matter rather than individual provisions.

23. Also, proposed clause 44.1(a) does not provide for an annualised wage arrangement to encompass the allowances which are relevantly provided for in clauses 18 and 49 of the Award and which are referred to in clause X.1(a)(ii) of Model Clause 3.

[2] [2019] FWCFB 4368, [25].

24. Clause 44.1(a) should provide for an annualised wage arrangement to encompass overtime rates referred to in clause 50.3(e) of the Award which may be considered 'Overtime penalty rates' referred to in clause X.1(a)(iii).

Clerks (Private Sector) Award 2010

25. No additional technical or drafting issues have been identified in the draft determination for this award.

Contract Call Centres Award 2010

26. Proposed clause 18A.2 lists the entitlements, in satisfaction of which, an annualised salary may be paid. Consistent with paragraph [25] of the July Decision, these should reflect those in clause 18.5(b) of the current award.

27. Clause 30.4 - Payment for time worked on a public holiday, is not listed as an entitlement which may be absorbed within an annualised salary in the draft determination. In order to reflect the entitlements which may be encompassed in the existing annual salary provision, Ai Group proposes that this entitlement be added to the list in proposed clause 18A.2(b).

Horticulture Award 2010

28. No additional technical or drafting issues have been identified in the draft determination for this award.

Hospitality Industry (General) Award 2010

29. Ai Group does not oppose the relocation of the exemption provision in clause 27.2 applicable to Managerial Staff (Hotels) to clause 20.2 consistent with the submissions of the Hospitality Associations dated 1 August 2019.

30. The words "within the Managerial Staff (Hotels) classification level" have been unnecessarily repeated in proposed clause 20.2(a).

31. Proposed clause 20.2(b)(iii) incorrectly states: "An employee being paid according to clause 27.2(b)(i)". This should be amended to read:

An employee being paid according to clause 20.2(b)(i)

32. The draft determination deletes clause 27 and replaces it with a new annualised wage arrangement provision applicable to employees other than those classified as Managerial Staff (Hotels). The current clause 27 contains:

- The existing annualised salary provision applicable to employees other than Managerial Staff (Hotels) (clause 27.1);
- An exemption provision applicable to Managerial Staff (Hotels) (clause 27.2)
- A provision relating to 'payment of salaries' applicable to staff covered by both clauses 27.1 and 27.2.

33. The 'payment of salaries' provision is retained in proposed clause 20.2(b)(vi) which applies only to Managerial Staff (Hotels).

34. Ai Group contends that the insertion of the model 'annualised wage arrangement' clauses was not intended to result in alterations to the manner in which other award provisions interact with employees paid an annualised salary. As a result, the deletion of clause 27.3 and retention only in proposed clause 20.2(b)(vi) inadvertently removes an existing entitlement to pay employees other than Managerial Staff (Hotels) monthly where such employees are in receipt of an annualised salary. Clause 27.3 is not an 'annualised wage arrangement' provision and its application to employees currently covered by clauses 27.1 and 27.1 should not be impacted by the proposed variations.

35. Ai Group proposes that, in order to avoid an unintended removal of the capacity to pay employees other than Managerial Staff (Hotels), who are in receipt of an annualised salary, monthly, the following subclause should be inserted into Clause 26 – Payment of Wages of the current award as varied by the draft determination:

> **26.7** Despite clause 26.2, where an employee is being paid in accordance with clause 20.2 or clause 27, the employer may elect to pay the employee monthly.

36. The Commission has expressed its intent to modify each model clause to accommodate the full range of award entitlements which may currently be encompassed in an existing annual wage arrangement provision.[3] This intention is not reflected in the current exposure draft.

