



## **ASU Submission to Fair Work Commission**

### **Four yearly review of modern awards Part 2-3, Div 4 – s. 156**

### **AM2016/13 – Annualised Salaries Clerks – Private Sector Award 2010 & Others**

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# Table of Contents

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Introduction ..... 3

History of Annualised Salary ..... 3

Ministerial Amended Request..... 5

Post Award Modernisation..... 7

Modern Awards Review 2012..... 8

Annualised Salary in Modern Awards..... 9

Clerk PS Award ..... 12

Annualised Salary v IFAs..... 16

ASU Award Review Request..... 18

Conclusion ..... 19

## Introduction

1. On 31 May 2016, Fair Work Commission President, Justice Ross, issued a Statement<sup>1</sup> in relation to the 4 yearly review of modern awards and a number of applications made to insert new, or vary existing, annualised salary terms in modern awards.
2. His Honour indicated that he was satisfied that a broader review of all annualised salary terms was required and pursuant to ss 618 and 582 formed a Full Bench to review and determine annualised salary terms as a common issue.
3. The Australian Services Union has made application under s156 to vary the following three awards to replace annualised salary clauses, unilaterally determined by employers, with a clause requiring employee agreement and adequate safeguards as per the modern Local Government Industry Award 2010 (Clause 14.7) and submissions lodged on 2 March 2014 re Groups 3 & 4 awards:
  - Clerks – Private Sector Award 2010 – Clause 17.
  - Contract Call Centre Award 2010 – Clause 18.5.
  - Legal Services Award 2010 – Clause 30.
4. As Justice Ross has indicated in his Statement this review is appropriate in the 2014 4 yearly review notwithstanding the dismissal of ASU's applications to remove these same annualised salary clauses during the Transitional Review in 2012<sup>2</sup>.

## History of Annualised Salary

5. The history of the annualised salary clauses in the three ASU clerical related awards in this matter relate specifically to the making of the modern Clerks - Private Sector Award 2010 ('Clerks PS Award') in the first instance. The Clerks PS award clause remains the most inferior provision for employees with inherent flaws and a separate and unique history from many other modern awards as follows.

### 6. Award Modernisation Full Bench

In the first AIRC Full Bench Statement re: Award Modernisation<sup>3</sup>; there was significant reluctance to adopt annualised wages and salaries as a matter of course or as a general standard in modern awards. The Full Bench found that annualised salary clauses were not a common feature of awards, could disadvantage employees and as a result would not adopt a standard provision in modern awards as follows:

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<sup>1</sup> 2016 FWC 3520

<sup>2</sup> *ibid* paragraph 9

<sup>3</sup> [2008] AIRC FB 1000 (19 December 2008)

[67] We deal now with annualised wages and salaries. In our statement of 12 September 2008 we said:

*“[26] A number of parties suggested that annualised wage and salary arrangements be included in modern awards. Such arrangements are provided for in the Act. [See s.576J(1)(f)]. No substantial case was put for inclusion of these arrangements on a general basis and we have considered the situation award by award. We do not consider that such provisions should be included in modern awards as a matter of course. Where there are similar arrangements in a relevant pre-reform award or NAPSA, where there is a consensus, or where there is a case on the merits based on the nature of the industry or patterns of work the situation may be different. Most of the exposure drafts do not contain such arrangements.”*

*[68] A number of parties suggested that annualised wage and salary arrangements are a desirable flexibility for employees and should be introduced as a matter of course. It was also suggested that the reference to such arrangements in the WR Act is a clear indication that such arrangements are desirable. There are arguments of convenience which must be taken into account. Employers and some employees might prefer the predictability of regular uniform payments. It has also been suggested that productivity might improve if a salaried approach is adopted. While there is some force in these submissions we are not prepared to adopt annualised payment arrangements as a general standard. There are a number of reasons.*

*[69] Although annualised wage and salary provisions are a common feature of workplace agreements they are very rare in the Commission’s awards. By far the predominant method of calculating entitlements is weekly, based on ordinary hours, penalties, overtime etc. This is a system with which employees, particularly employees who are safety net dependent, are familiar. No doubt many employees arrange their affairs on that basis. While employers invoked the need for flexibility there is always the potential for employee disadvantage which through fear of reprisal or ignorance employees are unable to correct. There are also some practical problems associated with the concept in industries in which short hour employment is common and in which working hours may vary unpredictably. While flexibility might be important, when safety net entitlements are at issue employers would be required to keep a record of hours in any event to ensure that the annualised pay was sufficient to meet those entitlements. Finally, in some industries employers may be able to implement annualised pay arrangements without breaching the award. We assume that this occurs in many areas of employment already. Annual salaries are of course also a feature of many workplace agreements.<sup>4</sup> (emphasis added)*

7. The AIRC Full Bench ultimately determined to maintain them where such provisions already existed in relevant awards but that the matter could be revisited in one of the regular award reviews as follows:

*[70] As indicated we have decided not to adopt a standard provision for annualised wages and salaries in modern awards. Where such provisions already exist in relevant awards we have*

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<sup>4</sup> Request from Minister for Employment and Workplace Relations - 28 March 2008 - and amended Request 16 June 2008 (Award Modernisation) [2008] AIRCFB 1000 (19 December 2008)

*maintained them. The matter could be revisited in one of the regular award reviews which have been foreshadowed. We also note that the Clerks—Private Sector Award 2010 will include an overtime exemption provision which will go part of the way to addressing claims for annualised salaries in that award. We deal with this later. The parties to the Rail Industry Award 2010 agreed that the award should contain an annualised wage and salary provision but could not agree on all of the terms. We deal with that matter later also.*<sup>5</sup>

## 8. Rail Industry Award<sup>6</sup>

In a contested dispute between the parties regarding the terms of the Annualised Salary clause the FWC Full Bench in paragraphs 256-258 decided that any such arrangement should only be by agreement between the employer and the employee concerned and have proper safeguards as follows:

### ***Annualised wage and salary arrangements***

*[256] We have accepted the submissions of the parties that annualised salary arrangements are a common feature in the industry and we note that a clause dealing with this matter was contained in drafts proposed by both RSCC and the rail unions. However, they were not in the same terms.*

*[257] The rail unions submitted that entering into such an arrangement should only be by agreement between the employer and employee concerned. We agree and the clause in the award has been drafted accordingly. Additionally the rail unions sought a provision about assumptions that may have been made about overtime or penalty components to be absorbed into the annualised wage. There is merit in these submissions and our clause reflects them.*

*[258] We have made a number of other changes to the terms of the clause as contained in the exposure draft. It now provides that a copy of the agreement is to be given to the employee and kept by the employer as a time and wages record. We have also inserted provisions dealing with the manner in which the agreement may be terminated. (emphasis added)*

## **Ministerial Amended Request**

9. On 2 May 2009 the then Minister for Employment Julia Gillard issued a Variation of Award Modernisation Request Under Section 567C(4) including removal of exemption provisions from modern awards see Copy of the Request (**Attachment A**). The request only related to the removal of the award exemption provision where it existed such as in the Clerks – Private Sector Award. There was no request in relation to replacing such provisions with annualised salary clauses.

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<sup>5</sup> *ibid*

<sup>6</sup> [2008] AIRC FB 1000

10. **Clerks – Private Sector Award**

On 16 November 2009<sup>7</sup> the Fair Work Commission Full Bench removed the exemption provisions as requested by the Minister. However of its own volition the Full Bench inserted in its place an annualised salary clause which did not require employee agreement and lacked adequate safeguards. This decision seems at odds with the Full Bench's own requirements in paragraph 25 stating: "*the exemption provision should be removed but the flexible working arrangements should be available with respect to clerical employment and that these should be subject to appropriate safeguard and processes to ensure that employees clearly understand and agree to any arrangements which may differ from base award entitlements*" (emphasis added). The decision was also inconsistent with the Full Bench's Decision in December 2008 re: Rail Industry Award, where it insisted that there should be agreement between the employer and employee<sup>8</sup>.

11. The Full Bench also stated (in paragraph 25) that, '*the wording of the clause is in line with clauses in some other modern awards*' and that it '*safeguards (employees) against disadvantage*'. The ASU submits that the annualised salary clause unilaterally inserted into the Clerks PS Award is inferior to the many annualised salary clauses in other modern awards, which require employee agreement and have appropriate safeguards, such as that agreement must be genuinely made without coercion or duress (see Manufacturing and Associated Industries and Occupations Award 2010 - clause 24.1 (g) (iii)) and that the employee can have the involvement of the relevant union or an employee nominated representative (see Pharmacy Industry Award 2010 - clause 27.4).

12. **Banking, Finance and Insurance Award**

On 16 November 2009<sup>9</sup> as with the Clerks PS Award decision the Full Bench removed the exemption clause and inserted the same annualised salary clause in the modern Banking, Finance and Insurance Award (Clause 14).

13. **Mining Industry Award**

On 21 December 2009<sup>10</sup>; the Commission inserted into the modern Mining Industry Award (Clause 17) the same annualised salary clause as the Clerks PS Award.

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<sup>7</sup> [2009] AIRC FB 922

<sup>8</sup> [2008] AIRCFB 1000; at paragraph 257

<sup>9</sup> [2009] AIRC FB 923

<sup>10</sup> [2009] AIRC FB 958

## Post Award Modernisation

### 14. Clerks PS Award

On 25 February 2010<sup>11</sup>; the ASU sought to vary the Annualised Salary clause so that arrangements may only be entered into by consent. The Fair Work Commission dismissed the application for the following reasons:

- Clerical employees are commonly remunerated by way of annualised salary;
- The terms of the relevant awards and NAPSA were taken into account in formulating the annualised salaries clause on 16 November 2009 and safeguards are appropriate for clerical employment; and
- The variations sought (i.e. employee agreement) would reduce existing flexibility and require changes in practices which have operated for many years.<sup>12</sup>

The ASU has, with respect, consistently disagreed with and challenged the assumptions made in each of the above dot points.

