

FAIR WORK COMMISSION

Four Yearly Review of Modern Awards

AM2016/13

Submissions in support of draft determination in relation to annualised salary clause in the Rail Industry Award 2010 on behalf of Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd

10 October 2016

Contact: Tony Woods
Henry Davis York
61 2 9947 6329
tony.woods@hdy.com.au

Submissions in support of draft determination relating to annualised salaries and the Rail Industry Award 2010

1 Background

- 1.1 These submissions are made in support of the draft determination in relation to the annualised salaries provision in the *Rail Industry Award 2010 (Rail Award)* filed on behalf of Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd, and annexed at Appendix A. The draft determination seeks to vary clause 18 of the Rail Award which deals with annualised wage and salary arrangements (**Proposed Amendments**). Annexed at Appendix B is a "mark-up" of the current clause with the Proposed Amendments.
- 1.2 The Proposed Amendments are in response to the Full Bench review of the *Pastoral Award 2010¹ (Pastoral Award Review)* and the subsequent Statement² issued by Justice Ross on 31 May 2016 and Directions³ issued on 2 September 2016.
- 1.3 By way of summary, the Proposed Amendments seek to:
 - (a) confirm the application of the clause to both employees and future or "prospective" employees; and
 - (b) include further provision for the requirements of what must be set out in a written annual salary agreement.
- 1.4 The Fair Work Commission (**FW Commission**) has provided guidance regarding changes to modern awards during the 4 yearly review of modern awards (**Review**).⁴ Relevantly, the FW Commission has stated:
 - (a) Where a party seeks to vary a modern award in the context of the Review, it must advance a merit argument in support of the proposed variation which includes:
 - (i) submissions addressing the relevant legislative provisions; and
 - (ii) probative evidence which demonstrates the facts supporting the proposed variation.⁵
- 1.5 The FW Commission will also have regard to:
 - (a) the historical context applicable to each modern award;
 - (b) previous decisions relevant to any contested issue, and the context in which such decisions were made.⁶
- 1.6 These submissions address the above points in support of the Proposed Amendments and aim to assist the FW Commission in the Review.

¹ [2015] FWCFB 8810.

² [2016] FWC 3520.

³ AM2016/13.

⁴ [2014] FWCFB 1788 at [60].

⁵ ibid.

⁶ [2014] FWCFB 1788 at [60] sub-point 3.

2 Relevant legislative provisions

- 2.1 Section 156 of the *Fair Work Act 2009* (Cth) (**FW Act**) sets out the legislative framework for four-yearly reviews of modern awards.
- 2.2 Specifically in relation to the variation of existing modern award provisions, section 156(2)(b)(i) sets out the FW Commission's power to make one or more determinations varying modern awards.
- 2.3 Section 134 of the FW Act sets out the 'modern awards objective'. This section provides the FW Commission is obliged to ensure modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account a number of factors, including for example the requirement to ensure a stable and sustainable modern award system.
- 2.4 A Full Bench of the FW Commission has noted that⁷:

The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

- 2.5 As there is a degree of tension between some of the requirements which the FW Commission must take into account, the FW Commission is faced with a balancing task, which may result in different outcomes for different modern awards.⁸
- 2.6 Section 138 provides that only those terms which are necessary to achieve the modern awards objective should be included in modern awards. It follows that a proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed, then it would only include terms to the extent necessary to achieve the modern awards objective.⁹ This view has been supported by a Full Bench of the FW Commission which added¹⁰.

the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.

- 2.7 Part 2-3, Division 3 of the FW Act prescribes the terms that *may*, *must* or *must not* be included in a modern award. Most relevantly, section 139(1)(f) provides that a modern award *may* include a term about **annualised wage arrangements** that:
 - (i) have regard to the patterns of work in an occupation, industry or enterprise; and
 - (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and

⁷ [2014] FWCFB 1788 at [60] sub-point 3.

⁸ [2014] FWCFB 1788 at [33].

⁹ [2014] FWCFB 1788 at [36].

¹⁰ [2014] FWCFB 1788 at [60] sub-point 5.

