



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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Overview

1. On 20 February 2018 a Full Bench of the Fair Work Commission handed down a decision in relation to the common issue of a review of “annualised wage arrangement” provisions in modern awards as part of the 4 yearly award review. The ASU makes these submissions arising from the Directions issued by the Full Bench.
2. The Decision conclusions of what is necessary for an annualised wage arrangement provisions can be summarised as follows: [at paragraphs 129 – 134]
 - (1) Award annualised salary clauses are deficient and there are certain necessary requirements depending on whether individual arrangements are based on:
 - Stable Hours – Employee agreement not needed.
 - Variable Hours – Should only be applied by agreement.
 - (2) All Annualised Wage Arrangements should be in writing with a copy on pay records and a copy for the employee.
 - (3) Where an Annualised Wage Arrangement is by agreement it should be terminable by the employer or employee at annual intervals upon notice.
 - (4) In no circumstances should an annualised wage arrangement clause permit an employee receiving less pay over the course of a year than the terms of the award. Essential that there be mechanisms with three types of requirements considered as follows:
 - (A) Minimum increment above the base rate of pay prescribed in wage clause.
 - (B) Identify the way the annualised wage is calculated.
 - (C) Employer to undertake an annual reconciliation or review exercise.
 - (5) With respect to mechanism (A) any such award provision should be justifiable by reference to reasonable assumptions about the number of hours being paid for and impose outer limits on overtime hours or other penalty rate hours which are to be taken as paid for by the increment.
 - (6) In relation to mechanism (B) the calculation method for the annualised wage arrangement must expose any assumptions made about the number of overtime and penalty rate hours that are to be worked on average. The arrangement should contain an outer limitation on the number of such hours in a pay period or across a roster cycle that are paid for by the annualised wage.
 - (7) In relation to mechanism (C) the annual reconciliation exercise should involve a comparison between the amount paid by way of an annualised wage and the amount that would have been payable had the award been applied the ordinary way. Any shortfall would be required to be paid by the employer.

- (8) The Full Bench is proceeding on the basis that annualised wages only apply to full-time employees. Any proposition that a casual employee could be on an annualised arrangement is “oxymoronic” and while no proposition for part time employees is proposed an opportunity to advance any such proposal remains available.
3. The Full Bench indicated that they would *provisionally* consider a number of model clauses which could give effect to the above (1) to (8) conclusions relying on 4 options based on whether a modern award covers employees who work:

“reasonably stable hours” i.e. at employer discretion in Model clauses 1 & 2 as follows:

- Model Clause 1 – Annualised Wage Arrangement, not to disadvantage employees
- Model Clause 2 – Annualised Wage Arrangement with a percentage(%) increment as a minimum

or

“highly variable hours” i.e. with employee agreement in Model clauses 3 & 4 as follows:

- Model Clause 3 – Annualised Wage Arrangement similar to Model Clause 1 but with employee agreement
- Model Clause 4 – Annualised Wage Arrangement similar to Model Clause 2 but with employee agreement

Clerks Private Sector, Legal Services & Contract Call Centres Awards

4. The ASU lodged applications to vary three “Clerical related” modern awards i.e. *Clerks Private Sector Award 2010*, *Legal Services Award 2010* and *Contract Call Centres Award 2010*; to replace the existing annualised salary clauses, at the employers’ discretion, with a clause requiring employee agreement and adequate safeguards as per the modern *Local Government Industry Award 2010* (Clause 14.7). The Full Bench was not satisfied the clerical related awards should be varied in this way. With respect an assumption was made that these awards were likely to involve “reasonably stable hours” and as per the general conclusion it was not necessary to require employee agreement. However as a result of the general conclusion the Bench made in relation to the Pastoral and Horticulture Awards it was considered that the three clerical related awards may be deficient and parties were invited to make further submissions about whether the awards should be varied to include the proposed Model Clauses 1 or 2.
5. The ASU welcomes the Full Bench questioning whether existing provisions are deficient. Since these modern awards were made the ASU has consistently argued that these provisions are inherently inferior and unfair based on certain assumptions and not substantiated at any level by probative evidence ever provided by any of the employer representatives.
6. The ASU also welcomes the need for comprehensive employer record keeping mechanisms to address certain clearly identifiable deficiencies. Where the Fair Work Ombudsman has found there are award reliant industries with a high incidence of noncompliance with record keeping and a clear