37. The entitlements in substitution of which an annual salary may be paid to employees pursuant to current clause 27.1 are not restricted to those which are contained in the individual clauses listed in proposed clause 27.2(a). Amounts which may be absorbed into the payment of an annualised salary are expressed broadly in current clause 27.1(b)(ii) as follows: (emphasis added)

> **(b)** An agreement provided for in subclause 27.1(a) will:
>
> …
>
> (ii) unless the parties otherwise agree, relieve the employer of the requirements under clauses 32—Penalty rates and 33—Overtime (or other award clauses prescribing monetary entitlements, as specified in the agreement) to pay penalty rates and/or overtime (or other specified award-derived monetary entitlements) that the employer would otherwise be obliged to pay in addition to the weekly award wage for the work performed and the hours worked by the employee, provided that the salary paid over a year will be sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations (and other monetary entitlements specified in the agreement) had been complied with.

38. By limiting the entitlements in substitution of which an annual salary may be paid to the exhaustive clauses listed in proposed clause 27.2, the draft determination inadvertently reduces the utility of the provision and contradicts the Commission's purpose as expressed in paragraph [25] of the July Decision.

39. Ai Group proposes that the draft determination be altered to reflect the approach in clause 27.1(b)(ii) of the Award which does not limit the award-derived monetary entitlements which may be absorbed into an annualised salary. This reduces the complexity of the clause and simplifies the application of the provision if new monetary entitlements are to be added to the Award at a later date.

[3] [2019] FWCFB 4368, [25].

40. In addition, the proposed clause 27.2 does not provide for an annualised wage arrangement to encompass the annual leave loading which is relevantly provided for in clause 34.2 of the Award and which is referred to in clause X.1(a)(v) of the model clause. This needs to be addressed.

Hydrocarbons Industry (Upstream) Award 2010

41. Clause 20 of the *Hydrocarbons Industry (Upstream) Award* 2010 is not purely an 'annualised wage arrangement' provision.

42. Clauses 20.1 – 20.3 pertain to annualised salaries which may be paid to any employee. Clauses 20.4 – 20.6 allow for the payment of a 'composite daily rate' and are applicable only to employees who are required to perform drilling (as part of prospecting or exploration), prospecting and exploration duties.

43. Whilst we have detected no drafting or technical issues with the replacement of clauses 20.1 - 20.3 with Model Clause 1, Ai Group contends that clauses 20.4 – 20.6 do not pertain to the payment of an annualised salary and are not within the scope of the current proceedings.

44. As such, Ai Group proposes that the 'annualised wage arrangement' clause be inserted as a stand-alone provision separate from the sub-clauses dealing with the payment of a 'composite daily rate'.

Legal Services Award 2010

45. Consistent with the Commission's stated intent at paragraph [54] of the Decision issued on 27 February 2019[4], shift allowances should be added to the classes of award entitlements in substitution for which an annualised salary may be paid.

[4] [2019] FWCFB 1289

Manufacturing and Associated Industries and Occupations Award 2010

46. In inserting the model clauses into each of the awards relevant to these submissions, the Commission's expressed intention was to add award entitlements which may be encompassed in an annualised wage arrangement where these are currently allowed for in a modern award.[5]

47. As has been highlighted earlier in these submissions, this intention has not been accurately reflected in the draft determinations, particularly where an existing annualised wage arrangement provision expresses the entitlements which may be encompassed in such an arrangement by subject matter as opposed to a limited number of clauses.

48. Clause 24.1(g) of the current Award states that the terms the employer and the individual employee may agree to incorporate within the annualised salary arrangement are:

- Minimum wages;
- Overtime rates'
- Penalty rates;
- Allowances;
- Leave loadings; and
- Payment of wages.

49. By contrast, proposed clause 24A.2(a) allows agreement to be reached for an employee to be paid an annualised wage in satisfaction of any or all of the specified provisions listed therein.