### 15. Oil Refining and Manufacturing Award 2010

On 4 March 2010<sup>13</sup>; arising out of an application by Oil industry employers the FWC Full Bench inserted the Clerks PS annualised salary clause into the modern oil industry award (which included clerical classifications) notwithstanding that there already existed an annualised salary clause covering all employees. As a result the Full Bench decided to have two separate clauses – one new clause for ‘Clerical’ employees and the other pre-existing clause now specifically for ‘Non clerical’ employees. The Non clerical employees (originally covering all employees) clause requires agreement and also has built-in safeguards such as in 20.2 (d) *‘In addition to the requirements of clause 20.3, any written agreement under this clause must specify each separate component of the annualised wage or salary arrangements and any overtime or penalty assumptions and calculations commuted into the annualised arrangement.’* And further in 20.2 (f) the agreement may be terminated by the employer or employees giving 12 months’ notice. Whereas the ‘clerical’ employees clause requires no employee consent and has fewer built-in safeguards.

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<sup>11</sup> [2009] AIRC Full Bench 969

<sup>12</sup> [2010] FWAFB 969

<sup>13</sup> [2010] FWA FB 1805

## Modern Awards Review 2012

### 16. **Contract Call Centres Award**

On 22 October 2012<sup>14</sup> Senior Deputy President Kaufman dismissed an application by the ASU to remove the annualised salary clause in the Contract Call Centres award. As with the Clerks PS provision the ASU argued that without their agreement it disadvantaged employees.

### 17. **Clerks PS Award**

On 14 November 2012<sup>15</sup> Senior Deputy President Kaufman dismissed an application by the ASU to remove the annualised salary clause in the Clerks PS award for the same reasons as the Contract Call Centres award.

### 18. **Clerks PS Award Appeal**

On 5 March 2013<sup>16</sup> the FWC Full Bench dismissed an ASU appeal against SDP Kaufman's decision re Clerks PS award.

### 19. **Local Government Industry Award**

On 13 May 2013<sup>17</sup> the Fair Work Commission approved consent variations to the Local Government Industry Award which included an annualised salary clause. This clause is superior to the Clerks PS Award provision and was relied on for the drafting of orders in this application for the following reasons:

- The clause requires agreement between the employee and employer;
- 10 safe guards are listed in clause 14.7 (d) and
- The agreement can be terminated with 4 weeks' notice to the other party.

### 20. **Water Industry Award**

On 9 December 2014<sup>18</sup> the Fair Work Commission inserted an annualised salary clause in the Water Industry award. The South East Water Corporation, supported by the AIG, made an application to insert into the Water Award the Clerks PS award annualised salary clause. The ASU opposed this application and agreed that if the Water Award was to have such a clause; it should be in the same terms as the Local Government Industry Award clause. The Full Bench decided to place into the

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<sup>14</sup> [2012] FWA 9025

<sup>15</sup> [2012] FWA 9731

<sup>16</sup> [2013] FWC Full Bench 1228

<sup>17</sup> [2013] FWC 2936

<sup>18</sup> [2014] FWC Full Bench 5195

Water Industry Award the Clerks PS Award clause, but, with three additional safeguards for the employees as in clause 19.1 (b) requiring written advice to the employee in relation to the annual salary, commencement date, award level classification and terms to ensure no disadvantage to the employees.

21. **Pastoral Award**

On 24 December 2015<sup>19</sup> the Fair Work Commission declined to insert an annualised salary clause in the Pastoral Award and decided to refer this Award to this Full Bench reviewing annualised salary clauses in a number of modern awards. In its Decision the Full Bench made some observations on annualised salary clauses. In particular at paragraph 156 it said that this 4 Yearly 'Review is broader in scope than the Transitional review and as such it is the first real opportunity to fully examine the appropriateness of the safeguards to be incorporated in such terms' (emphasis added). The ASU agrees with the Full Bench that this broader 4 yearly review is the first real opportunity to properly revisit the serious flaws in the Clerks PS annualised salary provision.

## **Annualised Salary in Modern Awards**

22. The ASU submits that out of the 122 Modern Awards only 18 have an Annualised Salary Clause. The 18 Awards can be categorised into 3 groups as follows:

23. **Group 1 – Minimalist, few employee safeguards and no employee agreement.**

This group includes:

- Clerks – Private Sector Award 2010
- Legal Services Award 2010
- Salt Industry Award 2010
- Mining Industry Award 2010
- Banking, Finance and Insurance Award 2010
- Wool, Storage, Sampling and Testing Award 2010

24. **Group 2 – Employee agreement and inbuilt safeguards.**

This group includes:

- Local Government Industry Award 2010
- Rail Industry Award 2010
- Restaurant Industry Award 2010
- Hospitality Industry (General) Award 2010

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<sup>19</sup> [2015] FWC Full Bench 8810

- Manufacturing and Associated Industries and Occupations Award 2010
- Oil Refining and Manufacturing Award 2010 *(NB While there needs to be agreement for the Non-clerical employees, it does not specify agreement for Clerical employees).*

Examples of Safeguards for employees in these Group 2 awards are as follows:

- **Local Government Award**

Clause 14.7 (d) lists 10 safeguards including (i) that the agreement must be in writing and signed by both parties and (ix) that it must contain the salary for the purposes of accident make up pay.

- **Rail Industry Award**

Clause 18.4 says, 'Any written agreement under this clause must specify each separate component of the annualised wage or salary arrangement and any overtime or penalty assumptions and calculations commuted into the annualised arrangement.'

- **Restaurant Industry Award**

Clause 28.2 says, 'The employer must keep all records relating to the starting and finishing times of employees to whom this clause applies. This record must be signed weekly by the employee. (emphasis added) This is to enable the employer to carry out reconciliation at the end of each year comparing the employee's ordinary wage under this award and the actual payment. Where such a comparison reveals a shortfall in the employee's wages, then the employee must be paid the difference between the wages earned under the award and the actual amount paid.'

- **Hospitality Industry (General) Award**

Clause 27.1 (e) says, 'Where payment in accordance with this clause is adopted, the employer must keep a daily record of the hours worked by an employee which will show the date and start and finish times of the employee for the day. This record must be countersigned weekly by the employee and must be kept at the place of employment for a period of at least six years.' (emphasis added).

- **Manufacturing and Associated Industries Award**

Clause 24.1 (g) (vi) includes a number of safeguards including, 'detail how the agreement does not disadvantage the individual employee in relation to the individual employee's term and conditions of employment' and in 24.1 (g) (VIII) it says, 'An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's

understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.'  
(emphasis added)

- **Oil Refining and Manufacturing Award**

Clause 20.2 (e) says, 'The employer must give the employer a copy of the agreement and keep the agreement as a time and wages record.'

25. **Group 3 – No explicit employee consent but employee safeguards and records kept**

This group includes:

- Pharmacy Industry Award 2010
- Broadcasting and Recorded Entertainment Award 2010
- Telecommunications Services Award 2010
- Water Industry Award 2010
- Hydrocarbons Industry (Upstream) Award 2010
- Contract Call Centre's Award 2010

Examples of safeguards for employees in these Awards:

- **Pharmacy Industry Award**

Clause 27.4 says, 'The employee may be represented in the discussions in relation to the making of an Agreement under this clause by either their union or nominated representative, and any agreement reached under this clause must be recorded in writing, and a copy retained by the employer.'

- **Broadcasting and Recorded Entertainment Award**

Clause 44.5 says, 'If the employee's pattern of ordinary hours of work changes during the period of the agreement or is found to be wrongly calculated or extraordinary events have intervened they will be entitled to terminate the agreement and revert to the conditions contained in this award'.

- **Telecommunications Services Award**

Clause 15.3 (c) says, 'An employee will be advised in writing upon engagement, or in any other case upon request being made in writing to the employer, of the method of compensation being used. The methods of compensation are set out in clause 15.3 (b). If the employer is

compensating the employee by a method identified in clause 15.3 (b), the employer must identify the special additional remuneration, allowance or loading which is being paid.’

- **Water Industry Award**

In the matter<sup>20</sup>, the Full Bench added 3 safeguards to the Clerks – Private Sector type Award clause reflected in clause 14.2.1 (b).

- **Hydrocarbons Industry (Upstream) Award**

This award contains clause 20.5 ‘Composite daily rate not to disadvantage employees. The composite daily rate must be no less than the amount to which the employee would have been entitled to receive under the relevant wages rates, penalties, allowances and loading prescribed by third award over the period of the engagement for which the composite rate is paid.’ (emphasis added)

- **Contract Call Centre Award**

Clause 18.5 (f) on Transfers says, ‘Where an employee is transferred permanently from day work to shift work or from shift work to day work, such employee should receive at least one month’s notice. However, the employer and employee may agree on a lesser period of notice.

The ASU submits from the above analysis that contrary to popular opinion the Clerks – Private Sector Award type annualised salaries clause is not the norm. Of the 18 awards with annualised salary clauses 6 do not require employee consent, 6 require employee consent and another 6 are not explicit in requiring consent, but contain a range of provisions to safeguard an employee’s interests which do not exist in Group 1 type awards described above.

## **Clerk PS Award**

26. The *Clerks – Private Sector Award 2010* was made in Stage 1 – Priority Awards of Award Modernisation by the Australian Industrial Relations Commission (“the AIRC”) and became operative on 1 January 2010. The Clerks PS Award largely replaced several Federal industry and common rule awards and State NAPSAs covering clerical and administrative employees in the private sector.