business model for systemic underpayment of wages the ASU submits there should be no award provision for annualised pay arrangements.

7. Notwithstanding the reopening of adequate safeguards to ensure workers do not get paid less than what they otherwise would have been paid under the award, clear method of calculation and adequate record keeping; the ASU rejects the proposition that the clerical related awards continue to not have the fundamental right to employee agreement.
8. Therefore the ASU submits that the clerical related awards should also be open to **Model Clause 3** i.e. which includes employee agreement.
9. In relation to clerical related awards the decision is with respect based on two general assumptions as follows:

- **Employer Discretion vs Employee Agreement**

That employers covered by certain modern awards can implement annualised wage arrangements at their discretion i.e. without agreement of the employee. An assumption that entrenches discrimination against the majority of workers covered by these awards who are generally female (70%+). An assumption that was also not reflected in the greater majority or critical mass of the relevant pre modernisation awards. The pre modernisation history of other “non-clerical” modern awards is the main reason acknowledged for why only a certain number of modern awards (19) actually have annualised wage provisions and yet history is not the reason for why it exists in the clerical related awards - just a general assumption that such arrangements existed.

- **Stable vs Unstable Hours**

That office workers are employed on more “stable” hours than any other worker. Such criteria has not been raised previously as a critical factor by either the Fair Work Commission nor any employer or any other party to proceedings. Clerical related awards also cover workers with unstable hours and there is no definitive evidence that hours are more (or less) stable than any other modern awards.

10. With respect the ASU does not accept either of these assumptions as they are both inherently unfair as they apply to any modern award not the least the clerical related awards. The clerical related awards are critical modern awards that together cover in excess of 1 million clerical, administrative and call centre workers in the private sector. At no point in time since the modern awards were created has there been any evidence provided by employers nor any other party to proceedings to support either of these general assumptions. The assumptions entrench a view of the clerical awards that place them in an inferior category of modern awards which the ASU submits was never envisaged by the Fair Work Act.

11. Just as the Full Bench found (paragraph 107) there was no common reason for why certain (19) modern awards had annualised salary/wage provisions except that they reflected a pre modernisation history (which generally did not apply in the case of the clerical awards except the Contract Call Centres award); there can be no common reason why awards should be treated any different with respect to employee agreement or for that matter the basic right to terminate the arrangement.
12. During proceedings in this matter the ASU submitted 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 the original ASU submissions in this matter) at Attachment B (*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*) 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. There were admittedly some unknown number of individual employment arrangements but no evidence of widespread use - just general assumptions about this.
13. With respect it is general assumptions that have dictated a narrow view of clerical related annualised salary arrangements that has never been substantiated by the employer representatives particularly those that promoted it the most - normally NSW employer peak organisations such as AiG, ACCI, ABI NSWEF Motor Traders of NSW.
14. The ASU believes it remains critical to provide State based historical context that cannot be disputed at any level as follows:
 - 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.
 - 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.
 - 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.
 - Only the NSW and ACT Common rule clerical awards could be said to have had exemption clauses i.e. above a certain rate of pay essential award provisions did not apply.