50. Proposed clause 24A.2(a) does not reflect the full list of entitlements which may be encompassed in an annualised wage arrangement in clause 24.1(g) of the current award. For example, the penalty rates required to be paid to employees

[5] [2019] FWCFB 1289, [54] and [61].

where requested to work through a public holiday (clause 36.2(f)) or a meal break (clause 38.5) may be encompassed in an annualised wage arrangement pursuant to existing clause 24.1(g) but could not be the subject of such an agreement under proposed cl. 24A.2 as neither clause 36 nor clause 38 are listed in clause 24A.2(a).

51. Ai Group therefore proposes that the approach in the current award of listing the entitlements which may be encompassed in an annualised wage arrangement by subject matter rather than by clause reference should be maintained. This avoids unnecessary complexity in determining whether an entitlement may be subject to such an arrangement and prevents further issues arising if new entitlements, which may be defined within the subject matters listed in current clause 24.1(g), are added to the award at a later date.

52. Also, proposed clause 24A.2 does not provide for an annualised wage arrangement to encompass penalty rates applicable on weekends which are relevantly provided for in clause 36.2(e) of the Award and which are referred to in clause X.1(a)(iv) of Model Clause 3. This needs to be addressed.

Mining Industry Award 2010

53. No additional technical or drafting issues have been identified in the draft determination for this award.

Oil Refining and Manufacturing Award 2010

54. In proposed clause 20.2(b)(iv), ‘annual leave loading’ is incorrectly spelt.

55. In proposed clause 20A.2(a)(iv), the pin-point reference should be to clause 26.4(b), consistent with proposed clause 20.2(b)(iv).

Restaurant Industry Award 2010

56. Proposed clause 28.1(a) does not provide for an annualised wage arrangement to encompass all allowances which are relevantly provided for in clause 24 of the Award despite these being referred to in clause X.1(a)(ii) of the model clause.

Salt Industry Award 2010

57. No additional technical or drafting issues have been identified in the draft determination for this award.

Telecommunications Services Award 2010

58. No additional technical or drafting issues have been identified in the draft determination for this award.

Water Industry Award 2010

59. No additional technical or drafting issues have been identified in the draft determination for this award.

Wool Storage, Sampling and Testing Award 2010

60. No additional technical or drafting issues have been identified in the draft determination for this award.

3. SUBSTANTIVE CONSIDERATIONS CONCERNING THE HOSPITALITY INDUSTRY (GENERAL) AWARD 2010 AND THE RESTAURANT INDUSTRY AWARD 2010

61. In paragraph [2] of the December Decision, the Commission *provisionally* decided that the outer-limit of ordinary-time penalty rate hours under clause X.1(b)(i) shall be an average of 16 ordinary hours per week over the pay period or roster cycle and that the outer limit of overtime hours under clause X.1(b)(ii) shall be an average of 10 per week over the pay period or roster cycle. These *provisional* decisions are reflected in proposed clause 20.2(b) of the Hospitality Award and proposed clause 28.1(b) of the Restaurant Award.

62. The purpose of the imposition of an "outer limit" is to safeguard employee remuneration where an annualised salary is paid to ensure that employees are not disadvantaged by the absence of separate payment for hours which attract penalty or overtime rates. This concern was referred to by the Commission in its conclusions regarding what is necessary for an annualised wage arrangement provision to form part of the fair and relevant safety net of terms and conditions required by s.134(1). [6] At paragraph [129](4) of the Commission's 20 February 2018 Decision (**2018 Decision**), the Full Bench stated:

> (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.

[6] [2018] FWCFB 154, [129](4).

…

(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.

63. In Ai Group's 27 March 2018 Submission, this conclusion was not concurred with.[7] We expressed the view that the purpose of the "outer limit" as a mechanism of safeguarding employee entitlements was faulty on the grounds that in many circumstances, an annualised salary may be struck based on consideration of matters that are in no way related to the issues identified in the Model Clause.[8] For example, in many cases, annualised salaries are determined according to market rates. Annualised salaries may also be set at a level which would clearly alleviate any concerns over whether the minimum requirements of the award would satisfy the quantum being paid.

