



# IN THE FAIR WORK COMMISSION

AM2016/13  
s 156 - Four yearly review of modern awards  
Annualised Wage Arrangements

## SUBMISSIONS

19/03/2018

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## Introduction

1. The Health Services Union (**HSU**) makes these submissions in response to the directions issued by the Full Bench (**Full Bench**) of the Fair Work Commission (**FWC**) on 20 February 2018.<sup>1</sup> The decision invited interested parties to make submissions on whether:
  - a. the terms of the provisions proposed by the Full Bench are appropriate to be adopted as model annualised wage arrangement provisions;
  - b. any existing annualised wage arrangement provision in a modern award should be varied to reflect any of the proposed model terms;
  - c. any modern award which does not currently contain an annualised wage arrangement should be varied to include one of the proposed model clauses; and
  - d. annualised wage provisions are capable of having any practical application to part-time employees.
2. In particular, the HSU makes these submissions in response to the question raised by the Full Bench as to whether the proposed Model Clause 3 or Model Clause 4 should be introduced into the *Health Professionals and Support Services Award (HPSS Award)*, in relation to the classes of employees encompassed by the Australian Industry Group's (**Ai Group**) claim.<sup>2</sup>

## The modern awards objective

3. The HSU contends that it is neither appropriate nor necessary to include an annualised wage arrangement in the HPSS Award in order to ensure that the award meets the *modern awards objective*.
4. That objective applies to the exercise by the FWC of its modern award powers, that is, the powers in Part 2-3 of the *Fair Work Act 2009 (the FW Act)*, including the power to make determinations varying awards in its 4-yearly review conducted pursuant to section 156 of the FW Act.
5. The modern awards objective is defined in s.134 of the FW Act as follows (underlining added):

*What is the modern awards objective?*

*(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*

- (a) relative living standards and the needs of the low paid; and*
- (b) the need to encourage collective bargaining; and*
- (c) the need to promote social inclusion through increased workforce participation; and*
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*

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<sup>1</sup> [2018] FWCFB 154, [148]

<sup>2</sup> [2018] FWCFB 154, [142]



- (da) *the need to provide additional remuneration for:*
  - (i) *employees working overtime; or*
  - (ii) *employees working unsocial, irregular or unpredictable hours; or*
  - (iii) *employees working on weekends or public holidays; or*
  - (iv) *employees working shifts; and*
- (e) *the principle of equal remuneration for work of equal or comparable value; and*
- (f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
- (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; and*
- (h) *the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

6. Fairness in the context of s.134 of the FW Act is to be assessed from the perspective of both the employees and employers covered by the award (*4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37]).

## **Annualised salaries in the HPSS Award**

7. In relation to the HPSS Award and the health sector awards in general, the HSU maintain that annualised wage arrangements are not suitable, and are not necessary to ensure the modern awards objective.
8. Annualised wage arrangements have never been a feature of industrial awards covering hospitals or the health system. As indicated in our oral submissions, annualised salary provisions are also very rare in enterprise agreements in the health sector.<sup>3</sup>
9. Moreover, the health sector is characterised by high proportions of shift work, and work performed on evenings, weekends and public holidays, which regularly attract penalty rates, as well as overtime.<sup>4</sup>
10. This history and these characteristics of the health sector, suggest that the insertion of annualised wage arrangements in the HPSS Award does not meet the principal purpose of the modern awards objective, which is to provide ‘*a fair and relevant minimum safety net*’.<sup>5</sup>
11. In our submission the provisions in Model Clauses 3 and 4 do not adequately overcome the complexities involved in introducing annualised wage arrangements into a sector with no history of their use. We submit that such provisions would still make it difficult to ensure that additional remuneration is paid to employees with working arrangements of

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<sup>3</sup> Transcript of Proceedings, *Four Yearly Review of Modern Awards, AM2016/13 Annualised Salaries* (Fair Work Commission, 7 December 2017) PN1716.

<sup>4</sup> Ibid PN1720.

<sup>5</sup> *FW Act* s 134(1).



the kind specified in s 134(1)(da) of the *FW Act*, and would contradict the requirement that the modern awards system be ‘*simple, easy to understand, stable and sustainable*’,<sup>6</sup>

12. Also relevant is the consideration of the need to encourage collective bargaining.<sup>7</sup> If employees and employers believe annualised wage arrangements would be beneficial to a particular group of employees in a particular health workplace, it would be appropriate for such arrangements to be introduced through enterprise bargaining. However, there is no evidence to suggest this is necessary, or relevant, to be implemented as a sector-wide approach.
13. As stated in the HSU’s previous submission, an earlier application during the two-year review process to insert an annualised salaries provision in the HPSS Award was firmly rejected by Vice President Watson.<sup>8</sup> In its application in this matter, the Ai Group has also failed to provide any evidence as to why annualised wage arrangements are necessary to ensure the modern awards objective is met in the HPSS Award.
14. Furthermore, as observed by the Full Bench, in the award modernisation process so far, there has been an unwillingness to place annualised wage arrangement clauses in modern awards with no history of such provisions in their predecessor awards.<sup>9</sup> The HSU is of the view that, at least in relation to the HPSS Award and other health sector awards, this approach is correct and should be maintained.
15. We also submit that it should be acknowledged that the HPSS Award and the health sector operate differently to other sectors. The suitability of annualised wage arrangements for other awards or sectors does not mean that such provisions can be easily translated and inserted into the HPSS Award or other health sector awards. This is relevant in relation to s 156(5) of the *FW Act* which provides that each modern award should be reviewed in its own right.