15. The ASU challenges the assumption that workers covered by the clerical related awards have more stable hours than workers covered by other modern awards either with annualised wage arrangements, with employee agreement, or the greater majority of modern awards that have no such arrangements.
16. The ASU submits that hours of work vary across each of the three clerical related awards often reflecting the demands of the industry where clerical and administrative workers are employed. **Annexure 1** is a table setting out the hours of work provisions in some Enterprise Agreements underpinned by the modern Clerks Private Sector award that currently apply. The agreements have clauses that indicate hours of work arrangement that are not as stable as the award(s) provides.
17. In the alternative if Model Clause 3 is not accepted by the Full Bench the ASU would submit Model clause 1 should apply and does not accept that either Model Clause 2 or 4 are appropriate for award reliant office workers. Percentage increments in the past have locked in low premiums in a minimum rates awards typical of industries that are not highly non-unionised such as those employing award reliant workers covered by the clerical related awards. The low increment/percentage in time becomes the normal pay or the going rate whatever hours are worked.
18. In relation to annualised wage arrangements for Part Time employees the ASU opposes any such proposal as it has not been previously been raised or substantiated as necessary for either employers or employees.

Contract Call Centres Award – Higher Classifications

19. The current Contract Call Centres Award 2010 (as per the predecessor pre modernisation award) at clause 18.5 limits Annualised Salary arrangements to the higher classification as follows:
 - Customer contact stream—Principal Customer Contact Leader;
 - Clerical and administration stream—Clerical and Administration Employee-Level 5; and
 - Contract Call Centre Industry Technical Associate
20. Therefore the ASU submits that with respect to this particular clerical related award Model Clause 3 should be adopted but only applied to the three higher classifications consistent with this award's history.
21. In the alternative if the Full Bench does not accept Model Clause 3 the ASU submits that as per the other clerical related awards Model Clause 1 should be applied.

Rail Industry Award 2010

22. In relation to the Rail Industry Award the ASU submits that the history of the existing terms of the annualised salary clause relevant to how the Full Bench decision should be applied.

23. During the award modernisation process the rail industry parties had disputed the terms of the annualised salary clause. The AIRC Award Modernisation Full Bench¹ decided that any such arrangement should only be by agreement between the employer and employee and should 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*)

24. Therefore the ASU would submit that employee agreement requirements be retained in any new clause and otherwise adopt part of the Model Clause by adding X.2 and X.3 from FWC decision Model Clause 3 as follows to clause 18 of the award:

18.7 Annualised wage not to disadvantage employees

- (a) *The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or if the employment ceases or the agreement terminates earlier, over such lesser period as has been worked).*
- (b) *The employer must each 12 months from the commencement of the annualised wage arrangement or, within any 12 month period upon the termination of employment of the employee or termination of the agreement, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.*

¹ [2008] AIRC FB 1000

- (c) *The employer must keep a record of the starting and finishing times, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement agreement for the purpose of undertaking the comparison required by clause 18.7(b). This record must be signed by the employee each pay period or roster cycle.*

18.8 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 14 —Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

Conclusion

25. The ASU concludes that Model Clause 3 is the most appropriate and fairest provision for the clerical related awards (Clerks - Private Sector and Legal Services Awards) with the historical restriction to the three highest classifications in the Contract Call Centres Award. The ASU with respect continues to challenge general assumptions that i) private sector office and call centre workers generally work stable hours and most importantly ii) annualised wage arrangements do not need employee agreement. If these assumptions prevail in the alternative the ASU submits Model Clause 1 would be considered the most appropriate for these awards.
26. With respect to the Rail Industry Award the ASU submits model clause 3 (in part) would be most appropriate given its history as a modern award.
27. The ASU has read the submissions of the ACTU and support those submissions.
28. The ASU seeks to reserve its rights to make further submissions in reply to opposing submissions expected from the relevant employer associations and is not opposed to further hearings nor further time to respond to questions that may be raised by the Full Bench.