- (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged
(emphasis added).
- 2.8 The Full Bench of the FW Commission affirmed the "need for careful consideration to be given to the 'appropriate safeguards' to be incorporated in an annualised wage arrangements term to 'ensure that individual employees are not disadvantaged' (as required by s.139(1)(f)(iii))."¹¹
- 2.9 It is in this context that these submissions are made.
- 3 Relevant decisions**
- 3.1 In the Pastoral Award Review the Full Bench of the FW Commission helpfully summarised the relevant authorities and legislative context of annualised salary clauses in modern awards.¹² This included an examination of previous instances where the content of a proposed annualised salary clause was contested.
- 3.2 The first instance was the award modernisation decision of the Full Bench which also made certain priority modern awards, including the Rail Industry Award (**Award Modernisation Decision**).¹³ In regards to the annualised salary clause in the Rail Award, the Full Bench noted the historical context of annualised salary clauses in the rail industry (as further set out at 4.2 below). The Full Bench then extracted the clause which was determined by the Award Modernisation Full Bench, noting that the clause provided for the following safeguards¹⁴.
- (a) the annualised salary arrangement is to be by agreement, in writing, between the employer and employee;
 - (b) the agreement must specify the annual salary that is payable and the provisions of the award that will not apply as a result of the agreement; and
 - (c) the employer must give the employee a copy of the agreement and keep the agreement as a time and wages record.
- 3.3 The Full Bench then examined the second decision in which the content of the annualised salary term was contested, being the decision relating to the *Clerks-Private Sector Award 2010* (**Clerks Award Decision**).¹⁵ In the Clerks Award Decision, the Full Bench inserted an annualised salary clause in place of the existing "exemption provision" which sought to exclude employees who earn in excess of a specified amount from coverage of the award. The Full Bench noted the annualised salary clause "provides for an alternative way to remunerate employees, safeguards against disadvantage and a formal process to establish and maintain the annualised salary arrangement."¹⁶
- 3.4 Following the Clerks Award Decision, the Australian Municipal, Administrative, Clerical and Services Union (**ASU**) made a further application to vary the annualised salary in the *Clerks-Private Sector Award 2010* so that agreement between the employee and employer was

¹¹ 4 yearly review of modern awards - Pastoral Award 2010 [2015] FWCFB 8810 at [170].

¹² [2015] FWCFB 8810 at [128] - [170].

¹³ [2008] AIRCFB 1000.

¹⁴ [2015] FWCFB 8810 at [134].

¹⁵ [2009] AIRCFB 922.

¹⁶ [2009] AIRCFB 922 at [25].

required before any annualised salary arrangement could be entered into. The Full Bench dismissed this application,¹⁷ and in doing so, stated at [8]:

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.

- 3.5 The same issue was addressed, with the same outcome, in an application to vary the *Oil Refining and Manufacturing Award 2010*.¹⁸
- 3.6 In the two year review of modern awards, two applications were made by the ASU to delete annualised salary clauses from modern awards: one in respect of the *Clerks Award 2010*,¹⁹ and one in respect of the *Contract Call Centres Award 2010*.
- 3.7 In respect of the *Clerks Award*, the Full Bench declined to delete the annualised salary clause, and held that such clause is a base award entitlement, being only part of the safety net of terms and conditions provided by the award. Employees also have the protection of the safety net in the FW Act, being the minimum terms and conditions in the National Employment Standards, modern awards and national minimum wage orders.²⁰ Further, the FW Act does not stipulate that annualised salary arrangements in modern awards must be made by agreement between the parties.²¹
- 3.8 In respect of the *Contract Call Centres Award 2010*, Senior Deputy President Kaufman considered the submissions of the ASU as to why the annualised salary provision prevents the award from meeting the modern awards objective in that it does not provide a fair and relevant minimum safety net of terms and conditions with respect to the minimum rates for employees, and found:
 - (a) in relation to the need to encourage collective bargaining [s 134(1)(b)], the mere fact that an annualised salary is paid does not prevent bargaining about whether an enterprise agreement should contain an annualised salary arrangements clause, nor does it prevent bargaining about what other entitlements should be included in any enterprise agreement²²;
 - (b) in relation to the need to promote social inclusion through increased workforce participation [s 134(1)(c)], whether or not there is an opportunity for employees in the higher classifications to participate in the determination of award conditions does not determine participation in the labour market, has no demonstrated connection with the fact that there is an annualised salary arrangements clause in the Award, ignores the fact that it is the ASU that represented clerical employees in the making of the Award, and those employees are not excluded from the coverage of the Award²³; and
 - (c) in relation to the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

¹⁷ [2010] FWAFB 969.