27. Annualised salaries and exemption provisions existed in a minority of underpinning clerical awards and in some unknown number of individual employment arrangements. There was no evidence of widespread use of annualised salary arrangements. However most importantly neither annualised salary nor exemption provisions existed in the majority or the critical mass of underpinning clerical awards. Where annualised salary provisions existed they all included a requirement for employee

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<sup>20</sup> [2004] FWC FB 5195

agreement and many had substantial safeguards. **Attachment B** is a table with Exemption and Annualised salary provisions in the top Federal industry and State common rule awards which were replaced by the modern Clerks PS award (*NB most clerical enterprise awards are not included*).

28. In the second largest State of Victoria the previous federal common rule Clerical and Administrative Employees award had no history of either award exemption rates or annualised salaries. Likewise the South Australian Clerks Award had no history of exemption rates or annualised salary clauses.
29. In the third largest State of Queensland the relevant clause, frequently but wrongly referred to as an exemption clause, was in fact an annualised salary clause and provided for agreement to be made for the payment of an annualised salary.
30. Similar clauses existed in the Western Australia Clerks award. The same applied to the Tasmanian Clerical award which also required agreement to be made as annualised salary packages which would provide benefits in line with the award.
31. Only the NSW and ACT Common rule clerical awards could be said to have had exemption clauses ie above a certain rate of pay essential award provisions did not apply.
32. As result of the removal of the exemption provision in the federal *Clerks (Breweries) Consolidated Award – Exemption* case by the AIRC Full Bench<sup>21</sup> the greater majority of federal industry clerical awards either had no exemption or annualised salary clauses. Those that did retain exemption provisions were as a result of the *Clerks Breweries* decision earmarked for removal prior to the award modernisation process.
33. The ASU submits that there was no majority or critical mass of underpinning (pre modernisation) private sector clerical and administrative awards that had either exemption rates or annualised salary clauses. In the table in Attachment B out of the 39 awards 11 (28%) had exemption provisions (now omitted in modern awards) and 7 (18%) had annualised salary arrangements all requiring employee agreement. Therefore over 50% of predecessor clerical awards covering the greater majority of private sector clerical employees had neither exemption provisions or annualised salary clauses.
34. The ASU further submits that exemption provisions as forerunner to the modern annualised salary provision reflected an old State (NSW) differential originating from exemption provisions successfully promulgated by NSW based employer peak organisations, such as AIG, NSWEF and ABI.
35. The ASU has consistently argued since the award modernisation process that Annualised salary provisions should not be used to force flexible working arrangements which would otherwise require employee agreement through the standard Award Flexibility provision ('IFAs'). The annualised salary clause at the employer's discretion allows an employer to avoid the standard safeguards in the Award flexibility clause and otherwise discriminate against all clerical employees covered by the award when

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<sup>21</sup> *Print S6744, 26 May 2000*

compared with employees covered by most other modern awards quite often working in the same industry or for the same employer.

36. The ASU submits that employers have sought to exploit this provision to go further than the award flexibility clause and enforce potentially unreasonable and unfair unilateral individual workplace flexibilities to suit employers, contrary to the legislative intent for fairness and equity in award flexibility. The witness statement provided by Terry O'Loughlin highlights inherent unfairness of the annualised salary clause.
37. Indeed employer workplace relations law firms have, since the making of the modern Clerks PS award in 2010, advised their clients to put in place unilateral annualised salary arrangements instead of IFAs. **Attachment C** is an on-line Newsletter (June 2010) published by Piper Alderman which highlights the fundamental flaw in the Clerks PS award and advises employers accordingly as follows:

*"This annualised salaries provision will mean that, for most clerical employees, individual flexibility agreements are not necessary because the annualised salary clause will provide most employers with the ability to put in place unilaterally the type of arrangement they prefer for their clerical employees"*  
(emphasis added)

The ASU acknowledges that this legal advice unfortunately remains accurate and confirms the concern the ASU has consistently raised for the last six years.

38. Further the legal advice laments the fact that such unilateral annualised salary clause do not exist in most other modern awards because they do not suit employers as follows:

*"Unfortunately, annualised salaries provisions are not common in modern awards....the Commercial Sales Award 2010 does not. Therefore to provide commercial travellers with an annual salary arrangement in accordance with the award, an employer would have to make an individual flexibility agreement with each employee."*

39. The ASU is aware that employers in other industries have for some years sought to pursue the inferior Clerks PS Annualised Salaries provision to circumvent the standard award flexibility provision in their own industry modern award. Although unsuccessful the National Retailers Association (NRA) sought to pursue the inferior provision in the General Retail Industry Award 2010 as follows in their 2012 Award Review Application (AM2012/8) on 9 February 2012 (see **Attachment D**, at page 4):

**Clause 19 – Annualised Salaries**

1. *Include a new clause 19 – Annualised Salaries. It is proposed to include an annualised salary provision in similar wording to that provided by the Clerks Private Sector Award 2010. The inclusion of this provision is in line with many common law contract arrangements which are already being utilized in the industry. The inclusion of this provision offers greater certainty for these arrangements for both employers and employees by avoiding the use of individual*

flexibility agreements which may be terminated by either party giving 4 weeks notice. (emphasis added)

40. The ASU submits this 4 yearly award review is an important opportunity to revisit the provision as it was not, with respect, adequately considered by the AIRC either through award modernisation nor later when the ASU sought to vary it in 2010 and remove it during the 2012 award review. The concerns once again raised by the ASU are consistent with those originally expressed by the AIRC acknowledging the “*desirability*” for employers to have maximum flexibility but: “*potential for employee disadvantage which through fear of reprisal or ignorance employees are unable to correct.*” The ASU submits that the AIRC Full Bench through its initial assessment (which the ASU says was correct) of annualised salaries provides a cogent reason in its own right to vary the current award provision.
41. A recent decision of the Western Australian Industrial Magistrate Court (*Simone Jade Stewart v Next Residential Pty Ltd*<sup>22</sup>) found in favour of an employee claim to unpaid overtime because her annualised salary contract failed to properly specify the provisions of the Clerks Private Sector Award. The ASU submits that employers generally do not sufficiently specify annualised arrangements and offer them on ‘take it or leave it’ basis. **Attachment E** is a copy of the decision and a related *Workplace Express* article. In the commentary the employee agent, Mr Patrick Mullally from Workclaims Australia is quoted as saying that the case involved a “*very common attempt to exclude award provisions*” and went on to say it was “*unusual*” to see a former employee prepared to challenge it in court. Mr Mullally insightful comments best illustrates why there needs to be adequate safeguards as well as employee agreement with annualised salary clauses.
42. The ASU submits that the inclusion of an annualised salary clause in the Clerks PS Award without employee agreement prevents it from meeting a number of modern awards objectives. Primarily, it does not “provide a fair and relevant minimum safety net of terms and conditions” with respect to minimum rates for employees covered by the award.
43. The ASU further submits that the annualised salary clause prevents the Clerks PS Award from achieving the following modern awards objective:
- *s134(1)(b) – the need to encourage enterprise bargaining.*

There is no option for employees to make a genuine agreement about the award provisions listed in Clause 17.1(a) rather they must accept an individual annualised salary arrangement whether or not they agree or it suits their circumstances. In such circumstances where employers are permitted to unilaterally introduce annualised salary clauses there is no incentive for the employer to bargain.

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<sup>22</sup> [2016] WAIRC 00756 16 September 2016

- *S134(1)(c) – the need to promote social inclusion through increased workforce participation.*

There is no opportunity for employees covered by the Clerks PS Award to participate in the determination of essential award conditions. The greater majority of employees covered by the award are female and non-unionised and are therefore already under-represented in the labour market in relation to both participation and the ability to have a say in the terms and conditions of their work. Annualised salaries can also be imposed on juniors.

- *s134(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;*

Individual flexibility clauses are included by statute in all modern awards and are intended to provide the appropriate safeguards for an employer and employee to negotiate and genuinely agree to a salary arrangement that will benefit both parties. An annualised salary clause circumvents this process and can create confusion about whether the award flexibility clause or the annualised salary provision should apply.

## **Annualised Salary v IFAs**

44. The Fair Work Commission must also consider whether, pursuant to sub item 6(2)(b), the Clerks PS Award operates *effectively without anomalies or technical problems arising from the Part 10A award modernisation process*. The ASU submits that the Clerks PS Award does not meet this objective while it contains an annualised salary provision clearly undermining the mandated Award Flexibility provision.
45. An anomaly is created where the Award Flexibility clause and its protections, otherwise available to all employees covered by the greater majority of other modern awards, are not available to employees where an annualised salary arrangement is at the total discretion of the employer.
46. To this end employees are simultaneously expressly entitled to the provisions of the Award Flexibility clause and implicitly denied access to the same clause via the operation of the annualised salary clause. That is to say, employees covered by the Clerks PS Award are denied the right to negotiate arrangements to meet the “genuine individual needs of the employer and the employee” around when work is performed; overtime rates; penalty rates; allowances; and leave loading via operation of the annualised salary clause. This right for an employee to agree on an individual arrangement was the clear intention of the Minister’s award modernisation request.<sup>23</sup>

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<sup>23</sup> Minister for Employment and Workplace Relations, REQUEST UNDER SECTION 576C(1) – AWARD MODERNISATION, para 10.