Clerical Related Enterprise Agreements – Hours of Work, Overtime & Shift Work

Agreement (Expiry date)	Award	Hours of Work, Shift Work & Overtime
DHL Express Customer Service Queensland Enterprise Agreement 2015 (Expiry 2 October 2018)	Clerks PS	<p>Clause 18 Hours While Customer Service operates across extended hours, the core business hours are 6.00am to 6.00pm Monday to Friday. Hours will be rostered two weeks in advance. Regular starting and finishing times may vary by day of the week for both full and part time employees. Where DHL desires to vary or change the regular starting and finishing times of a full or part time employee two (2) weeks' notice of such variation shall be given, unless variation by mutual agreement for a shorter notice period is reached.</p> <p>Clause 23 Penalties/Overtime Additional hours For any hours worked before 6:00am or after 6.00pm Monday to Friday a penalty loading of 50% will apply (in addition to paid ordinary time). If such time is worked as overtime, overtime rates will apply.</p>
Electrolux Home Products – National Customer Contact Centre Enterprise Agreement 2016 – 2019 (Expiry 30 June 2019)	Clerks PS	<p>Clause 13 Ordinary Hours of Work Employees shall work their ordinary hours within the span of 6:00am to 8:00pm as provided for by the Employer's roster. By mutual agreement, the Employer may require a change to the employee's usual rostered start and finish times, in which the Employer shall provide the employee with a minimum of 7 days' notice prior to the change taking effect.</p> <p>Sat & Sun ordinary hours Employees may be rostered to work ordinary hours on a Saturday by mutual agreement. For ordinary hours worked on a Saturday, employees shall receive their ordinary rate of pay for the hours worked prior to 12 noon. Work performed after 12 noon Saturday shall attract a penalty of double time.</p>
NRMA Contact Centre EA 2015 (Expiry 30 June 2018)	Clerks PS	<p>Clause 4.1 – breaks between shifts An ordinary shift can extend up to ten (10) hours per day (excluding an unpaid meal break) by mutual agreement.</p> <p>Clause 4.5 – Extensive Overtime provisions</p>
Serco Traffic Camera Services Employment Agreement 2017 (Expiry 31 October 2019)	Clerks PS	<p>Clause 25 Ordinary Hours of Work Support Operation Centre - 5:30 am and 8:30 pm, Monday to Friday inclusive. In the absence of agreement the Company shall give 14 days notice of major changes to hours of work arrangements.</p>
Toll IPEC Melbourne Airport Clerical Enterprise Agreement 2015 (Expiry 1 July 2018)	Clerks PS	<p>7.1 The ordinary spread of hours will be 7.00am until 8.00pm, Monday to Friday. 7.1.2 Employees may be required to work on rotating shifts.</p>

Clerical Related Enterprise Agreements – Hours of Work, Overtime & Shift Work

Agreement (Expiry date)	Award	Hours of Work, Shift Work & Overtime
Transurban Customer Service EBA 2016 (Expiry 30 June 2019)	Clerks PS	<p>3.4.3 Day Workers 3.4.3.4. for Employees employed after 1 July 2010 and before or on 30 June 2016, or if paragraph 3.4.3.3 operates, the span of ordinary hours for the Employee will be Monday to Saturday, 6am to 9pm. 3.4.3.5. for Employees employed after 1 July 2016, the span of ordinary hours for the Employee will be Monday to Sunday, 6am to 9pm.</p> <p>3.4.14 – Reasonable Overtime Extensive Overtime provisions</p>
World Vision Australia Contact Centre Enterprise Agreement 2015 (Expiry 24 July 2018)	Clerks PS	<p>12. Hours of Work 12.1 The ordinary hours of work are to be from 7.00 am to 7.00 pm Monday to Friday and from 7.00am to 12.30pm Saturday. 12.2 From time to time the Contact Centre may need to operate outside these hours.</p> <p>Operating Hours 12.4 The operating hours for the Contact Centre are: 7.00am -10.00 pm Monday- Saturday</p> <p>14 - Rosters 14.4 - Roster Publication 14.5 – Changes to Roster</p>