20 March 2018

IN THE FAIR WORK COMMISSION

AM2016/13

4 Yearly Review of modern awards – Review of annualised wage arrangement provisions in modern awards

Submissions of the National Road Transport Association (NatRoad)

Introduction

1. These submissions are filed on behalf of the National Road Transport Association (**NatRoad**) in response to the publication of a Decision dated 20 February 2018 (**Decision**)[1] by the Full Bench of the Fair Work Commission (the **Commission**) in relation to annualised wage arrangement provisions in modern awards.

2. The Full Bench has devised model terms relating to annualised wage arrangements and has invited interested parties to make submissions concerning whether:

   (1) the terms of the above provisions are appropriate to be adopted as model annualised wage arrangement provisions;
   (2) any existing annualised wage arrangement provision in a modern award should be varied to reflect any of the proposed model terms (subject to the conclusions stated later in this decision concerning the specific claims advanced in these proceedings);
   (3) any modern award which does not currently contain an annualised wage arrangement should be varied to include one of the proposed model clauses; and
   (4) annualised wage provisions are capable of having any practical application to part-time employees (including any proposals to that end).[2]

3. NatRoad's interests arise principally from members' coverage of the *Road Transport and Distribution Award 2010* (**Distribution Award)** and the *Road Transport (Long Distance Operations) Award 2010* (**Long Distance Award**). These awards do not contain annualised wage arrangement provisions. Several other modern awards also regulate members' employment arrangements. Two of those awards are within the 19 set out in the Decision as currently containing annualised salary provisions: the *Clerks*

[1] [2018] FWCFB 154
[2] Id at para 134

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- *Private Sector Award 2010* and the *Manufacturing and Associated Industries and Occupations Award 2010.* But these submissions are principally directed to the Distribution Award and the Long-Distance Award (together the **Transport Awards).**

4. NatRoad is a not-for-profit industry association. It represents the interests of more than 1100 contract carriers, employing contractors, owner-drivers and other businesses that operate in the road transport industry throughout Australia. Most of NatRoad's members are small business owners and operators.

Benefits of Annualised Arrangements

5. NatRoad notes that the Full Bench has outlined the benefits of annualised wage arrangements for both employers and employees at paragraph 101 of the Decision. In short for employers these are simplicity, managing cash flow and creating predictability in labour costs. For employees, the benefits come from getting a fixed and certain remuneration amount each pay period regardless of the number of hours worked, which will carry with it the advantages of income security and predictability of earnings for budgeting and obtaining finance.

6. In addition, as the superannuation guarantee charge is calculated based on an employee's ordinary time earnings[3] despite clause X.3 of each model clause, the superannuation payment to workers would increase because of the annualised hours being treated as ordinary time. If averaging is permitted as proposed in this submission, it is clear all annualised hours are ordinary time.

7. The Full Bench links those benefits mentioned in paragraph 5 of this submission with the notion that 'an annualised wage arrangements provision in a modern award is capable of forming part of a fair and relevant minimum safety net of terms and conditions for the purpose of s 134(1)'.[4]

8. The Decision also sets out some extracts from the Full Bench decision in *Re South East Water Corporation.*[5] One of those extracts articulates the basis on which a clause dealing with annualised salaries is able to satisfy the modern awards objective:

   We are satisfied that the clause we have decided upon is necessary to achieve the modern awards objective. In this respect it is a clause which is consistent with s.134(1)(d) in that it will promote flexible modern work practices and the efficient and productive performance of work. Consistent with s.134(1)(f) it should have a positive impact on the regulatory burden on employers and reduce employment costs associated with payroll. It should provide to both employers and employees, wishing to enter into an annualised salaries arrangement, a simple and easy to understand provision consistent with s134(1)(g).[6]

9. NatRoad notes that aspects of the *South East Water Corporation* are distinguishable[7] but the above extract relating to satisfaction of the modern awards objective remains a valid and cogent observation.