47. The ASU submits that the Award Flexibility provision is a term that must be included in a modern award (s144) and while the annualised salary provision is permitted (s139(f)) to be included at the discretion of Fair Work Commission it should only be included to the extent necessary to achieve the modern awards objective.
48. In a conflict between which provision should apply to Clerks PS award employees the ASU submits the legislated requirement for an Award Flexibility provision, should prevail over a clause that is merely permitted and as found by the AIRC rare in awards (only 15% of awards have annualised salary clauses) but common in workplace agreements.
49. The ASU submits that in addition to the AIRC initial negative assessment there are cogent reasons for the variation to the annualised salary clause based on equity and fairness which are that the provision is:
- Inherently inequitable and discriminatory as it mainly applies to private sector clerical and administrative employees;
  - Inherently unfair as no employee agreement is required nor is there any ability to terminate individual annualised salary arrangements; and
  - Undermines the proper application of the award flexibility provisions;
50. The ASU has consistently argued that over time annualised salary arrangements are more appropriate, relevant and more secure in Enterprise Agreements where actual pay rates apply and annualised pay arrangements can be agreed, monitored, renegotiated and more reliably reviewed by employees.
51. The ASU further submits that the annualised salary provision in the Clerks PS Award was not adequately considered by the AIRC when compared to the consideration given to the Award Flexibility provision.<sup>24</sup> The AIRC Full Bench appeared to give less consideration to the fact that annualised salaries were not common in awards and did not exist in the majority of Clerks PS predecessor awards.
52. In contrast the development of the model award flexibility clause was premised on the request by the then Minister for Employment and Workplace Relations:

The Commission will prepare a model flexibility clause to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the

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<sup>24</sup> *Priority industries/ occupations, model award flexibility clause, timetable, priority awards/NAPSAs* [2008] AIRCFB 550 (20 June 2008)

employee. The Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee.<sup>25</sup>

53. In its decision of 20 June 2008, the AIRC Full Bench said of the draft model award flexibility clause:

It is evident from the terms of cl. 10 and 11 of the request, which we have set out above, that the clause *should provide for agreements between an employer and an individual employee*.<sup>26</sup>

54. Of the draft model clauses before it, the AIRC noted:

All of the drafts advanced have a number of common features. *Obviously they all contemplate an agreement between an employer and an individual employee which meets their genuine individual needs*<sup>27</sup>... It is the Commission's task to design a model clause which permits flexibility based on individual needs but also to "ensure" that the clause cannot be used to disadvantage an employee.<sup>28</sup>

55. The ASU submits that there was far less scrutiny when the AIRC Full Bench inserted an annualised salary provision into the Clerks PS award. Little research, evidence or analysis exists to demonstrate that annualised salary provisions are appropriate for employees covered by the Clerks PS Award.

## **ASU Award Review Request**

56. The ASU application requests the Fair Work Commission review the three clerical related awards in their own right and give renewed consideration to the matters raised by sub item 6(2) and the cogent reasons outlined in this submission. The ASU submits that the clauses in question should be replaced by the annualised salary clause in the modern Local Government Industry Award 2010 (As per Attachment F).

57. The grave concerns held by the ASU for the operation of individual annualised salary arrangements in modern awards is consistent with the concerns held by the AIRC Full Bench when it first considered such arrangements in awards as outlined in this submission.

58. The ASU submits that, with respect, the AIRC adoption of annualised salary provisions without scrutiny is more common to white collar awards employing predominantly female workers (70+%) and with low levels of unionisation.

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<sup>25</sup> Minister for Employment and Workplace Relations, *REQUEST UNDER SECTION 576C(1) – AWARD MODERNISATION*, para 10.

<sup>26</sup> *Priority industries/ occupations, model award flexibility clause, timetable, priority awards/NAPSAs* [2008] AIRCFB 550 (20 June 2008) para [164]

<sup>27</sup> *ibid* para [157]

<sup>28</sup> *ibid* para [163]

59. In contrast the modern manufacturing award [*Manufacturing and Associated Industries and Occupations Award 2010* - Clause 24(g)] maintains an annualised salary clause that the ASU understands was the subject of analysis and scrutiny and only applies to the higher classifications. This award traditionally covers a male dominated and highly unionised workforce.
60. The modern *Oil Refining and Manufacturing Award* provides the most clear cut example of one rule purposely being applied to traditional blue collar male, highly unionised workforces and another for the larger non-unionised white collar, mainly female, clerical workforce.
61. The ASU submits that the varying the annualised salary provision as sought by the ASU will not prejudice employers' interests nor is there any evidence that it will result in additional labour costs or lead to less workplace flexibility.

## **Conclusion**

62. Despite previous decisions of the Commission where it inserted into modern awards Clerks – Private Sector Award type Annualised Salary Clauses, the presently constituted Full Bench has sufficient discretion to follow at least 12 other awards of the Commission which allow for employee consent and/or numerous safeguards to protect the employee. The ASU submits that the fairer annualised salary clause in the modern Local Government Award should be relied on by the Commission to replace the current clauses in the Clerks – Private Sector, Legal Services and Contract Call Centre's Awards.
63. This would ensure the annualised salary clauses in these awards were brought into line with the IFA provision in modern awards which require consent, include safeguards and can be terminated by the employee with notice. An employee covered by the Clerks – Private Sector Award type annualised salary clause is unable to either agree to any arrangement in the first place or terminate any such arrangement. The ASU claims this is inherently unfair and inconsistent with the mandated IFA clause and traditional common law employment arrangements.

## VARIATION OF AWARD MODERNISATION REQUEST UNDER SECTION 576C(4)

I, JULIA GILLARD, MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS, pursuant to section 576C(4) of the *Workplace Relations Act 1996* (the Act), vary my award modernisation request of 28 March 2008, as varied on 16 June 2008 and 18 December 2008 as follows.

1. At the end of subparagraph 2(e) add:

“(f) exempt or have the effect of exempting employees who are not high income employees, from modern award coverage or application, unless there is a history of exempting employees from coverage across a wide range of pre-reform awards and NAPSAs in the relevant industry or occupation.”

2. After paragraph 2 insert:

“2A In paragraph 2(e) an enterprise award means an award that regulates the terms and conditions of employment in:

- a. a single enterprise (or part of a single enterprise) only; or
- b. in one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:
  - i. franchisees of the same franchisor; or
  - ii. related bodies corporate of the same franchisor; or
  - iii. any combination of the above.

2B In paragraph 2(e) a NAPSA derived from a State enterprise award means a NAPSA derived from a State award that regulated the terms and conditions of employment in:

- a. a single enterprise (or part of a single enterprise) only; or
- b. in one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:
  - i. franchisees of the same franchisor; or
  - ii. related bodies corporate of the same franchisor; or
  - iii. any combination of the above.”

3. Subparagraph 3 (e), omit “the principle of equal remuneration for work of equal value” and substitute “the principle of equal remuneration for work of equal or comparable value”.

4. After paragraph 11AA insert:

“11AB The Commission can also require any appropriate additional protections for employees or groups of employees of Australian Disability Enterprises.”

5. After “small business redundancy entitlements” in paragraph 32 add “or the rate of pay at which various types of leave is taken.”

6. Dot point 8 in paragraph 33, omit “and”.

7. At end of dot point 9 in paragraph 33 add:

“; and

- specify further situations in which section 119 (redundancy pay) does not apply to the termination of an employee’s employment.”

8. After paragraph 33 insert:

“33AAA Where an industry has developed specific arrangements for termination and redundancy to reflect the way the industry operates, the Commission may specify in a modern award that section 119 of the NES does not apply in those circumstances.

33AA Where a modern award covers work performed in remote locations, the Commission should include terms that permit the roster arrangements and working hours presently operating in practice in those locations to continue after the making of the modern award.

33A The NES allows a modern award to include terms requiring an employee, or allowing an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. Where an award covers remote work, a modern award should provide that an employer may reasonably require employees who work on a roster cycle make up of working days (on-duty period) and non-working days (off-duty period) to do either or both of the following:

- (i) to take any period or periods of annual leave of the same duration as the on-duty period under the employee’s work cycle roster;
- (ii) to take annual leave on any day nominated as annual leave as part of the roster cycle.”

9. Omit sub-paragraph 45(b) and substitute:

“ (b) a provision that would provide a calculation of payment, a payment rate, or a payment rule in relation to a piece worker employee with respect to paid leave or paid absence under the NES. For example, a method of making payment to a piece worker employee when that employee is absent on annual leave. Any provisions setting out a calculation payment must take into account the methods by which a piece worker may be remunerated under the modern award, including by incentive payments or bonuses.”

[Signed]



**THE HON JULIA GILLARD  
MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS**

2nd May 2009



**Australian Government**  
**Australian Industrial Registry**

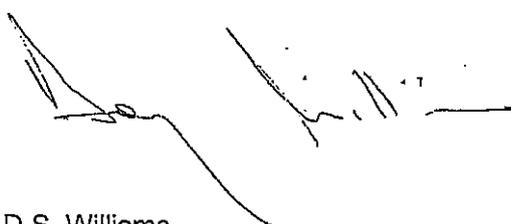
*Workplace Relations Act 1996*

s.576D(1) – award modernisation request

INDUSTRIAL REGISTRAR WILLIAMS

MELBOURNE, 8 MAY 2009

I, **Douglas S. Williams**, Industrial Registrar, having received a copy of an amended award modernisation request from the President hereby publish the request under sub-section 576D(1) of the *Workplace Relations Act 1996*.

  
D.S. Williams  
Industrial Registrar



annual leave, paid personal/carer's leave and paid absences on public holidays.

2. We also propose the loading to be capped at 23% instead of 25% in line with the loading payable to casual employees in lieu of similar benefits.