¹⁸ [2010] FWAFB 1805.

¹⁹ [2012] FWA 9731 (SDP Kaufman at first instance) and [2013] FWCFB 1228 (Full Bench).

²⁰ [2013] FWCFB 1228 at [22].

²¹ [2013] FWCFB 1228 at [23].

²² [2012] FWA 9025 at [24].

²³ [2012] FWA 9025 at [26].

[s 134(1)(g)], and the submission that annualised salary provisions are inconsistent with individual flexibility arrangement provisions, each clause "has a separate work to do" and they are not inconsistent with each other, and section 134(1)(g) is directed at unnecessary overlap between two or more of modern awards, not between terms within a modern award²⁴.

- 3.9 The final case which the Full Bench considered in relation to annualised salary clauses in the Pastoral Award Review was in the context of an application by South East Water Corporation to insert an annualised salary clause into the *Water Industry Award 2010 (Water Award Case)*.²⁵ As the *Water Industry Award* did not contain an annualised salary clause, the Full Bench considered the award modernisation process generally, and specifically, the making of the *Water Industry Award*. Here, the following passage of the Award Modernisation Decision was extracted²⁶:

[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.

[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 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

²⁴ [2012] FWA 9025 at [29] - [30].

²⁵ [2014] FWCFB 5195.

²⁶ [2008] AIRCFB 1000.

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.

- 3.10 In the Water Award Case, the Full Bench also considered the "inbuilt features" that the ASU submitted should be included in the annualised salary clause and found that "the principal ones are the claimed need for agreement and an express provision identifying the notice period to terminate any such arrangement", and so varied the proposed clause.²⁷ The Full Bench also introduced requirements in respect of annual reviews of annualised salary arrangements, and the details which are to be contained in writing in annualised salary arrangements, including the classification level of the employee, the identification of the date on which the annualised salary arrangement commences and that a copy of the arrangement is to be provided to the employee.²⁸ In doing so, the Full Bench noted they were not persuaded that anything about the attributes of the water industry or its employees justified a departure from rulings consistent with those cited above.²⁹

4 Historical context of the Rail Award and Facts supporting the Proposed Amendments

- 4.1 The historical context of the annualised salary provisions in the rail industry is, in our submission, straightforward.
- 4.2 Annualised salary arrangements are a common feature in the rail industry. Significantly, this was acknowledged by the Australian Industrial Relations Commission Award Modernisation Full Bench the Award Modernisation Decision.³⁰
- 4.3 In the Award Modernisation Decision, the Full Bench stated:

[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 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.

...

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

- 4.4 In accepting those submissions, the Full Bench inserted clause 18 into the Rail Industry Award.³¹
- 4.5 In our submission, clause 18 of the Rail Award in its current form already meets the modern awards objective. In circumstances where the current formulation of the Rail Award achieves the modern awards objective, includes all appropriate safeguards required to ensure individual

²⁷ [2014] FWCFB 5195 at [28].

²⁸ [2014] FWCFB 5195 at [32].

²⁹ [2014] FWCFB 5195 at [31].

³⁰ [2008] AIRCFB 1000 at [256].

³¹ [2008] AIRCFB 1000 at [258].

employees are not disadvantaged, and provides a safety net of conditions, any significant or substantial change to the Rail Award is not required.