64. In paragraph [46] of its February 2019 Decision, the Commission determined not to depart from its view that annualised wage arrangements should specify an outer limit on the number of hours that would attract penalty rates which may be worked pursuant to the arrangement. The Decision stated[9]:

> An annualised arrangement pursuant to which an employee may be required to work an unlimited number of such hours per pay or roster cycle without additional remuneration is likely to lead to financial disadvantage to the employee and be oppressive.

65. The Commission however made clear that such an "outer limit" of hours attracting a penalty or overtime rate is not intended to be the same as the average number of such hours upon which the calculation of the annualised

[7] AM2016/13, Ai Group (Further Submission) 27 March 2018, [90].

[8] AM2016/13, Ai Group (Further Submission) 27 March 2018, [90].

[9] [2019] FWCFB 1289, [46].

wage is based. It stated that such a limit should account for "reasonable fluctuations" in the amount of overtime per week that may be covered by the payment of an annualised wage.

66. Ai Group cannot discern, without additional information, how the "outer limits" provided for in the draft determinations of the Hospitality Award and the Restaurant Award were arrived at. Such information would be necessary to make detailed submissions on the appropriateness of the 16 hour "outer limit" for ordinary hours attracting a penalty rate and the 10 hour "outer limit" for overtime hours. Without any detail on how these figures were calculated, a common reference point for argument is unavailable.

67. It is imperative that the "outer limit" on ordinary hours attracting a penalty rate and overtime hours not be set so low as to render the annualised wage arrangement provisions unworkable. This is a particularly important issue for employees engaged under the *Hospitality Award* and the *Restaurant Award* where, as the Commission acknowledged in paragraph [128] of its 2018 Decision, a significant number of ordinary hours are likely to be performed at unsociable hours which attract evening or weekend penalty rates. For example, under the Hospitality Award, ordinary hours attract penalty rates on:[10]

- Saturdays;
- Sundays;
- Public holidays;
- Monday–Friday—7.00 pm to midnight; and
- Monday–Friday—midnight to 7.00 am

68. A 16-hour outer limit on the average ordinary hours which would attract a penalty rate per week would effectively preclude the useful application of the provision to employees rostered to work more than two eight-hour days per

[10] *Hospitality Industry (General) Award 2010*, cl. 32.1 - 32.3.

week which fall entirely within any of the above categories. Moreover, for employees working two eight-hour days for each of Saturday or Sunday, an employer would always need to pay the additional penalty rate each time a public holiday is worked if a weekly pay or roster period is implemented. The proposed "outer limit" of 16 ordinary hours attracting a penalty rate would dramatically reduce the usefulness of the annualised wage arrangement provision for employers covered by the *Hospitality Award*.

69. An additional issue arises concerning the fact that proposed clause 27.2(a) of the *Hospitality Award* and proposed clause 28.1(a) of the *Restaurant Award* prescribe an annualised wage of an amount that is **at least** 25% more than the relevant minimum wage multiplied by 52. Ai Group considers that any incentive to pay an annualised salary over the 25% minimum increment above the base rate which must be paid would be detrimentally impacted by an unmovable "outer limit" on ordinary hours attracting a penalty rate and the overtime hours which may be worked without additional payments being required to be paid over the annual salary. If employers are unable to pay an annualised salary in satisfaction of additional hours attracting a penalty rate or additional overtime hours, the attraction of paying an annualised salary in excess of 25% over the minimum would be dramatically reduced.

70. In order to address the obvious disincentive to the payment of an annualised salary more than 25% in excess of the base rate which would be caused by a hard outer limit, Ai Group proposes scope be afforded in clause 27.2(b) of the Hospitality Award and clause 28.1(b) of the Restaurant Award for proportionate increases in the "outer limits" be allowed where a higher annualised salary is paid.

4. HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010

71. At paragraph [10] of the December Decision, the Commission invited further submissions concerning the issue of the classifications to which an annualised wage arrangement provision inserted into this award should apply.

72. The present question surrounding the coverage of an annualised wage arrangement provision in the HPSS Award arose out of Ai Group's original proposal to include such a clause in our submissions of 10 October 2016. Importantly, Ai Group's original proposal was not intended to limit the application of the provision only to employees with managerial or supervisory responsibilities. As outlined in detail in our earlier submissions, the professional nature of employees engaged as 'health professional employees' was considered sufficient to justify the application of an annualised wage arrangement provision to such employees.

73. Ai Group's arguments in support of the inclusion of an annualised wage arrangements provision made numerous references to the importance of allowing appropriate flexibilities for the engagement of professional employees. Relevant extracts of Ai Group's submission are reproduced below: (emphasis added)

> 4. Many modern awards recognise that employees engaged in professional, supervisory, managerial or other senior roles are commonly and appropriately remunerated by way of an annual salary, in satisfaction of various award entitlements that would otherwise apply. Such awards include, for example:
>
> …
>
> 5. The Health Professionals Award, however, does not presently afford this flexibility to employers or employees covered by it. Given its coverage of professionals and senior support services employees, the absence of this flexibility is inappropriate and unduly restrictive.
>
> …
>
> 64. The proposed clause would also apply to employees engaged as health professionals. Such employees, from level 1 through to level 4, must meet the relevant requirements to practise as a health professional or have obtained such qualification as deemed acceptable by the employer. A list of common health professionals can be found at Schedule C to the Award. These employees are indeed 'professional' employees – they have typically

undertaken tertiary education and specialist training in order to perform their work. In many cases, they may also need to fulfil other requirements in order to meet the rules of or be eligible for membership of their professional association.

65. A substantial number of modern awards presently contain an annualised salary clause that applies to employees in professional, supervisory or managerial roles. In fact many also apply to employees who are captured by a classification at the lower end of the spectrum and thus do not necessarily possess the skills, expertise, knowledge or experience of level 8 or 9 support services employees and health professionals under the Health Professionals Award.

…

67. … The analysis undoubtedly allows for the conclusion to be drawn that employees who perform managerial or supervisory roles, and those who are engaged in professional employment under a number of modern awards may, pursuant to a term of the award, be remunerated by way of an annualised salary. We can see no reason why employees covered by the Health Professionals Award who perform work that is comparable in nature, and their employers, should be denied the benefit of an award term that permits annual remuneration. The absence of such a provision is unfair to employers and employees.

74. As the extracts above plainly show, Ai Group's submission proposing the inclusion of an annualised wage arrangement provision did not intend the application of any potential clause to be confined to employees with managerial or supervisory responsibilities. Engagement as a professional employee was considered a factor in support of providing an option for payment by way of an annual salary pursuant to the HPSS Award. In support of Ai Group's proposal, a number of awards were referred to which contained provisions which were applicable to "professional employees" and allowed for flexible methods of compensation where an annual salary is paid.[11] For example:

- The *Architects Award 2010* provides minimum rates of pay which are expressed as "minimum annual wages" (clause 15) and allows a broad scope to employers in compensating employees for time worked in excess of ordinary hours of duty (clause 19.2).

- The *Broadcasting and Recorded Entertainment Award 2010* allows for payment by way of an annualised salary instead of ordinary pay,

[11] AM2016/13, Ai Group (Submission) 10 October 2016, [66].

overtime, shift penalties, annual leave loading and distant engagement provisions (clause 44).

- The *Medical Practitioners Award 2010* allows for Senior Doctors to be excluded from overtime provisions in the award (clause 24.1). The minimum rates of pay for such employees are expressed as an annual minimum salary (clause 14).