THE END

## Clerks – Private Sector Award 2010 – Predecessor Awards (Federal & State)

October 2016

Award	Pub ID	State	Exemption	Annualised Salary
Clerical and Administrative Employees (State) Award	<a href="#">AP773032</a>	NSW	Yes Clause 29	No
Clerical and Administrative Employees (Victoria) Award 1999	<a href="#">AN120664</a>	VIC	No	No
Clerical Employees Award – State 2002	<a href="#">AN140067</a>	QLD	No	Yes – by agreement Clause 1.4.2
Clerks (SA) Award	<a href="#">AN150039</a>	SA	No	No
Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972	<a href="#">AN160066</a>	WA	No	Yes – by agreement Clause 36
Clerical and Administrative Employees (Private Sector) Award	<a href="#">AN170017</a>	TAS	No	Yes – by agreement
Clerks (A.C.T.) Award 1998	<a href="#">AP772208</a>	ACT	Yes (limited) Clause 3.2	No
Clerical and Administrative Employees (Northern Territory) Award 2000	<a href="#">AP839196</a>	NT	No	No
Clerks (Road Transport Industry) Award 2002	<a href="#">AP818787</a>	Federal	Yes Clause 4.4	No
Clerical and Administrative Employees (Health Insurance Industry) Award 2001	<a href="#">AP809224</a>	Federal	No	No
Clerical and Administrative Staff – International Freight Forwarding and Customs Clearing Industry Award 2003	<a href="#">AP826032</a>	Federal	No	Yes – by agreement Clause 16.2
Clerical and Administrative Employees - Breweries - Award 1999	<a href="#">AP772069</a>	Federal	No	Yes – by agreement Schedule B
Off-Course Agency Employees Award 2001	<a href="#">AP812511</a>	Federal	No	No
Records Management Services Award 2002	<a href="#">AP817097</a>	Federal	No	No
Victorian Legal Professional, Clerical and Administrative Employees Award 2004	<a href="#">AP831581</a>	Federal	No	No
Clerical and Administrative Employees in Temporary Employment Services (State) Award	<a href="#">AN120130</a>	NSW	Yes Clause 25	No
Clerical and Administrative Employees Legal Industry (State) Award	<a href="#">AN120675</a>	NSW	Yes Clause 21	No
Real Estate Industry (Clerical and Administrative) (State) Award	<a href="#">AN120457</a>	NSW	Yes Clause 35	No
Tab Clerical and Administrative Agency Casual Staff Award 2002	<a href="#">AN120533</a>	NSW	No	No
Tab Clerical and Administrative Staff Phonetab Operators Award 2004	<a href="#">AN120534</a>	NSW	No	No
Mirror and Telegraph Publications Clerical Award 2000	<a href="#">AN120339</a>	NSW	No	No
Clerical Employees In Metropolitan Newspapers (State) Award	<a href="#">AN120676</a>	NSW	Yes Clause 34	

## Attachment B.

Clerical and Administrative Employees, Hire Cars and Taxis (State) Award	<a href="#">AN120131</a>	NSW	Yes Clause 37	No
Clerical Award – Private Hospitals – State 2003	<a href="#">AN140065</a>	QLD	Yes Clause 1.4.2	No
Taxi Industry – Call Centre Operators and Clerical Employees Award – State 2004	<a href="#">AN140294</a>	QLD	Yes Clause 1.4.2	No
Clerks Metal Industry (SA) Award	<a href="#">AN150040</a>	SA	No	No
Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972	<a href="#">AN160066</a>	WA	No	Yes Clause 36 by agreement
Clerks (Timber) Award	<a href="#">AN160067</a>	WA	No	No
Clerks (Unions and Labor Movement) Award 2004	<a href="#">AN160068</a>	WA	No	No
Clerks' (Accountants' Employees) Award 1984	<a href="#">AN160069</a>	WA	No	No
Clerks (Commercial Radio and Television Broadcasters) Award of 1970	<a href="#">AN160065</a>	WA	No	No
Clerks' (Racing Industry – Betting) Award 1978	<a href="#">AN160077</a>	WA	No	No
Clerks' (Grain Handling) Award, 1977	<a href="#">AN160074</a>	WA	No	No
Clerks' (Taxi Services) Award of 1970	<a href="#">AN160079</a>	WA	No	No
Clerical and Administrative Employees (Private Sector) Award	<a href="#">AN170017</a>	TAS	No	Yes Clause 6 by agreement
Totalizator Agency Award	<a href="#">AN170107</a>	TAS	No	No
Clerical and Administrative Employees in Permanent Building Societies (State) Award	<a href="#">AN120129</a>	NSW	Yes Clause 14	No
Clerks' (Oil Companies) Award 2002	<a href="#">AP820387</a>	Federal	No	No
Clerks (Vehicle Industry - Repair Services and Retail) Award 2003	<a href="#">AP826201</a>	Federal	No	No



# Individual Flexibility Agreements and Annualised Salaries

With modern awards now in force, it is timely for employers to review any existing arrangements they have in place for paying employees annual salaries in lieu of award provisions that might otherwise apply, and to consider the options now available for making such arrangements.

All modern awards now contain an "Award Flexibility" provision which enables an employer and an employee to enter into a written agreement to vary the operation of certain specified clauses. The specified clauses are those dealing with:

- arrangements for when work is performed
- overtime rates
- penalty rates
- allowances, and
- leave loading.

The Award Flexibility provision requires that the agreement entered into must leave the employee better off overall than the employee would be if the award clauses were simply applied in full. It gives an employer the capacity to reach agreement to pay an employee an annualised salary which compensates for all hours worked and incorporates matters such as potential overtime payments, allowances and leave loading. These agreements do not require approval by any outside body.

There is an argument that any agreement entered into which purports to create an annualised salary but does not comply with the procedural requirements of the Award Flexibility clause will be a breach

of the award and/or the *Fair Work Act 2009*. It is also possible that a Court might regard the non-complying arrangement as an invalid attempt at offsetting award entitlements, thereby creating a possible underpayment issue. Subject to some encouraging comment by a recent Full Bench (see below), these arguments are yet to be tested, and we do not suggest that employers immediately rush to convert all relevant employees to individual flexibility agreements. However we do suggest that it is appropriate to consider whether these individual flexibility agreements might suit an employer's particular operation.

In addition to Award Flexibility provisions, some modern awards also contain provisions specifically allowing an employer to pay an employee an annualised salary. For example, clause 17 of the Clerks – Private Sector Award 2010 states that:

"An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

- (i) minimum weekly wages
- (i) allowances
- (i) overtime and penalty rates, and
- (i) annual leave loading."

The Award goes on to say that the employer must advise the employee in writing of the annual salary and which provisions of the award are satisfied by the annual salary. The Award does not require the agreement of the employee to the annualised salary. It is interesting to note that on 25 February 2010, a Full Bench of Fair Work Australia rejected a union application to vary the Award to make the annualised salaries clause subject to the agreement of the employee. In rejecting the application, the Bench said:

*"Awards operate in conjunction with contracts of employment. It is generally accepted that clerical employees are commonly remunerated by way of annualised salaries whether the relevant award expressly provides for such arrangements or not. It is also generally accepted that if the salary is expressly paid in compensation of all award entitlements and the amount paid exceeds the amount due under the award then the arrangement is not inconsistent with the award. The intention of the ASU in making its application is that the only arrangements which can legally be entered into are those expressly provided for in the award."*

This annualised salaries provision will mean that, for most clerical employees, individual flexibility agreements are not necessary because the annualised salary clause will provide most employers with the ability to put in place unilaterally the type of arrangement they prefer for their clerical employees.

Unfortunately, annualised salary provisions are not common in modern awards. For example, the Banking, Finance and Insurance Industry Award 2010 has an annualised salary provision whereas the Commercial Sales Award 2010 does not. Therefore to provide commercial travellers with an annual salary arrangement in accordance with the award, an employer would have to make an individual flexibility agreement with each employee.

We therefore recommend that clients give consideration to which of their employees are covered by modern awards and whether or not the arrangements in place for current and new employees are consistent with the requirements of the relevant award.

## IN FAIR WORK AUSTRALIA

FWA use only

FWA Matter No.:

**APPLICATION TO VARY A MODERN AWARD - 2012 REVIEW**

Application to vary a modern award (*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, Part 2 of Schedule 5*)

**Applicant**

<b>Name:</b>	National Retail Association		
	<b>Title [if applicable]</b>	Mr [ ] Mrs [ ] Ms [ ] Other [ ]	specify:
<b>Address:</b>	6 Overend Street		
<b>Suburb:</b>	East Brisbane	<b>State:</b>	Q <b>Postcode:</b> 4169
If the Applicant is a company or organisation:			
<b>Contact person:</b>	Gary Black	<b>ABN:</b>	44009664073
Contact details for the Applicant or contact person (if one is specified):			
<b>Telephone:</b>	07 3240 0100	<b>Mobile:</b>	0413 046 614
<b>Fax:</b>	07 3240 0130	<b>Email:</b>	<a href="mailto:g.black@nra.net.au">g.black@nra.net.au</a>

**Applicant's representative (if any)**

<b>Name:</b>			
	<b>ABN:</b> [if applicable]		
<b>Address:</b>			
<b>Suburb:</b>	<b>State:</b>	<b>Postcode:</b>	
<b>Contact person:</b>			
<b>Telephone:</b>	<b>Mobile:</b>		
<b>Fax:</b>	<b>Email:</b>		

- 1. What is the name of the modern award to which the application relates?**  
General Retail Industry Award 2010 – MA000004
- 2. What variation(s) are sought?**  
Please see Attachments A and B to this application.
- 3. Grounds:**  
Please see Attachment C to this application.

<b>Date:</b>	9/02/2012
<b>Signature:</b>	
<b>Name:</b>	Gary Black
<b>Capacity/Position:</b>	Executive Director, NRA

**The application will be published on the Fair Work Australia website and relevant subscribers notified.**



National Retail  
Association

# Attachment A – Variations Sought

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NRA Application – 2012 Award Review

General Retail Industry Award 2010

9 February 2012

We propose to vary the *General Retail Industry Award 2010* ('award') as outlined below. A marked up version of the award outlining the proposed variations is also attached to this application and marked Attachment B.