5 Proposed Amendments - merit argument

- 5.1 In light of the above, the amendments to clause 18 of the Rail Award which we propose seek only to clarify the operation of clause 18 in furtherance of the modern awards objective. The Proposed Amendments are put forward in light of the Pastoral Award Review, which suggested that careful consideration needs to be given to the appropriate safeguards to be incorporated in annualised wage clauses to ensure individual employees are not disadvantaged.³² The Rail Award contains the appropriate safeguards, and the Proposed Amendments simply seek to ensure the Rail Award continues to operate in a manner consistent with these.
- 5.2 Each Proposed Amendment is therefore only minor in nature. These amendments are addressed separately below.

Application to employees and prospective employees

- 5.3 The Proposed Amendment seeks to insert a new clause 18.1 which states that all references to an "employee" in this clause 18 includes reference to a "prospective employee" that the employer is offering employment to.
- 5.4 The FW Commission has the power to vary a modern award to remove ambiguity or uncertainty or correct an error under section 160 of the FW Act.
- 5.5 The operation of clause 18 without this amendment, in respect of its application to persons who had not yet commenced employment with an employer, is ambiguous. While it is clear that an employer can enter into an annualised salary provision with an employee, it is less clear whether or not an employer could enter into such an agreement with a potential, prospective or future employee.
- 5.6 The effect of this ambiguity has caused employers to consider themselves unable to enter into an annualised salary agreement until individuals are actually employed by the employer. This has resulted in individuals being offered employment on the base rate of pay, and the annualised salary arrangement is only discussed after the individual actually commences employment with the employer.³³

The proposed clause 18.1 seeks to address this ambiguity by ensuring that prospective employees are afforded the opportunity to discuss annualised salary arrangements prior to their employment actually commencing, and to be offered employment on the basis of an annualised salary.

- 5.7 If this is not considered to be a technical ambiguity, the inclusion of the proposed clause 18.1 should be considered to further align clause 18 with the modern awards objective, specifically, the need to ensure a simple, easy to understand, stable and sustainable modern award system.

³² [2015] FWCFB 8810 at [170].

³³ Witness statement of David Johnston at [12].

Annual review of annualised salary arrangements

- 5.8 The principles extracted from the relevant decisions at section 3 of this advice suggest that a necessary safeguard is a clause which provides for an annual review of annual salary arrangements. We do not support this view in the context of the Rail Award.
- 5.9 The Rail Award contains provision for annualised salary agreements to specify each separate component of the annualised salary arrangement, and any overtime or penalty assumptions and calculations commuted into the annualised arrangement. The Rail Award also provides that annualised salaries must be no less than the amount the employee would have been entitled to receive under the rates and allowances prescribed by the award. These existing provisions give employees sufficient clarity about how their annualised salary is calculated, and importantly, place an obligation on the employer to ensure **at all times** that employees who receive annual salaries are better off overall than they would otherwise be if they received base rate plus allowances. An employee who wishes to raise a dispute about whether or not their annualised salary arrangement means they are better off overall may do so under the provisions of clause 9. A provision for an annual review in these circumstances is therefore unnecessary.
- 5.10 We note that certain other modern awards provide for an annual reconciliation of pay where an employee is disadvantaged by their annualised salary arrangement.
- 5.11 Again, the operation of the clauses set out above render such an additional protection unnecessary in circumstances where an employee's entitlement to earn more under an annualised salary is already guaranteed with ongoing effect.
- 5.12 We do not consider an annual review and/or reconciliation to be consistent with the flexibility intended to be afforded by annualised salary approach, nor an appropriate safeguard in the wider context of clause 18.3 of the Rail Award, and the Rail Award more generally. Employees are sufficiently guaranteed to be better off overall when paid according to an annualised salary. The obligation is on the employer to ensure this. Further, employees are informed how their annualised salary payments are calculated, including by reference to each component of the annualised salary, and the overtime and penalty assumptions relied upon in the calculation of the annualised salary. An employee also knows how often he or she works. In these circumstances, an employee will know when they are not working in accordance with the assumptions relied upon, and here is entitled to pursue the relevant avenue of recourse.
- 5.13 Imposing a further requirement on employers to conduct reviews and/or reconciliations would require employers to keep comprehensive records of hours worked by each employee to encapsulate overtime hours worked and other allowances which may accrue from time to time. We consider this would place an administrative burden on employers which would be unreasonable in the circumstances where a guarantee is in place to ensure employees are not disadvantaged under the annualised salary arrangement. The Full Bench in the Award Modernisation Decision stated at [69]:

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.

