FAIR WORK COMMISSION

Four Yearly Review of Modern Awards

AM2016/13

Submissions regarding Full Bench Decision [2018] FWCFB 154 on behalf of Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd (**Rail Employers**)

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Submissions regarding Full Bench decision [2018] FWCFB 154

1. These submissions are provided in response to the request by the Full Bench in [2018] FWCFB 154[1] for the Rail Employers to comment on whether clause 18 of the Rail Industry Award 2010 (**Rail Award**) should be varied to reflect, in whole or in part, Model Clause 3 as proposed by the Commission (**Model Clause**).[2]

2. For the reasons set out below, we respectfully submit that clause 18 of the Rail Award in its present form ensures that appropriate safeguards are in place for employees, while also promoting flexible modern work practices consistent with the modern awards objective such that, with the exception of the proposed amendment to clause 18.4 detailed below, the clause does not require variation.

Rail Award - clause 18

3. Clause 18 of the Rail Award in its current form is set out at Appendix A to these submissions for reference.

The Model Clause

4. The Model Clause which the Full Bench has proposed clause 18 of the Rail Award be varied to reflect reads as follows:

> ***X. Annualised wage arrangements***
>
> *X.1 Annualised wage instead of award provisions*
>
> *(a) An employer and a full-time employee may enter into a written agreement for the employee to be paid an annualised wage in satisfaction, subject to clause X.1(c), of any or all of the following provisions of the award:*
>
> *(i) clause X – Minimum weekly wages;*
>
> *(ii) clause X – Allowances;*
>
> *(iii) clause X – Overtime penalty rates*
>
> *(iv) clause X – Weekend and other penalty rates; and*
>
> *(iv) clause X – Annual leave loading*
>
> *(b) Where a written agreement for an annualised wage agreement is entered into, the agreement must specify:*
>
> *(i) the annualised wage that is payable;*
>
> *(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;*
>
> *(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and*

[1] [2018] FWCFB 154 at [147].
[2] [2018] FWCFB 154 at [132].

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified in the agreement pursuant to clause X.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

(d) The employer must give the employee a copy of the agreement and keep the agreement as a time and wages record.

(e) The agreement may be terminated:

(i) 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

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

X.2 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or if the employment ceases 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.

(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 X.2(b). This record must be signed by the employee each pay period or roster cycle.

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

The proposed variation

5. With the exception of proposed amendments for clarification, one of which is reiterated below in respect of clause 18.4, the Rail Employers previously submitted on 10 October 2016 that the current form of clause 18 meets the modern awards objective in section 134 of the *Fair Work Act 2009* (Cth) (**FW Act**), satisfies the elements in section 139(1)(f) of the FW Act by including appropriate safeguards to ensure employees are not disadvantaged, and provides a safety net

of conditions in a simple and straight forward manner. We submit that this remains the case, and that in circumstances where these legislative aims are achieved, the Commission should not vary clause 18 in a manner which would impose a rigid and onerous framework on employers.

6. Importantly, there was no evidence before the Commission which gives any indication that the clause has not operated as simply and clearly expressed. There is no evidence to demonstrate a need to amend a currently effective process.

7. The Full Bench expressed concern with annualised wage clauses such as those in the Rail Award which provide an effective "upfront" mechanism to ensure an annualised wage is demonstrably equal to remuneration to which the employee would otherwise be entitled, but which appear to take no account of the steps to be taken *"when the employee's pattern of work begins to diverge from the assumptions in the calculation..."*.[3] The Full Bench referred to the evidence of David Johnston, noting that while Mr Johnston's evidence was that the employee's salary in this circumstance would be recalculated as necessary, there was no actual requirement in clause 18.4 that this occur.[4] However, the first sentence of clause 18.3 provides that protection.

8. It is a practical reality that each individual employee is well positioned to know what hours they do and do not work. Clauses 18.2 and 18.4 require the specificity which allows for the identification of when there is a departure from the elements making up the annualised wage. In circumstances where an employee considers that their annualised wage is not reflective of hours actually worked, the employee would raise this issue for discussion with their employer. This avenue for discussion is already accounted for in the dispute resolution provision at clause 9.1 of the Rail Award. The nature of such a discussion would require the employer to assess the employee's claim of underpayment. Where an underpayment is identified as part of the discussions, clause 18.3 of the Rail Award places an absolute obligation upon the employer ("the annual salary *must be no less*") to rectify the underpayment. We submit that these existing provisions for discussion and rectification strike an ideal balance between ensuring appropriate safeguards are in place to ensure the employees are not disadvantaged, while also ensuring sufficient flexibility in when and how the issue must be addressed, consistent with the modern awards objective.