### **Clause 3 - Award Coverage**

1. Amend current clause 3.1 Definitions and interpretation to include online retailing of goods or services as part of the general retail industry, and to specifically exclude businesses in the warehousing and distribution industry from coverage of this award. We also propose to amend clause 3.1 Definitions and interpretation to include employees working in offsite reserves including offsite reserves and facilities operated in conjunction with a retail establishment.
2. This will ensure greater certainty regarding award coverage for employees of employers in the retail industry working in distribution and warehousing facilities that are connected to the employer's retail operations.

### **Clause 7 – Award Flexibility**

1. Amend current clause 7.1(a) to include the ability for an employee and employer to make an individual award flexibility agreement regarding the minimum duration of shifts. Individual flexibility agreements have made little or no contribution to improving flexibility in working arrangements in the award. This proposal will provide some certainty around a common sense arrangement which recognizes that it is not always possible for retailers to provide 3 hours of work and it is often the case that employees want to work less than three hours in particular circumstances.

### **Clause 12 – Part-Time Employees**

1. Vary the current clause 12 of the award to remove the restrictive part time provisions that prevent many retailers from employing part time employees.
2. The variation requires that a part-time employee and their employer will mutually agree in writing to the average number of hours to be worked each week.
3. The variation then provides that a part-time employee's hours may be flexed up by mutual agreement on a temporary or permanent basis.

### **Clause 13 – Casual loading**

1. Vary current clause 13.2 to include a 23% casual loading in lieu of the 25% casual loading. A 23% casual loading is more closely aligned to the pre-reform position in many of the pre-reform retail awards.

### **Clause 13 – Minimum Daily Engagement for Casual Employees**

1. Clause 13.4 dealing with the minimum daily engagement for casual secondary school students recently came into operation as a result of a decision of Fair Work Australia to vary the award on 1 October 2011.
  2. The SDA has challenged this decision and the appeal to the federal court is still on foot with Justice Tracey yet to release his decision.
  3. The SDA have challenged the variation on the basis that Fair Work Australia exceeded its jurisdiction under the relevant provisions of the Fair Work Act. We submit therefore that if the SDA's challenge is successful, this issue should be revisited as part of the award review process. In this case, we submit that a variation is made in the same terms as the current clause 13.4, which is extracted below.
- 13.4 The minimum daily engagement of a casual is three hours, provided that the minimum engagement period for an employee will be one hour and 30 minutes if all of the following circumstances apply:*
- (a) the employee is a full-time secondary school student; and*
  - (b) the employee is engaged to work between the hours of 3.00 pm and 6.30 pm on a day which they are required to attend school; and*
  - (c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than three hours; and*

- (d) *employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee.*

### **Clause 17 – Introductory Retail Employee**

1. Vary current clause 17 to include a new classification of Introductory Retail Employee. We also seek to amend Schedule B to the Award to include a new clause B.1 classification definition of Introductory Retail Employee within that schedule.
2. An Introductory Retail Employee classification is the entry point for employees engaged in a sales, stores or clerical function with less than 6 months relevant experience in the retail industry, either as a junior or an adult. Such employees shall be advanced to a higher graded position after 6 months service with a particular employer. This shall mean 830 hours actual service.
3. The weekly introductory rate of \$582.60 equates to 90% of the Retail Employee Level 1 weekly rate.
4. The proposed new provision reflects the high turnover rate in the industry and the contribution that the retail sector makes to the delivery of critical employability skills to young people transitioning from school to work.
5. The variation is also necessitated by the decision of the Australian Government to strip the retail sector of training incentives and to withdraw funding for lower level qualifications. Small businesses in particular will be significantly impacted as they receive greatly reduced support for training young people.
6. Many young people transition from school to retail to other careers of choice. The effect of these arrangements is that the retail sector carries a disproportionate burden in transitioning young people from school to work. Retail funds the upskilling of our young people to the benefit of many other employing sectors.

### **Clause 17 and Schedule B – Removal of Retail Worker Level 8 classification**

1. Review of classification structure to reduce coverage of management positions in line with pre-reform position. The duties of a retail worker level 8 would have been treated as “award free” in many States and Territories prior to the introduction of this award.

### **Clause 19 – Annualised Salaries**

1. Include a new clause 19 – Annualised Salaries. It is proposed to include an annualised salary provision in similar wording to that provided by the *Clerks Private Sector Award 2010*. The inclusion of this provision is in line with many common law contract arrangements which are already being utilized in the industry. The inclusion of this provision offers greater certainty for these arrangements for both employers and employees by avoiding the use of individual flexibility agreements which may be terminated by either party giving 4 weeks notice.

### **Insert new clause 19A - Alternative Remuneration System**

1. An employer and employee may agree to implement an alternative system of remuneration to that provided by current clause 17 subject to the following conditions:
  - a) the employee is engaged in a sales capacity;
  - b) the employee will be paid a base rate plus commission on sales;
  - c) the commission arrangement must be clearly defined and include projection of what commission the employee may earn if particular sales targets are met
  - d) the terms of the alternative remuneration system must be fully explained to the employee before implementation

- e) the employee must agree to be remunerated under the alternative system
- f) the employee must be able to opt out of the alternative system after the system has been in place for a period of 12 months and at 12 monthly intervals after that
- g) the alternative remuneration system must comprise a base rate component and a commission component
- h) the base rate component for an employee 21 years and over shall be not less than the adult minimum wage. The base rate component for an employee under 21 years shall be the same proportion of the adult minimum wage as set out in the junior rates scale

**Clause 20 – Excess Travelling Costs and Travelling Time Reimbursement**

- 1. The amendment of current clauses 20.3 and 20.4 to provide for an exclusion of the application of these allowances where an employee may be required to work at numerous branch or shop locations as part of their duties.
- 2. This variation recognizes that an employee may have numerous locations at which they may be required to work.

**Clause 21 – First Aid Allowance**

- 1. The amendment of current clause 21.9 to ensure that casual and part time employees are paid the first aid allowance on a pro-rata basis depending on the number of hours they work in a week.

**Clause 20 – Higher Duties**

- 1. The amendment of current clause 20.12 to ensure the higher duties provisions apply for the actual hours worked by an employee at that higher classification.

**Clause 20 – Broken Hill**

- 1. The amendment of current clause 20.13(c) to ensure that the allowance is paid on an hourly basis to avoid casual and part time employees receiving the same amount as a full time employee.

**Clause 22 – Superannuation Fund and absence from work**

- 1. The deletion of current clause 22.5(b) to remove the provision that provides employees are to be paid superannuation payments for the duration they are off on a work related illness up to a maximum of 52 weeks. This was not a feature of many of the retail awards/NAPSAs prior to the introduction of this award.

**Clause 27 – Ordinary Hours**

- 1. The variation of clause 28.2(b)(i) to include a 5.00am commencement time for ordinary hours of work for bakeries.

**Clause 28 – 38 hour week rosters**

- 1. The deletion of current clauses 28.5 and 28.6 to remove out of date rostering methods that do not generally apply to the retail industry. The retail sector deserves to be allowed to operate in accordance with rostering provisions which reflect working arrangements in the industry and contribute to labour cost efficiency.

**Clause 28 – Consecutive days off**

- 1. The amendment of current clauses 28.11(b) and (c) to provide for employees to mutually agree not to have consecutive days off as prescribed in current clause 28.11(a).

**Clause 28 – Employees Regularly Working Sundays**

1. The deletion of current clause 28.13 as this is not reflective of the 7 day trading environment in which retailers operate.

#### **Clause 28 – Notification of Rosters**

1. The deletion of current clause 28.14(e) as employees should not receive overtime if they agree to a variation of their roster at short notice.
2. The variation of current clause 28.14(f) to ensure that rosters may not be changed for the sole intent of avoiding penalties or loadings that would have been paid had the roster not been changed.

#### **Clause 29 – Overtime and Penalties**

1. The variation of current clause 29.2(a) to reflect the application of overtime provisions to full time employees only.
2. Delete current clause 29.4(a) which provides for a 25% penalty for work performed after 6pm Monday to Friday.
3. The variation of current clause 29.4(c) to reduce the Sunday penalty rate to an additional 50% loading as opposed to an additional 100% loading.
4. The variation of current clause 29.4(d) by inserting a new sub-clause (iv) to provide that where a public holiday falls on a weekend and an additional public holiday is declared or gazetted then the public holiday loading will only apply on the actual day and not the additional day so declared or gazetted.

#### **Clause 31 – Breaks**

1. The amendment of current clause 31.1 to resolve an ambiguity as to when rest breaks and meal breaks apply.

#### **Clause 32 – Annual Leave Loading**

1. The amendment of current clause 32.3 to remove the entitlement for employees to weekend penalty rates in lieu of the 17.5% annual leave loading where this is higher. This was not a feature of the pre-reform awards/NAPSAs prior to the introduction of this award.
2. The amendment of current clause 32.3 by inserting a new clause 32.3(C) which provides that annual leave loading is not payable on accrued but untaken annual leave paid out upon termination.

#### **Clause 32 – Cashing Out of Annual Leave**

1. The inclusion of a new clause 32.6 which allows for cashing out of annual leave in similar terms to that provided in the NES for award and agreement free employees.

#### **Variation Sought – Introduction of incentive payment scheme**

1. The award needs to be varied to provide for the introduction of an incentive or performance based scheme. This scheme will deliver employers the flexibility to structure remuneration to allow for a fixed base pay component and an incentive component. This mechanism will achieve two goals – it will facilitate the attainment of higher performance standards and it will mean that high performance employees will be more appropriately rewarded for their contribution.
2. In the service sector customer service standards are paramount and labour regulation should be specifically geared to support the achievement of operational objectives.