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[3] See ATO Ruling SGR 2009/2 http://law.ato.gov.au/atolaw/view.htm?Docid=SGR/SGR20092/NAT/ATO/00001
[4] Above note 1 at para 101
[5] [2014] FWCFB 5195
[6] Id at para 36
[7] Id at para 22

10. NatRoad also notes the current Full Bench's observation that: 'Certainly the fact that s 139(1)(f) permits the inclusion in a modern award of a term about annualised wage arrangements which satisfies the three identified conditions indicates that it was contemplated by the legislature that provisions of that nature were capable of achieving the modern awards objective.'[8]

11. The three identified conditions mentioned in the prior paragraph are 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
(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged.

The Proposed Clauses: too complex

12. The Decision at paragraph 129 sets out the Full Bench's conclusions concerning what is necessary for an annualised wages arrangement provision to form part of the fair and relevant minimum safety of terms and conditions required by s 134(1) taking into account the matters identified in paragraphs (a)-(h) of the subsection.

13. The Full Bench then proposes a number of model clauses which provisionally give effect to the Full Bench's conclusions.

14. NatRoad has studied the clauses. In addition, we sought member feedback on their terms. We do not support their adoption in the form proposed. We consider that the modern award objectives set out at paragraph 7 of this submission, as identified by the Full Bench in *Re South East Water Corporation,* would be derogated from rather than met or enhanced were the provisions as presently proposed to form part of the Transport Awards.

15. Instead of adding to simplicity or positively impacting the regulatory burden, the proposed clauses would have the opposite effect. We next outline the basis of that proposition.

Model Clause 1

16. Model clause 1 relates to employees who, in the Full Bench's words, "work reasonably stable hours."[9] In the Decision, the Full Bench makes a distinction between employees who work "reasonably stable hours" and those who have "highly variable" [10] hours or hours which would "to a significant degree … be subject to overtime, weekend, evening or other penalty rates."[11] This distinction is used to determine whether the employer is able to offer an annualised salary as of right ("stable hours") or only with employee agreement ("unstable hours").

[8] Above note 1 at para 101
[9] Id at para 129.1
[10] Ibid
[11] Ibid

17. The distinction set out in the prior paragraph is not relevant to the Long-Distance Award. There, an employee must be paid either on a cents per kilometer (cpk) rate or by way of an hourly driving rate. Most employees are paid the cpk rate. Measuring the industrial relations arrangements by the distinction chosen is not relevant. That also relates to the way in which clause X1(b) is constructed.

18. Clause X1(b) requires the employer who chooses to pay the employee an annual salary to advise an employee in writing about 4 matters. The first two of these are reasonable and not burdensome. These are the annualised wage that is payable and the provisions of the award that will be satisfied by payment of the annualised wage. X1(a)(i)-(v) contain the award terms that are subsumed into an annualised salary (note the typographical error in the clause where (iv) is repeated rather than numbered (v)) and this would be a way to show the extent of the provisions which are being so treated. The third requirement is to set out how the annualised wage has been calculated including, inter alia, "specification of each separate component of the annualised wage."

19. This latter requirement appears to go beyond the Full Bench's determination that "the arrangement identify the way the annualised wage is calculated."[12] What is a "separate component" of the annualised wage? The point is that it won't have separate components; it is an annualised wage/salary arrangement. We suggest for simplicity the phrase be deleted.

20. The same subclause requires the employer to include "any overtime or penalty assumptions used in the calculation." But surely this is encompassed in the idea of setting out "the method" of the calculation? Again, for simplicity this part of the subclause should be deleted.