- The *Pharmacy Industry Award 2010* restricts payment by way of an annualised salary to employees classified under the award as a pharmacist or a pharmacy assistant level 4. It is significant for the purposes of these proceedings that "pharmacist" is listed in Schedule C of the HPSS Award which contains the List of Common Health Professionals which are covered by the definitions for "health professional employees" in clause B.2. It would introduce an anomaly into the modern award system if "lower level" pharmacists engaged under the HPSS Award could not be paid pursuant to an annualised salary arrangement, whereas such arrangements would be permitted for pharmacists to which the *Pharmacy Industry Award 2010* applies.

- The *Legal Services Award 2010* permits payment of an annualised salary pursuant to clause 30. This provision is not restricted in its application based on the classes of employee covered by the award. However, it is useful for present purposes to consider that Law Graduates, who have attained a tertiary qualification at a comparable level to many health professional employees, may be paid pursuant to this clause.

75. Significantly, of the classifications in the awards listed above, none of these are necessarily required to perform managerial or supervisory functions.

76. Although the Chiropractors' Association Australia (**CAA**) initially supported Ai Group's proposal to include an annualised wage arrangement provision in the HPSS Award, it did not agree that the provision should be restricted by classification.

77. The CAA position in relation to Ai Group's application was referred to in paragraph [59] of the 2018 Decision. At paragraph [58] of the 2018 Decision, the Commission also paraphrased Ai Group's argument without explicit reference to professional roles:

> **[58]** Ai Group submitted that a number of modern awards contained annual salary provisions for employees engaged in supervisory, managerial or other senior roles, and the absence of this flexibility in this award was inappropriate and unduly restrictive.

78. It is in this context that the following extract from the 2018 Decision should be viewed: (emphasis added)

> **[142]** However we see no reason in principle why managerial or supervisory-level employees should not have access to an annualised salaries provision in appropriate form. We invite the Ai Group, United Voice and other interested parties to lodge submissions in accordance the timetable at the end of this submission as to whether, in relation to the classes of employees encompassed by the Ai Group's claim, Model Clause 3 or Model Clause 4 should be introduced into the Health Professionals Award.

79. It is unsurprising that no reference was made to professional employees, separately to managerial or supervisory level employees, as the Commission sought to deal with the CAA's qualified support for Ai Group's position and had already omitted reference to professional employees when paraphrasing Ai Group's position. To read into the Commission's decision an intention to limit the application of any annualised wage arrangement provision to employees with managerial or supervisory responsibilities would result in an excessively literal interpretation.

80. Ai Group responded to the Commission's call for submissions on 27 March 2018, opposing the variation of the HPSS Award to include Model Clause 3 or Model Clause 4, and confirming a preference for Ai Group's proposed wording. No reference was made to the extent of the application of the provision, as it was not apparent at this point in time that this matter had been significantly called into question. The HSU's submission of 19 March 2018 opposed allowing an annualised wage arrangement clause to apply to any employee covered by the HPSS Award.[12]

81. The Commission's subsequently stated in its February 2019 Decision that it was "prepared to vary that award to include an annualised wage arrangements provision that is applicable to managerial or supervisory employees only and is otherwise in the form of Model Clause 3". This merely repeated the reference to 'managerial or supervisory' employees' which had already been made in the 2018 Decision. No discussion occurred in either Decision which concerned limiting the application of the proposed annual wage arrangement provision to a narrower group of employees than that which was proposed in Ai Group's original proposal.

82. In response to the Commission's invitation for submissions as to whether Model Clause 3 should be inserted into the HPSS Award, Ai Group responded in its 10 April 2019 Submission as follows:

> "Ai Group submits that Model Clause 3, with the minor amendments proposed in section 2 of this submission, should be inserted into the Health Professionals Award for managerial and supervisory employees."

83. This submission was made on the assumption that the reference to restricting application of the annualised wage arrangement provision to 'managerial and supervisory employees' was merely a paraphrase of Ai Group's original proposed scope for the application of the clause, inadvertently omitting reference to professional employees.