#### **Schedule D - Amendment to loading for school based trainees under Clause D.6 Employment Conditions**

1. Variation of D.6 employment conditions contained in Schedule D – National Training Wage to include transitional arrangements for the loading that may be payable to a school based trainee on all hours worked in lieu of paid

## Annualised salary deal didn't specify award opt-outs, says court

Thursday, October 06, 2016, 12:54pm

A court has cleared the way for an employee to pursue claims for \$29,000 in allegedly unpaid overtime and lunch breaks after finding her employment contract failed to specify the provisions of the clerks award that would be bought out in her annualised salary.

Perth building company Next Residential Pty Ltd denied directing a former administration coordinator to work overtime or through lunch breaks and argued before WA's Industrial Magistrates Court that any additional hours are set off against late starts and early finishes.

It maintained that the former employee is not entitled to what she claims because she agreed in her contract of employment to an annualised salary in accordance with clause 17 of the award.

Clause 8.1 of her contract stated that her salary was "inclusive of any award provisions/entitlement that may be payable under an award" and her employer said the document was "explicit" and its intentions "clear" that it was inclusive "of any or all" of the provisions set out and payable under the award" (also see clause 5).

But the employee maintains that she is entitled to overtime and lunchbreak payments because Next Residential did not comply with a requirement in clause 17(1)(b) of the award to identify in writing the applicable award and the provisions that were to be satisfied via an annualised salary.

### Magistrate finds employment contract failed to specify provisions it ousted

Magistrate Giuseppe Cicchini agreed that the contract did not snuff out her claim as the document "does not clearly indicate that the claimant's annual salary included those entitlements which she now seeks to recover".

Finding her contract "lacked the type of specificity required" under the award, he said this was "crucial because a worker must be able to compare his or her annual salary to award entitlements so that the no-disadvantage test can be properly considered".

Rather he said clause 8.1 attempted in the "broadest possible way to include within the annualised salary 'any' award provisions/entitlements that may be payable under 'an' award.

"However, such text creates uncertainty with [respect] to various issues, including the award to which it refers and the award provisions it purports to cover.

"On the face of it, the clause appears to attempt to include award entitlements which are incapable of inclusion," Magistrate Cicchini said.

Clause 17.1(a) of the award says an employer can pay an employee an annual salary to cover minimum weekly wages, allowances, overtime and penalty rates and annual leave loading, but the magistrate said it was "obvious" that not all entitlements are capable of inclusion within annualised salary and "one such example is the provision of meal breaks".

He also observed that the text of the clause made it "obvious that the parties were not alert to the applicable award, let alone its provisions which were to be included in the annualised salary".

The magistrate said that if clause 8.1 of the employment contract had "made specific reference to 'any and all' of the payments set out in cl 17.1(a) of the award, then there would have been no doubt as to what the parties intended."

Next Residential employed the administration coordinator in January 2014 on a starting salary of \$75,000, which increased to \$78,000 by the time her employment ended in January this year.

### Ruling a warning to employers, says representative

The employee's agent, Patrick Mullally of Workclaims Australia, told *Workplace Express* the case involved a "very common attempt to exclude award provisions" but he said it was "unusual" to see a former employee prepared to challenge it in court.

He said it also "serves as a warning" for other employers that even where there is an attempt to pay over the award it is vital to "have regard to how you exclude award provisions by paying in lump sums and which award provisions can be traded off".

"The modern award does have provisions for salaries to be annualised but employers must have regard to naming applicable awards and they need to be careful about using broad based generic terms when determining annualised salaries," he said.

He said a conciliation conference is scheduled for Monday.

Simone Jade Stewart v Next Residential Pty Ltd [2016] WAIRC 00756 (16 September 2016)

## WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2016 WAIRC 00756

**CORAM** : INDUSTRIAL MAGISTRATE G. CICCHINI

**HEARD** : THURSDAY 1 SEPTEMBER 2016

**DELIVERED** : THURSDAY, 15 SEPTEMBER 2016

**FILE NO.** : M 12 OF 2016

**BETWEEN** : SIMONE JADE STEWART  
**CLAIMANT**

AND

NEXT RESIDENTIAL PTY LTD  
**RESPONDENT**

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**Catchwords** : The Clerks - Private Sector Award 2010 [MA000002] (the Award) - Non-payment of overtime and lunch breaks allegedly worked – Preliminary issue – Whether the written contract of employment which makes provision for the payment of an annualised salary complies with clause 17(1)(b) of the Award – Whether the claim is ousted by the contract of employment which provides for the payment of annualised salary.

**Legislation** : *Fair Work Act 2009*

**Instruments** : Clerks - Private Sector Award 2010 [MA000002]

**Case(s) referred to in reasons** : *Kucks v CSR Limited* (1996) 66 IR 182  
*City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813  
*Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148

**Result** : Preliminary Issue Resolved

**Representation:**

Claimant : Mr P. Mullally of Workclaims Australia as agent.

Respondent : Ms J Beeson of Beeson HR Consulting as agent.

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## REASONS FOR DECISION

### Background

- 1 Next Residential Pty Ltd (the respondent) is a residential building company. It operates in Western Australia from premises at 8 Gibberd Road, Balcatta.
- 2 It employed Ms Simone Jade Stewart (the claimant) in the capacity of administration co-ordinator from 20 January 2014 until 27 January 2016.
- 3 The terms and conditions of the claimant's employment were set out in a written contract of employment entered into by the parties on 20 January 2014. It is not in issue that pursuant to that contract the claimant was paid an annual salary. At termination of her employment the claimant's salary was \$78,000.
- 4 The parties agree that at all material times the claimant's employment was governed by the Clerks - Private Sector Award 2010 [MA000002] (the Award).
- 5 On 28 January 2016, the claimant lodged a claim against the respondent seeking to recover \$28,984 allegedly owed to her by the respondent. She asserts that the respondent failed to pay her overtime and lunch breaks worked as directed.
- 6 The respondent denies that it directed the claimant to work overtime or to work through her lunch breaks. It says that any nominal additional hours worked by the claimant was not at its direction but rather was worked by the claimant on or of her own volition. Further the respondent says that any additional hours worked by the claimant were set off against early finishes, late starts and half days worked.
- 7 The respondent says that the claimant is not entitled to what she claims because, as agreed in her contract of employment, she was paid an annualised salary. Such was in accordance with cl 17 of the Award.

### Preliminary Issue

- 8 The parties seek the determination of a preliminary issue. That is whether the contract of employment excludes those parts of the Award provisions upon which the claimant relies.

### Contractual Provisions

- 9 Clause 8.1 of the contract of employment provides:

***Salary***

*Please refer to Annexure A at the back of this document for the particulars of your salary. Your salary will be paid fortnightly into an account nominated by you. Your salary is inclusive of any award provisions/entitlements that may be payable under an award.*

- 10 It is not in issue that the claimant's salary at commencement was \$75,000.
- 11 Clause 6 of the contract of employment sets out what was agreed with respect to hours of work. It provides:

*Your ordinary hours of work are from 8.00am to 5.00pm Monday to Friday with a one (1) hour lunch break. You are expected to work, on average at least 40 hours per week, however there will be times when you will be required to work reasonable additional hours as necessary to ensure that the requirements of your position are met. Your remuneration takes these additional hours of work in account and no further payment will be made for extra hours worked.*

**Award Provision**

12 Clause 17 of the Award which concerns annualised salaries provides:

***17.1 Annual salary instead of award provisions***

- (a) *An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:*
- (i) *clause 16 – Minimum weekly wages;*
  - (ii) *clause 19 – Allowances;*
  - (iii) *clauses 27 and 28 – Overtime and penalty rates; and*
  - (iv) *clause 29.3 – Annual leave loading.*
- (b) *Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.*

***17.2 Annual salary not to disadvantage employees***

- (a) *The annual salary 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 salary is paid (or if the employment ceases earlier over such lesser period as has been worked).*
- (b) *The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.*

***17.3 Base rate of pay for employees on annual salary arrangements***

*For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause 16 – Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.*

**Claimant's Argument**

13 The written contract of employment which was prepared by the respondent:

- (i) did not identify the applicable Award; and
- (ii) did not advise the claimant of the Award provisions which were to be satisfied by the payment of the annual salary.

14 Clause 17(1)(b) of the Award provides that where an annual salary is paid, the employer must advise the employee in writing of the annual salary and which provisions of the Award is to be satisfied by the payment of the annual salary.

15 Given that the respondent has not complied with clause 17(1)(b) of the Award, the claimant is entitled to overtime hours worked and to receive payment for having worked through lunch breaks. The respondent cannot rely upon cl 17 of the Award to exclude the claim.

**Respondent's Answer**

16 The claimant was 'furnished' with an employment contract which clearly states in cl 8.1 (Remuneration) that the salary was 'inclusive of any award provisions/entitlement that may be payable under an award'. The respondent says that the employment contract is explicit and its

intentions are clear that the salary payable to the claimant was inclusive 'of any or all' of the provisions set out and payable under the Award.