21. The fourth requirement is complex. The drafting uses the phrase "the outer limit number" of ordinary hours and the "outer limit number" of overtime hours. We suggest that the word "maximum" be used rather than the term "outer limit". That expression can accommodate the idea that the Full Bench is seeking to apply as per the following explanation:

    Additionally, 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, with any excess hours to be paid for in accordance with the normally applicable overtime or other penalty rate provisions. This outer limitation is not intended to reflect the average number of overtime and penalty rate hours upon which the annualised wage is calculated but rather a higher number of such hours representing 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 annualised wage.[13]

22. The expression used in this extract is that an "outer limit" represents "the maximum that an employee can reasonably asked to work." Hence, the term maximum should be adopted in the drafting, inclusive of in clause X1(c) if the Full bench determines to retain this provision.

23. A further issue with the clause is that it does not recognise the notion of averaging. There may be occasions where an employee was asked to, say, work on a tender that

[12] Id para 129(4)(B)
[13] Ibid

would assist the company with a major freight contract over, again by way of example, 5 years. The employee could be asked to work reasonable overtime in the circumstances that the contract is essential for the company's future and this overtime, given the centrality of the contract to the business' future viability, could be extensive. But the work wouldn't necessarily need to be of special importance: the clause could just reflect the seasonality of a business where extra hours at one point in time are offset against fewer hours later in the year.

24. Those on an annualised salary should be permitted to be on a system of averaging of hours where the maximum set in the relevant modern award is an average over 28 days at most. This is preferred as a protective yet efficient means of implementing an annualised wage arrangement. There is a clause relating to averaging in the Distribution Award: Clause 22.1. The drafting there adopted could be used as a model in the context of substituting averaging for the protective mechanism proposed via the "outer limit" clause. We note that the Model Clause 2, discussed below, takes up the issue of averaging and we here reiterate our preference for that mechanism over the so-called "outer limits" proposal. However, we do not support the way averaging is used per the discussion in clause 29 and 30 below.

25. Clause X.2 is drafted around the idea that an annualised wage should not disadvantage employees. The drafting of clause X.2(a) is emphatic in that regard, stating that "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 earlier over such lesser period as has been worked.)"

26. To facilitate the proposition that the annualised wage must not be less than what the employee would have otherwise earned, there is an administrative process set out in clause X2(b). An employer must calculate the amount that would have been earned under the award within the relevant 12-month period or on termination of employment and compare that with the annualised salary. If the amount under the award was higher than the annualised wage, then the employer must pay the "shortfall" to the employee within 14 days. An employer would be faced with an administrative burden of some magnitude. This is especially the case were large numbers of employees to be placed on an annualised wage arrangement.

27. There is a record keeping requirement added at X.2(c) which requires the employer to keep a record of starting and finishing times and any unpaid breaks taken for each employee who is on an annualised salary. The record must be signed by the employee each pay period or roster cycle. In the Transport Awards, given their requirements for weekly wage payments, this would be a weekly exercise. Currently, under the Long-Distance Award where a driver is paid via the cpk rate, a record of hours is kept via the fatigue management diary. But it seems a new record signed once a week would need to be kept, again adding to the administrative burden. The benefits of annualised wage arrangements could be enhanced with a concomitant decrease in the frequency of wage payments.

28. NatRoad has received member feedback that the administrative processes in all model clauses are cumbersome and burdensome. Their introduction would be a major barrier to the adoption of annualised salaries for those covered by the Transport Awards but especially for those who are covered by the Long-Distance Award. An alternative approach would be a mechanism by which employers set an annualised wage/salary

based on historical patterns of work and/or projections. Employers would bear the onus of showing that the basis of the projections were reasonable and were based on historical records or forecasts that disclosed a pattern of hours or earnings based on other criteria e.g. the number of kilometres travelled by a worker in the prior 12 months or forecast to be travelled based on forward orders. This mechanism would ameliorate the administrative burden that forms part of the current model clauses.

Model Clause 2

29. As mentioned in paragraph 24 of this submission, the drafting of Model Clause 2 proceeds on the basis that there is a process of averaging applied: X1(b). However, the clause also proceeds on the basis that a "nice "calculation is able to be made where a percentage more than the minimum weekly wage set out in the relevant award would be able to satisfy the allowances, penalty rates and leave loading requirements of the award.