## **Managerial and supervisory- level employees**

16. In its decision in this matter, the Full Bench has invited parties to provide feedback on the appropriateness of Model Clauses 3 and 4 in relation to the classes of employees encompassed by the Ai Group’s claim.<sup>10</sup> While we do not agree, as indicated above, that annualised salary provisions should be introduced into the HPSS Award at all, we are especially opposed to the provisions being applied to *all* levels of health professional employees, which the AIG claim sought to do.
17. As the HSU expressed in its oral submissions, health professionals are not ‘*professionals*’ in the same way that the term is used in other awards, or when referring to other industries or professions. Level 1 health professional employees under the HPSS Award are recent graduates, some of whom are still provisionally qualified, and may be undertaking clinical placements before being able to register with the Australian

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<sup>6</sup> *FW Act* s 134(1)(g).

<sup>7</sup> *FW Act* s 134(1)(b).

<sup>8</sup> AM2016/13 *HSU Submission in Reply* (18 November 2016).

<sup>9</sup> [2018] FWCFB 154, [107].

<sup>10</sup> [2018] FWCFB 154, [142].



Health Practitioners Regulatory Agency (AHPRA).<sup>11</sup> Level 2 employees still require supervision by senior employees. Level 3 employees may not have any managerial or supervisory responsibilities.

18. We submit that it is only Level 4 health professional employees under the HPSS Award that could appropriately be described as '*managerial and supervisory-level employees*'. Despite this, Level 4 health professional employees have not previously had annualised wage arrangements in the awards that covered them, and as such, it remains inappropriate to introduce them now.

## Model Clauses 3 and 4

19. While, as stated above, the HSU submits the Model Clauses proposed in paragraphs [132] and [133] are not necessary to be included in the HPSS Award, we nevertheless make some comments below in relation to these clauses.
20. We support the views of the Full Bench in paragraph [129] (1), that where awards cover employees who work highly variable hours or a high volume of work which would attract penalty rates or overtime, annualised wage arrangements should only be able to be applied by employee agreement.
21. However, it is the HSU's view that the current provisions in clause X.1(a) in paragraphs [132] and [133] do not adequately ensure that employee agreement be obtained without coercion or duress, nor that such an agreement cannot be made a condition of employment. We submit that it would be appropriate to include a clause similar to that found in clause 7.2 of the current HPSS Award, which provides:

*The employer and the individual employee must have genuinely made the agreement without coercion or duress. An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.*

22. In relation to X.2(b) in paragraphs [132] and [133], the HSU submits that it is exceedingly unfair for employees that an employer is only required to pay the shortfall for an underpayment –where an annualised wage arrangement works out to be less than what the employee would have otherwise received under the award – after 12 months. This means that in the case of an annualised wage arrangement that disadvantages an employee, that employee may have to wait up to 12 months in order to receive the full payment for their work performed that year. We submit that it would be more appropriate for an employer to have to make up the shortfall quarterly. This would be in line with the requirements around payment of superannuation, which is required to be paid at least quarterly.
23. The above is particularly problematic when read in conjunction with clause X.1(e)(i) in paragraph [132], or clause X.1(f)(i) in paragraph [133], which provide that 12 months notice is required for an employee to terminate an annualised wage arrangement. In practice, this could mean that an employee may not become aware that an annualised

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<sup>11</sup> Transcript of Proceedings, *Four Yearly Review of Modern Awards, AM2016/13 Annualised Salaries* (Fair Work Commission, 7 December 2017) PN1722.



wage arrangement is disadvantageous until the reconciliation occurs, after 12 months has elapsed. If they then provide notice, they will need to wait another 12 months for the arrangement to be terminated. This would mean it could take two years before an employee can terminate a disadvantageous annualised wage arrangement that pays below what they would otherwise receive under the award. We therefore submit that it is fairer to the employee that they be required to provide only 3 months notice to terminate an annualised salary arrangement.

## **Part-time employees**

24. The HSU submits that annualised wage arrangements have no practical application in relation to part-time employees. Where annualised wage arrangements are included in modern awards, their application should be restricted to full-time employees.
25. Part-time and overtime provisions in the HPSS Award provide for a distinction between 'agreed additional hours' which do not attract overtime, and overtime hours which do. That distinction is already quite complex, and is often the source of disputes in the workplace. We submit that it would add an unnecessary layer of complexity and confusion to add annualised wage arrangements to this issue.