### **Determination**

- 17 For administrative ease it is common for employers to pay an 'all-inclusive rate' which is intended to compensate the employee for all award entitlements in relation to their work, which may include minimum wages, overtime penalty rates and leave loading.
- 18 It is imperative that such intention be clearly articulated in the employment contract because an employer will be unable to meet its award obligations by offsetting award obligations against over award payments, unless there is specific agreement with the employee about what the over award payments are compensating the employee for.
- 19 The need for specificity is recognised by cl 17(1)(b) of the Award which requires the identification of the specific provisions of the award that will be satisfied by the payment of the annual salary. If a payment is made to satisfy a particular award obligation such as ordinary hours of work, then the excess cannot be set off against a different award obligation such as overtime unless the contract of employment clearly indicates that the excess is paid to satisfy any entitlement to overtime. The requirement for specificity is aimed at removing any doubt about what the annualised payment is for.
- 20 Clause 17.1(a) of the Award provides that an employer may pay an employee an annual salary in satisfaction of any or all of the following provisions (my emphasis added):
- (i) Clause 16 – Minimum weekly wages
  - (ii) Clause 19 – Allowances
  - (iii) Clauses 27 and 28 – Overtime and penalty rates
  - (iv) Clause 29.3 – Annual leave loading
- 21 It is obvious that not all entitlements payable under the Award are capable of inclusion within annualised salary. One such example is the provision of meal breaks (cl 26.1 of the Award).
- 22 The question which remains is whether cl 8.1 of the contract of employment elucidates the intention that the respondent asserts, being that the claimant's annual salary was inclusive 'of any or all' the provisions set out and payable under the Award. That question can only be resolved in light of industrial realities that existed at the time that the contract was made (see *Kucks v CSR Limited* (1996) 66 IR 182 [184] per Madgwick J; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813 [57] per French J). In that regard context is all important.
- 23 In *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148 Siopis, Buchanan and Flick JJ said:
- The test that should be applied is to discern the objective meaning of the words used bearing in mind the context in which they appear and the purpose they are intended to serve. Here, the definition in question expressly extended to work ancillary to the principal business. That was the true question for examination [22].*
- 24 Their Honours continued:
- In the present case, Coles stressed that industrial agreements and other instruments may legitimately extend and apply to new fact situations, relying on observations of Gibbs CJ in *R v Isaac; Ex parte Transport Workers' Union of Australia* (1985) 159 CLR 323 ("Isaac")*

*at 331. In the passage from Isaac upon which Coles relied, (which canvassed the proper construction of a union rule) Gibbs CJ emphasised the primacy of “the ordinary meaning of the words of the rule”. However, giving primacy to the text does not deny the importance of understanding the context in which an instrument is made, and which it is intended to address, nor the utility of bearing in mind the facts as they are known at the time the instrument is drafted [46].*

- 25 The final sentence of cl 8.1 of the contract of employment attempts in the broadest possible way to include within the annualised salary ‘any’ award provisions/entitlements that may be payable under ‘an’ award. However, such text creates uncertainty with aspect to various issues, including the award to which it refers and the award provisions it purports to cover. On the face of it, the clause appears to attempt to include award entitlements which are incapable of inclusion.
- 26 If cl 8.1 of the contract of employment had made specific reference to ‘any and all’ of the payments set out in cl 17.1(a) of the Award, then there would have been no doubt as to what the parties intended. However, because it does not do that it has led to confusion and disputation. The text of cl 8.1 of the contract of employment reveals a lack of regard to specificity which in itself reveals the context in which the contract of employment was made. It is obvious that the parties were not alert to the applicable award, let alone its provisions which were to be included in the annualised salary.
- 27 The written contract of employment did not identify the applicable award nor did it provide which award provisions were to be satisfied by the payment of the annual salary. It lacked the type of specificity required by cl 17(1)(b) of the Award. The requirement for specificity is crucial because a worker must be able to compare his or her annual salary to award entitlements so that the no-disadvantage test can be properly considered. That could not be done in this instance.

### **Conclusion**

- 28 The contract of employment does not exclude the claimant’s claim because cl 8.1 of the contract of employment does not clearly indicate that the claimant’s annual salary included those entitlements which she now seeks to recover.

**G. CICCHINI**

**INDUSTRIAL MAGISTRATE**

## Local Government Industry Award 2010 [MA000112]

### 14.7 Annualised Salaries

**(a)** Annual salary instead of award provisions

Notwithstanding any other provision of this award, an employer and an employee may agree that the employer may pay the employee an annual salary in satisfaction of any or all of the following provisions of the award:

- (i) Minimum Wages – clause 14;
- (ii) Allowances – clause 15;
- (iii) Higher duties – clause 18;
- (iv) Penalty rates – clause 23;
- (v) Overtime – clause 24; and
- (vi) Annual leave loading – clause 25.4

**(b)** Annual salary not to disadvantage employees

- (i) The annual salary 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 salary is paid (or if the employment ceases earlier over such lesser period as has been worked).
- (ii) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

**(c)** For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of annual salary equivalent to the relevant rate of pay in clause 14 and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

**(d)** An annual salary agreement must:

- (i) be in writing and signed by both parties;
- (ii) state the date on which the arrangement commences;
- (iii) be provided to the employee;
- (iv) contain a provision that the employee will receive no less under the arrangement than the employee would have been entitled to if all award obligations had been met, taking account of the value of the provision of matters not comprehended by the award such as private use of an employer provided motor vehicle;
- (v) be subject to an annual review;
- (vi) contain details of any salary package arrangements, including the annual salary that is payable;
- (vii) contain details of any other non-salary benefits provided to the employee such as an employer provided motor vehicle;
- (viii) contain details of any performance pay arrangements and performance measurement indicators;
- (ix) contain the salary for the purposes of accident make up pay; and
- (x) contain the award level classification for the role.

**(e)** An annual salary agreement may be terminated:

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

**(f)** On termination of an annual salary agreement, the employee will revert to the Award entitlements unless a new annual salary agreement is reached.

## **FAIR WORK COMMISSION**

**AM 2016/13**

**IN THE MATTER OF:**

**APPLICATION BY THE AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION FOR THE 2014 AWARD REVIEW OF THE CLERKS PRIVATE SECTOR AWARD 2010**

### **STATEMENT OF TERRY O'LOUGHLIN**

I, Terry O'Loughlin, of 116 Queensberry Street, Carlton in the State of Victoria state as follows:

1. I am an Industrial Officer with the Victorian Private Sector Branch of the Australian Services Union (ASU). I have held this position for 5 years. Prior to this I have undertaken the role of Industrial Officer/Senior Industrial Officer and Acting Branch Director within various organisations over a period of approximately 26 years.
2. In my capacity as an Industrial Officer I have become familiar with the terms and conditions of ASU members working as clerical and administrative employees in the private sector in Victoria, including award dependent workers.
3. The Victorian Branch has many members who rely on the provisions of the Clerks Private Sector Award 2010 ("Award"). Many of these members are in companies where no Collective Agreement applies. As a result of this their terms of employment are governed by the Award and are often accompanied by a Contract of Employment or Letter of Appointment outlining their terms and conditions of employment.
4. Since working at the Union, dealing with the members, and non-members, whose employment arrangements are underpinned by the Award I have come across many instances where there has been a dispute between the parties as to the terms and conditions applicable to the employee especially in relation to wages and hours of work.

## Annualised Salary

5. In regards to the Annualised Salary Clause the Union has experienced problems where members have been in dispute over the following:
  - The non- payment of overtime either through working extra hours or by working early mornings, late evenings or working on weekends.
  - The non-payment of shift penalties.
  - The non-payment of Annual Leave and Annual Leave Loading.
  - The non-payment of Public Holidays.
6. The Annualised Salaries Clause provides for the payment of an annual salary in satisfaction of a number of entitlements providing that the employee is not disadvantaged overall.
7. The Branch often faces disputes where letters or contracts of employment have been drafted that have statements that refer to the salary being 'all encompassing' in regard to penalties and allowances' or that the 'salary will cover all overtime entitlements' and other similar type statements.
8. When the Union pursues various penalties or allowances the employer responds by stating that the over Award payment forms the basis of an Annualised Salary that covers all other penalties and allowances even though they have never been detailed in the employee's contract of employment.
9. The Union has had a number of instances where the Annualised Salary Clause has contributed to ambiguities around members' terms of employment due to the lack of detail regarding the arrangement and that the member was unaware of the implications of such an arrangement because it did not require their consent.
10. The Annualised Salary Clause does not require the employees consent. The Annualised Salary Clause provides that any provision of the Award may be offset against a 'total salary' whereas the Flexibility Award Clause identifies the terms that can be offset. The Annualised Salary Clause does not stipulate the details of how the 'offsetting' arrangement is to be provided as compared to the Award Flexibility Clause and it does not provide for an election to end the arrangement where either party wishes to.

11. In my time at the Union I deal with a lot of members who are employed under individual contracts. The contracts vary from organisation to organisation in regards to their application of the Fair Work Act 2009 and accompanying awards. I deal with many members who are having problems regarding the application of award provisions for various reasons. If the matter turns into a dispute over entitlements to overtime, allowances and/or penalties the employer will invariably rely on the provisions of the Annualised Salary Clause over the Individual Flexibility Agreement (IFA) because of its less prescriptive arrangements.
12. The practical effect of the operation of the Annualised Salary Clause is that the IFA provisions, which are consistent through most awards, become inapplicable in the Clerks Award as many employers invariably use the provisions of the Annualised Salary Clause to defend their actions when a dispute arises.
13. Typical phrases that are used to offset entitlements such as 'in consideration of' and 'calculated to compensate' are used by many employers to simply infer that the employee's above minima salary rates can offset Award entitlements with no particulars as to any detail as to how this is done which the Annualised Salary Clause enables to the degree that an IFA does not.
14. I believe that the Annualised Salary Clause is in conflict with the requirements identified in the Award Flexibility Clause and that the Annualised Salary Clause is not consistent with a standard provision regarding workplace flexibility under Modern Award arrangements.
15. I believe that the removal of the Annualised Salary Clause or its adjustment to reflect Modern Award standards would greatly assist the parties in regard to the clarification and operation of such an arrangement.

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Terry O'Loughlin

Date: 10<sup>th</sup> October, 2016