(emphasis added)

- 5.14 Here, safety net entitlements are not at issue, therefore employers should not be required to keep records of hours worked in order to perform annual reconciliations.

Annual Salary Agreement

- 5.15 The Proposed Amendment varies clause 18.4 to specify further what must be included in any written agreement to enter into an annualised salary agreement.
- 5.16 The additional requirements inserted are that the written agreement must:
- (a) state the date on which the salary arrangement commences; and
 - (b) contain the award level classification for the role.
- 5.17 The insertion of these additional requirements is consistent with the approach taken by the Full Bench in the Water Award Case.³⁴ Here, the Full Bench noted that such additional requirements addressed the need for necessary safeguards without placing an unreasonable burden on employees or employers. We agree with this approach.
- 5.18 We believe the utility of such additional requirements also contributes to making the Rail Award "simple, easy to understand and sustainable" in line with the modern awards objective, and promotes employees being better informed about the details of their annualised salary arrangements.
- 5.19 Clause 18 already provides that annualised salary agreements must be in writing, must specify each separate component of the annualised wage or salary arrangement and any overtime or penalty assumptions and calculations commuted into the amount paid under each annualised arrangement, and must be provided to employees as a time and wages record. Clause 18 also already guarantees that an employee will receive no less under the arrangement than the employee would have been entitled to if all award obligations had been met. We do not consider it is necessary to specify this in any written agreement entered into under this clause.



Anthony Woods
Partner
61 2 9947 6329
tony.woods@hdy.com.au

10 October 2016

³⁴ [2014] FWCFB 5195 at [32].

Appendix A - Draft Determination

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FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 - 4 Yearly reviews of modern awards

Rail Industry Award 2010

Rail Industry

Review of modern awards to be conducted.

Further to the Decision and Reasons for Decision XXX in XXX, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Rail Industry Award 2010* be varied as follows:

- [1] Inserting the following clause above the current clause 18.1:

"18.1 All references to an "employee" in this clause 18.3 include reference to a prospective employee, being an individual to whom the employer is offering employment."
 - [2] Renumbering the remainder of clause 18 taking into account the insertion of a new clause 18.1.
 - [3] Deleting the current clause 18.4 and inserting in its place:

18.5 In addition to the requirements of clause 18.4, 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, state the date on which the salary arrangement commences and contain the award level classification for the role.
 - [4] The determination shall operate on and from XX YYYY 2016.

BY THE COMMISSION

Appendix B - Mark-up of clause 18 of the Rail Award 2010

18. Annualised wage and salary arrangements

18.1 All references to an "employee" in this clause 18.3 include reference to a prospective employee, being an individual to whom the employer is offering employment.

18.1-2 An employer and an employee may agree to enter into an annualised salary arrangement instead of any or all of the following provisions of this award:

Clause 14—Classifications and minimum wage rates;

Clause 15—Allowances and expenses;

Clause 23—Overtime and penalty rates; and

Clause 24.3—annual leave loading.

18.2-3 Where an annualised salary is paid the employer must specify in writing the annual salary that is payable and what provisions of this award will not apply as a result of the annualised salary arrangement.

18.3-4 The annual salary must be no less than the amount the employee would have been entitled to receive under the rates and allowances prescribed by this award. The annual salary is paid in full satisfaction of any obligation to otherwise make payments to the employee under this award and may be relied upon to set off any such obligation, whether of a different character or not.

18.4-5 In addition to the requirements of clause 18.34, 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, state the date on which the salary arrangement commences and contain the award level classification for the role.

18.5-6 The employer must give the employee a copy of the agreement and keep the agreement as a time and wages record.