[12] AM2016/13, Health Services Union (Submission), 19 March 2018, [16] – [18].

84. Ai Group agrees with the Commission's statement at paragraph [30] of the July 2019 Submission that it is appropriate that Model Clause 3 apply to Support Services employee Levels 8 and 9 as well as all Health Professional classifications in the HPSS Award.

85. We continue to rely on the position put in Ai Group's Correspondence of 28 August 2019 stating that the reference to 'managerial and supervisory employees' in paragraph [142] of the 2018 Decision was merely a reference to such employees in the support services stream and that the Commission did not intend to further narrow the application of any annualised wage arrangement provision to be inserted into the HPSS Award. The Commission was clearly loosely paraphrasing the intended coverage of the provision as originally expressed in Ai Group's 10 October 2016 submission proposing the inclusion of such a clause.

86. At paragraph [10] of the December Decision, the Commission suggested that there may be utility in submissions addressing whether the classifications of Health Professional Levels 1-3 perform managerial or supervisory duties and whether there is 'any other rationale' for an annualised wage arrangement provision to apply to these classifications.

87. Although Ai Group does not consider managerial or supervisory duties to be the relevant benchmark to apply in determining whether the application of an annualised wage arrangement clause to 'health professional employees' is necessary to achieve the modern awards objective, it is apparent that the classification descriptors in Schedule B of the HPSS Award assume that many such employees engage in some level of supervision.

88. The description of a Health Professional – Level 2 includes the following criteria: (emphasis added):

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

89. It may be assumed that a Health Professional – Level 3 would have at least the same degree of managerial/supervisory capacity as an employee classified at Level 2. Although the classification descriptor for a Level 3 employee does not contain any direct reference to the exercise of managerial or supervisory skills, it is likely that these are assumed in the following criteria:

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

90. Health Professional Employees classified at either Levels 2 or 3 should also be afforded the capacity to enter into an annualised salary arrangement on the basis of the high level of independence they are allowed in the performance of their duties.

91. Clause B.2.2 states that an employee classified at Level 2 is expected to work independently and exercise independent judgment. The classification descriptor merely states that such an employee *may* require professional supervision in certain circumstances. It is notable that the supervision referred to is limited to the employee's professional capacity rather than their day-to-day working arrangements.

92. For a Health Professional Employee classified at Level 3, it is clear that the award assumes that the employee will not be subject to direct managerial supervision. Clause B.2.3 states that an employee engaged at this level is experienced and is able to independently apply professional knowledge and judgment.

93. It is inappropriate to require businesses which engage professional employees who operate with high levels of independence in their day-to-day working environment to necessarily apply each individual entitlement in the HPSS Award.

94. A Health Professional Employee classified at Level 1 is unlikely to have any managerial or supervisory responsibilities in the workplace and no such criteria are suggested by the associated classification descriptor contained in Schedule B. Nevertheless, Ai Group maintains that the responsibilities and high-level skills which are intrinsic to engagement in a professional capacity should be sufficiently persuasive to enable the Commission to find that application of the annualised wage arrangement provision to such employees is appropriate. This is especially the case considering the numerous safeguards which are built into the provision and the fact that Model Clause 3 only permits entering into such an arrangement by agreement with an employee.

95. As mentioned above, an internal inconsistency would be introduced across the modern award system if graduate health professionals were unable to access the benefits of an annualised wage arrangement provision. Pharmacists engaged in the community pharmacy industry (along with higher level pharmacy assistants) are already afforded this capacity under clause 27 of the *Pharmacy Industry Award 2010*. Moreover, the Commission has determined that arrangements provided for in Model Clause 1 are to apply to Law Graduates covered by the *Legal Services Award 2010*. Neither of these awards require such graduates to exercise managerial or supervisory skills. It would be incongruous to exclude graduate health professionals from annualised wage arrangements considering their common application to professionals regardless of their managerial or supervisory capacity.