30. The method of calculation is again highly problematic for the Long-Distance Award where the award is underpinned by a minimum fortnightly guaranteed minimum payment by way of a minimum weekly amount. Calculations based on this amount would invariably be less than those calculated by reference to the cpk rate and the hourly driving rate.

31. Returning to the issue of averaging, the way in which clause X.1(b) is drafted is not permissive. We prefer this form of drafting rather than drafting which proscribes matters that would lead to an award breach. Setting a maximum number of hours in a month/28-day period or, preferably a six-month period, with a provision that indicates the excess hours in the chosen period must be reasonable for the purposes of s62(1) *Fair Work Act, 2009*[14]. Averaging using this method is much less administratively burdensome and provides the requisite employee protection as vindicated by the Parliament in that s62(1) must be followed. The "permissive" model of averaging would also require X.1(c) to set out that it would be only where the maximum number of hours in the specified period had been exceeded that further payment would be required and at overtime rates.

Model Clauses 3 and 4

32. This clause would apply to awards where employees work "unstable" hours per the distinction applied by the Full Bench and discussed in Clause 16 of this submission.

33. The main differences between this provision and the other model clauses discussed above is the requirement for there to be agreement before the arrangement is entered and the provisions relating to termination. Model clause 3 has similar "outer limits" provisions as Model clause 1 and Model clause 4 has limited averaging provisions.

34. Rather than maintain the distinction between the idea of "stable" and "unstable" hours arrangements, we would prefer to see the two additional protective mechanisms inserted in one clause, subject to the changes about drafting and averaging mentioned in this submission. That would aid simplicity and certainty.

[14] See s63(2) Fair Work Act 2009 for the power to do so

Conclusion

35. As discussed in this submission member feedback is that the currently drafted model clauses are too complex and will not be used. They are not drafted permissively when averaging is proposed, and the basis of averaging is too narrow. If the Commission decided to implement the clauses currently proposed, they should not be adopted in the Transport Awards. As argued in this submission, they are not of utility.

36. We commend to the Full Bench the changes to the provisions proposed in this submission to better meet the modern awards objective rather than through pursuit of the currently drafted provisions.

37. Attached to this submission is a model clause which incorporates the ideas expressed in this submission.

38. We therefore respond to the Full Bench's questions as set out in paragraph 2 of this submission as follows:

    1) the terms of the above provisions are appropriate to be adopted as model annualised wage arrangement provisions; This submission has argued that they are not appropriate particularly in the context of the Transport Awards.

    2) any existing annualised wage arrangement provision in a modern award should be varied to reflect any of the proposed model terms (subject to the conclusions stated later in this decision concerning the specific claims advanced in these proceedings); This submission shows that we do not agree with the extent of the safeguards proposed and, accordingly, we do not recommend replacement of extant provisions with the terms of the model clauses.

    3) any modern award which does not currently contain an annualised wage arrangement should be varied to include one of the proposed model clauses; Annualised wage provisions should be adopted in modern awards as a means of advancing the modern award objectives. However, for the reasons outlined in this submission, we submit that the model clauses are not appropriate.

    4) annualised wage provisions are capable of having any practical application to part-time employees (including any proposals to that end).[15] The answer would in part follow from the manner in which the model clauses are drafted. In relation to the current model clauses, we submit that they would not be appropriate for part-time work given the lack of suitability generally.

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[15] Id at para 134

DRAFT CLAUSE: ANNUAL SALARY PRO FORMA

X.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 X - Minimum weekly wages;

(ii) clause X- Allowances;

(iii) clauses XX—Overtime and penalty rates; and

(iv) clause X- 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.

X.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) An employer must establish the annual salary on a reasonable basis including taking into account patterns of work in the industry and the usual number of hours worked by employees in the enterprise.

(c) The hours of work of an employee used in establishing the annual salary may be made on the basis that the employee works 912 hours within a period not exceeding 6 months together with reasonable overtime.

(d) 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.

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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.