18.6-7 The agreement may be terminated:

(a) by the employer or the employee giving 12 months' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 - 4 Yearly reviews of modern awards

Rail Industry Award 2010

AM2016/13

Rail Industry

Review of modern awards to be conducted.

Further to the Decision and Reasons for Decision XXX in XXX, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Rail Industry Award 2010* be varied as follows:

- [1] Inserting the following clause above the current clause 18.1:

"18.1 All references to an "employee" in this clause 18.3 include reference to a prospective employee, being an individual to whom the employer is offering employment."
 - [2] Renumbering the remainder of clause 18 taking into account the insertion of a new clause 18.1.
 - [3] Deleting the current clause 18.4 and inserting in its place:

18.5 In addition to the requirements of clause 18.4, 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, state the date on which the salary arrangement commences and contain the award level classification for the role.
 - [4] The determination shall operate on and from XX YYYY 2016.

BY THE COMMISSION

Witness statement of David Johnston**FAIR WORK COMMISSION****4 yearly review of modern awards - annualised salaries****Commission Matter No:** AM2016/13

On 10 October 2016 I David Johnston of 2-10 Adams Drive, Welshpool, Western Australia, state:

1. I am the Principal Advisor, Employee Relations at Aurizon Holdings Ltd (**Aurizon**).
2. My role involves providing employee relations services to senior leaders and managers, managing the development, negotiation and implementation of industrial instruments and advising Aurizon's remuneration team on the structure and content of employment contracts for employees and prospective employees in all areas of railway related work, including engineering, rail operations, network operations, above and below rail maintenance, finance, administration and professional services. This necessarily includes me being familiar with the provisions of the *Rail Industry Award 2010 (Rail Award)*. That Rail Award is the only industrial instrument applying to about 390 employees in various classifications.
3. Annualised salaries are a common feature at Aurizon.
4. Approximately 97 percent of Aurizon Rail Award employees are paid based on an award annualised salary arrangement.
5. Annualised salary arrangements are beneficial to employees because:
 - (a) they are flexible;
 - (b) they provide a guarantee of regular and consistent earnings;
 - (c) they enable employees to average their work hours over the course of the year; and
 - (d) employees are incentivised to complete work within normal work hours and not have to "watch the clock".
6. Annualised salary arrangements are beneficial to the employer because:
 - (a) they are flexible;
 - (b) they provide certainty of regular salary payments; and
 - (c) they are more simple to administer than the base rate and allowances approach.

Lodged by:	Henry Davis York	Telephone:	61 2 9947 6000
Address for service:	Anthony Woods Henry Davis York, 44 Martin Place, Sydney, NSW, 2000 Ref: AJK / 3126847	Fax:	61 2 9947 6999
		Email:	tony.woods@hdy.com.au and albert.khoury@hdy.com.au

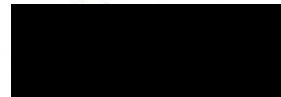
7. For these reasons, Aurizon regularly explores the option of providing annualised salaries to employees. It is common for Aurizon to explore the option of an annualised salary with a prospective employee at the time of recruitment.
8. In my experience, the way in which clause 18 of the Rail Award is currently worded, it does not allow for Aurizon to enter into an annualised salary arrangement with a prospective employee.
9. The current clause 18.1 only provides that "an employer" and "an employee" can enter into an annualised salary arrangement. Employee is defined to mean a national system employee within the meaning of the *Fair Work Act 2009* (Cth) (**FW Act**), which means an individual employed or usually employed by a national system employer.
10. As a result, Aurizon cannot enter into annualised salary agreements during recruitment with individuals who we have decided to recruit.
11. This is problematic for Aurizon as it has led to the practice whereby prospective employees are given a letter of offer showing their role and pay level in the Rail Award and told that after they commence we can offer them an annualised salary.
12. In my experience, this creates confusion and uncertainty for potential employees.
13. Being able to make an offer of employment on the basis of an annualised salary before the commencement of employment, where the offer meets the award requirements, would simplify the process and remove confusion.

Signed by David Johnston in the presence of:

Signature of witness

Print name

2-10 Adams Drive, Welshpool, Western
Australia
Address



David Johnston