The "outer limit" variation

9. The Full Bench has proposed the insertion of a clause requiring employers to specify the "outer limit" of ordinary hours attracting penalty rates and overtime hours as part of any annualised wage arrangement. These hours are intended to reflect the maximum that an employee can reasonably be asked to work in a given pay period without being entitled to an amount in excess of the agreed annualised wage.[5]

10. We submit that such a clause is not necessary to ensure employees are not disadvantaged. The clause in its present form is prescriptive in terms of the overtime and penalty assumptions which must be specified in any agreement. The obligation to provide this information gives employees a clear point of reference against which they may assess the hours (attracting penalties and overtime) actually worked. Where an inconsistency is identified, the dispute mechanism in clause 9 of the Rail Award discussed above, in combination with the absolute obligation in clause 18.3 of the Rail Award to make good any underpayment, ensures that the actual amount of pay ultimately received by the employee will always be reflective of the time

[3] [2018] FWCFB 154 at [127].
[4] [2018] FWCFB 154 at [127].
[5] [2018] FWCFB 154 at [129(6)].

actually worked, irrespective of whether that work is in excess of the assumptions forming part of the agreed annualised wage.

11. In addition to its lack of practical utility, an "outer limits" estimate would prove onerous and difficult to particularise in the case of each employee who enters an annualised wage agreement, given the potential variable nature of the hours of work. Attempting to reduce these hours to a single formula for the purposes of an "outer limits" calculation is an exercise which would prove onerous and introduce an unnecessary element of inflexibility, negating the very goal of flexibility the clause is intended to provide. The existing dispute/make good mechanism outlined above is the ideal method for ensuring that employees are not disadvantaged, while maintaining a sufficient level of flexibility.

12. Given its lack of practical utility and the inflexibility that would arise from such a variation, we submit that the proposed variation of the annualised wages clause in the Rail Award to include an "outer limits" provision is both unnecessary and not in keeping with the modern awards objective for "simple" awards.

Record keeping and reconciliation

13. In our submission, the proposed terms requiring ongoing record keeping and annual reconciliations as contemplated in clauses 2(b) and (c) of the Model Clause would unavoidably give rise to an inflexible work practice not in keeping with the modern awards objective. The Full Bench in [2018] FWCFB 154 recognised the inherent inflexibility that arises from the imposition of an annual reconciliation provision and associated record keeping requirements in the context of the *Restaurant Award*, stating that such a provision:

> *"...would obviate many of the benefits of an annualised wage arrangement which we have earlier identified."*[6]

14. This proposition advanced by the Full Bench holds true in respect of the Rail Award. Clause 18 in its current form, incorporating the proposed amendment to clause 18.4 addressed below, requires the employer to particularise with abundant clarity the basis for the calculation of their annualised salary, and imposes an absolute obligation on the employer to ensure that this annualised figure is no less than what the employee would have received under the applicable rates and allowances. Supplied with this information, an employee is best armed to assess whether the actual hours they have been engaged to work are consistent with the employer's prescriptive presumptions. Clause 9 of the Rail Award then provides the employee a clear mechanism for raising a dispute regarding any perceived underpayment. In circumstances where the employer is obligated to provide this information to the employee, and a clear avenue of redress is open to the employee, and no evidence has been advanced to indicate that these mechanisms are in anyway deficient in the context of the Rail Award, we submit that the imposition of additional record keeping and reconciliation process requirements upon employers represent unnecessary and inflexible obligations not in keeping with the modern awards objective.

15. At paragraph 129(4) of [2018] FWCFB 154, the Full Bench set out three mechanisms which it considered would ensure employees were not underpaid under any annualised salary arrangement, being:

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

[6] [2018] FWCFB 154 at [119].

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

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

16. There is no suggestion in the Full Bench's decision that the inclusion of more than one of these mechanisms is necessary to ensure there is no underpayment. Clause 18 in its present form already contains a prescriptive requirement that the employer identify the basis for the calculation of the annualised wage reflective of the requirement in 129(4)(B). On this basis, we submit:

(a) if the Commission accepts our submission regarding the lack of utility in an "outer limits" clause, no change to clause 18, barring our proposed amendment to clause 18.4 below, is necessary; or

(b) in the event the Commission considers that the variation of clause 18 to include an "outer limits" clause remains necessary, in light of the Full Bench's comments at paragraph 129(6), the Commission should be satisfied that the inclusion of such a clause negates the need for further "prescription of minimum increment" or "record keeping and reconciliation" provisions contemplated at clauses 129(4)(A) and 129(4)(C) respectively.

Proposed variation to clause 18.4

17. We submit that the proposed variation to clause 18.4 at Appendix B to these submissions, which the Full Bench has previously recognised has *"substantial merit"*[7], should be inserted into clause 18 of the Rail Award in lieu of the Model Clause. The amendment proposed is consistent with the requirements for such clauses previously identified by a Full Bench of the Commission in its review of the *Water Industry Award 2010*[8], but does not go so far as to introduce inflexibility into the annualised wage agreement process.

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[7] [2018] FWCFB 154 at [147].
[8] [2014] FWCFB 5195 at [32]

APPENDIX A - CURRENT CLAUSE 18 OF THE RAIL AWARD 2010

18. Annualised wage and salary arrangements

18.1 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 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 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 In addition to the requirements of clause 18.3, 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.

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

18.6 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.

APPENDIX B - MARK-UP OF CLAUSE 18.4 OF THE RAIL AWARD 2010

18.4 In addition to the requirements of clause 18.3, 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.